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Characteristic Performance—A New Concept in the Conflict of Laws in Matters of Contract for the EEC

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The concept of "characteristic performance," used in conflicts law to determine which country's law applies in the absence of an express or implied choice of law, has been incorporated into Article 4 of the Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations. In this article, Professor Lipstein examines the purpose, history, and criticisms of the concept of "characteristic performance" and concludes by supporting the use by the Member States of characteristic performance as a means of determining the legal system governing the contract as a whole.

INTRODUCTION

In 1972, a committee of experts appointed by the Commission of the European Communities published the Preliminary Draft of a Convention on the [choice of] Law Applicable to Contractual and Non-Contractual Obligations.[1] Its final revision was completed in 1979,[2]

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[1] English text in 21 AM. J. COMP. L. 587 (1973); French and English texts and accompanying report by Giuliano, Lagarde & van Sasse van Ysselt in EUROPEAN PRIVATE INTERNATIONAL LAW 221-314 (Lando, van Hoffmann, Siehz & Tubingen eds. 1975); French text in 62 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [REV. CRIT. D.I.P.] 209 (1973), with accompanying report by Giuliano, et al. in 9 REVISTA DI DIRITTO INTERNAZIONALE PRIVATO 189 (1973). *See also* Lando, *The EEC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations*, 38 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONAL PRIVATRECHT RABELS Z. 6 (1974); Collins, *Contractual Obligations—The EEC Preliminary Draft Convention on Private International Law*, 25 INT'L & COMP. L.Q. 35 (1976); Foyer, *L'avant-projet de Convention C.E.E. sur loi applicable aux obligations contractuelles et non-contractuelles*, 103 JOURNAL DU DROIT INTERNATIONAL 555 (1976); Batiffol, *Projet de Convention sur la loi applicable aux obligations contractuelles*,

and adopted by the Ministers of Justice of the Member States on June 19, 1980. The draft heralds incorporation of the Convention into the Law of the Ten within the not too distant future. Although several provisions of the Draft Convention have attracted special attention, only Article 4 will be examined here. This article, which determines which country's law applies in the absence of an express or implied choice of law, provides:

> (1) To the extent that the law applicable to the contract has not been chosen in accordance with article 3 [i.e. expressly], the contract shall be governed by the law of the country with which it is most closely connected . . .
> (2) . . . 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 . . .
> (3) [deals with contracts relating to rights in immovables].
> (4) [deals with carriage of goods].
> (5) Paragraph (2) shall not apply if the characteristic performance cannot be determined and the presumptions in paragraphs (2), (3) and (4) shall be disregarded, if it appears from the circumstances as a whole that the contract is more closely connected with another country.[3]

In the United States, the Draft Convention has been subjected to a critical examination by Professor Cavers[4] while the concept of "characteristic performance" has been pillaried by Jessurun d'Oliveira.[5] Given the novelty of the approach, it is useful to examine its history, and, as far as available, its practical application.

The Concept of Characteristic Performance

By stating that, in the absence of an express or implied choice of law[6] the law of the country applies with which the contract is most

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11 Revue Trimestrielle De Droit Européen 181 (1976); Siehz, *Zum Vorentwurf eines EWG-Ubereinkommens uber das Internationale Schuldrecht*, 19 Aussenwirtschaftsdienst des Betriebsberaters 596 (1973).

2 23 O.J. Eur. Comm. (No. L 266) 1 (1980) [hereinafter cited as Draft Convention], with an accompanying report by Giuliano & Lagarde, 23 O.J. Eur. Comm. (No. C 282) 1 (1980).

3 23 O.J. Eur. Comm. (No. L 266) 2 (1980).

4 Cavers, *The Common Market's Draft Conflicts Convention on Obligations: Some Preventive Law Aspects*, 48 S. Cal. L. Rev. 603 (1975).

5 d'Oliveira, *"Characteristic Obligations" in the Draft EEC Obligation Convention*, 25 Am. J. Comp. L. 303 (1977); d'Oliveira, *International Contract Law*, 22 Netherlands Int'l L. Rev. 194, 196 (1975).

6 Draft Convention, *supra* note 2, at art. 3(1).

closely connected,[7] the Draft Convention introduces the connecting factor "closest connection," which is not new to the common law countries.[8] Subsequently, the Convention identifies the "closest connection" with the place of the characteristic performance. The place of the characteristic *performance* is then revealed to be either (1) the *place of habitual residence* or *central administration*, or (2) the *principal place of business* of the debtor owing the particular characteristic performance.

In so defining the connecting factor of the choice of law rule for contracts as a whole, the "closest connection" includes a feature which in reality makes up the other part of a normal conflicts rule, namely the operative facts.[9] In referring to the "place of performance which is characteristic of the contract," the emphasis is placed only in part on the particular place of performance. Characteristic performance is also made to depend upon the type of contract to be performed; the characteristic performance is identical with the characteristic *obligation* owed in a contract which gives this type of contract its individual features. Thus, what appears in the guise of a connecting factor (place of performance) is in reality a category of legal relationships (commonly called "operative facts" for want of a better term) which are joined to the connecting factors: place of habitual residence, central administration or principal place of business of the contracting party owing the obligation which is *characteristic* of the particular type of contract.

Thus understood, the confusion created by the introduction of the criterion of characteristic performance as part of a connecting factor can be resolved. Far from being a connecting factor, it is rather a set of operative facts introducing a series of conflict rules fashioned on the basis of a number of types of contract. The characteristic performance flowing from the characteristic obligation serves to establish a typology of contracts, and the residence, central administration or place of business of the party owing the obligation which is characteristic of the contract serves as a connecting factor.

The concept of "characteristic performance" is not, as yet, current in the countries of the European Economic Community. In Germany, however, in order to ascertain the hypothetical intention of the parties absent an express or implied choice of law, courts have looked to "typical groups of situations," and to the "obligation typical of a profession"

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[7] Draft Convention, *supra* note 2, at art. 4(2).

[8] *See* Bonython v. Commonwealth of Austria [1951] A.C. 201, 219 (England); 2 DICEY AND MORRIS ON THE CONFLICT OF LAWS, 769 n.38, 770 n.46 (10th ed. J. Morris ed. 1980) (Australia and Canada).

[9] *See* LIPSTEIN, 135 (1972 I), Hague Rec. 99 at 196 and n.11 with references, especially to RABEL, CONFLICT OF LAWS I 47 (2d ed. 1958).

or of a "certain type of contract."[10] The technical term "characteristic performance" was coined in the Swiss literature and developed in the practice of the Swiss Federal Tribunal. That practice must be examined here in detail, since it seems likely that, in adopting the concept of characteristic performance, the Convention has also incorporated the Swiss practice which engendered it.

In seeking to formulate a choice of law rule, the parties to the Convention resorted to the Swiss solution rather than to any developed in one of the Member States. They selected the Swiss solution because they were reluctant to rely on either the application of the *lex loci solutionis*—which they regarded as too inflexible—or on that of the law having the closest connection—which they regarded as too vague. It remains to be seen, however, whether the Swiss solution offers a more balanced result.

The Swiss Experience

The Swiss solution was the outcome of a legal development in the conflict of laws in matters of contract peculiar to that country. Swiss theory and practice had distinguished, on the one hand, between the law governing the conclusion of the contract and the effects of the contract (known as the "great scission"), while on the other hand, with respect to the effects of the contract, it distinguished between the laws governing either party's respective performance (known as the "little scission").

Even during this period, a well-known writer, Schnitzer, advocated that in both respects attention should be concentrated on one legal system only, namely the law of the country where the obligation characteristic of the contract as a whole was to be performed.[11] In 1952, the Swiss Federal Tribunal abandoned the principle of the "big

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[10] For Germany, see Staudinger-Firsching, *Einführungsgesetz zum Bürgerlichen Gesetzbuch*, Pt 2b *InternationalesSchuldrecht* I (10/11 ed. 1978) nos. 483-592, *i.e.*, sale (483), manufacture (483), exclusive distributorship (485), lease (493), loan (498), employment (500), professional services (533), mandate (539), letters of credit (540), brokerage (543), agency (546), publishing (548), forwarding (549), carriage of goods (550 ff), bill of lading (559), carriage of passengers (568 ff), deposit (574), innkeepers (577), travel agents (578), insurance (587), partnership and joint venture (590). *See also* 7 SOERGEL-SIEBERT-KEGEL, BÜRGERLICHES GESETZBUCH (10th ed. 1970), particularly notes 246-62 before Article 7 of the Introductory Law to the Civil Code regarding, *e.g.*, contracts with banks, insurance companies, carriers, warehousemen, general contractors, publishers, professional services, mandate, brokers, commercial agents, carriage of goods, bills of lading, stock exchange and markets.

[11] A. SCHNITZER, II HANDBOOK DES INTERNATIONALES PRIVATRECHTS 624, 633, 639 (4th ed. 1958). *See also* the reports by Niederer and Knapp (1941), referred to in VISCHER, INTERNATIONALES VERTAGSRECHT 137 (1962). For a discussion on the "great" and "little" scission, see SCHNITZER, *supra* at 624 and 627; Vischer, *The Principle of the Typical Performance in Interna-*

scission"[12] following reassessment of its previous approach to the selection of the law governing the effects of a contract absent an express or implied choice.[13] Previously, the Federal Tribunal had relied first on the laws of the respective places of performance and later (in order to avoid the difficulties arising out of the "little scission") on that law indicated objectively by its closest connection or by the hypothetical intention of the parties.[14] The criterion of "closest connection"[15] was now narrowed down to coincide *prima facie* with the country where that party owing the "characteristic performance"[16] resides or operates. Thus, a single law was made to govern the conclusion and the effects of a contract including, with respect to bilateral contracts, the performance of both parties.[17]

It may be useful to supplement the term "characteristic performance" by reference to some interpretations provided by the Federal Tri-

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tional Contracts and the Draft Convention, HARMONIZATION AT PRIVATE INTERNATIONAL LAW BY THE EEC 25-30 (K. Lipstein ed. 1978).

12 Judgment of Feb. 12, 1952, ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] 78 II 75, 85 (Switz.); *see also* Knapp, 5 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 83 (1948).

13 Judgment of Feb. 22, 1949, Holzer v. Handjian (unreported), *but see* 5 ANNUAIRE DE DROIT SUISSE INTERNATIONAL 115 (1948). *See also* Judgment of Oct. 26, 1937, BGE 63 II 383, 385; Judgment of Sept. 26, 1933, BGE 59 II 355, 362; Judgment of Dec. 17, 1932 BGE 58 II 433, 435.

14 Judgment of Dec. 3, 1946, BGE 72 II 405, 411. *See also* Judgment of Feb. 17, 1953, BGE II 75, 78; Judgment of Apr. 23, 1951, BGE 77 II 86, 92; Judgment of Oct. 21, 1941, BGE 67 II 179, 181; Judgment of Feb. 12, 1952, BGE 78 II 75, 78.

15 Judgment of Mar. 5, 1974, BGE 100 II 34, 38; Judgment of May 2, 1973, BGE 99 II 315, 319; Judgment of Jan. 29, 1970, BGE 96 II 79, 89; Judgment of July 4, 1953, BGE 79 II 165, 166; Judgment of Feb. 12, 1952, BGE 78 II 74, 78; Judgment of Mar. 22, 1951, BGE 77 II 83, 84; Judgment of June 26, 1951, BGE 77 II 189, 191; Judgment of Dec. 3, 1946, BGE 72 II 405, 411; Judgment of Oct. 21, 1941, BGE 67 II 179, 181; Judgment of Sept. 18, 1934, BGE 60 II 294, 301 (first use of "close connection"). *See* F. VISCHER, INTERNATIONALES VERTRAGSRECHT 89 n.3 (1962).

16 Judgment of June 29, 1976, BGE 102 II 270, 273; Judgment of Feb. 25, 1975, BGE 101 II 83, 84; Judgment of Apr. 22, 1975, BGE 101 II 293, 298; Judgment of Mar. 5, 1974, BGE 100 II 34, 38; Judgment of July 1, 1974, BGE 101 II 200, 205; Judgment of May 2, 1973, BGE 99 II 315, 319; Judgment of Jan. 29, 1970, BGE 96 II 79, 89; Judgment of Oct. 1, 1968, BGE 94 II 355, 358, 360, 361; BGE 92 II 115; Judgment of Nov. 24, 1966, BGE 91 II 354, 358; Judgment of Oct. 5, 1965, BGE 91 II 442, 445; Judgment of June 25, 1963, BGE 89 II 214, 216; Judgment of June 26, 1962, BGE 88 II 195, 199; Judgment of Oct. 9, 1962, BGE 88 II 283, 286; Judgment of Aug. 8, 1962, BGE 88 II 325, 327; Judgment of Dec. 3, 1962, BGE 88 II 471, 474; Judgment of Sept. 26, 1961, BGE 87 II 271, 273; Judgment of Oct. 21, 1955, BGE 81 II 391, 393; Judgment of July 4, 1953, BGE 79 II 165; Judgment of Aug. 31, 1953, BGE 79 II 295, 297; Judgment of Feb. 12, 1952, BGE 78 II 74, 78, 80; Judgment of Feb. 5, 1952, BGE 78 II 145, 148; Judgment of Mar. 22, 1951, BGE 77 II 83, 84; Judgment of June 26, 1951, BGE 77 II 189, 191; Judgment of July 14, 1951, BGE 77 II 272, 275. For references to unpublished decisions, see ANNUAIRE SUISSE DE DROIT INTERNATIONAL, note 11 *supra*.

17 Judgment of Feb. 12, 1952, BGE 78 II 74, 78, 85. For a short summary of the development of the rule, see Vischer, *supra* note 10, at 25-6.

bunal itself. The Tribunal aimed to pinpoint that obligation incumbent upon one of the contracting parties which is peculiar to the type of contract in issue, or which marks the nature of the contract.[18] Somewhat incongruously, the Federal Tribunal has very occasionally paid due regard to the distribution of risk.[19] Furthermore, it rightly reserved its position in instances where the contract is even more closely connected with another country,[20] as, for example, in the case of standard contracts, arbitration clauses, or submissions to the courts of a particular country where it may be possible to detect an implied choice of law.[21]

In subsequent years a rich and varied practice has further explained the term "characteristic performance" by establishing a precise system of characteristic obligations arising from a diversity of contracts. Thus, today, it is possible to connect, at least generally, a series of different types of contract with the law of the place of residence or business administration of one of the parties to the agreement, as the following survey will show:

(i) sale of goods—law of the vendor's residence or place of business[22]

(ii) sale of land—form: *lex rei sitae*[23]

(iii) exclusive distributorship—sale[24]

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18 Judgment of Jan. 29, 1970, BGE 96 II 79, 89. *See also* Vischer, 14 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 43, 48 (1957); Makarov in FESTSCHRIFT FÜR LEWALD 299 (1953).

19 Judgment of June 10, 1952, BGE 78 II 190, 191 (loans).

20 *E.g.*, Judgment of Oct. 1, 1968, BGE 94 II 355, 360; Judgment of Feb. 5, 1952, BGE 78 II 145, 148; Judgment of June 10, 1952, BGE 78 II 190, 191; Judgment of Mar. 22, 1951, BGE 77 II 83, 84; Judgment of Mar. 7, 1950, BGE 76 II 45, 48.

Reliance on the *lex loci solutionis* as such is no longer possible. Judgment of Nov. 24, 1966, BGE 91 II 354, 358; Judgment of Oct. 5, 1965, BGE 91 II 442, 446; Judgment of Feb. 21, 1952, BGE 78 II 74, 80 (*but see* p. 78); Judgment of Mar. 22, 1951, BGE 77 II 83, 92; Judgment of June 26, 1951, BGE 77 II 189, 191; Judgment of July 14, 1951, BGE 77 II 272, 278; Judgment of Dec. 3, 1946, BGE 72 II 405, 411. In an agency contract, either the sale or licence element may prevail. Judgment of Aug. 8, 1972, BGE 88 II 325, 328 (sale element); Judgment of Feb. 12, 1952, BGE 78 II 74, 80 (sale element); Judgment of Oct. 1, 1968, BGE 94 II 355, 360 (licence element). *See generally* Judgment of Mar. 5, 1974, BGE 100 II 34, 38.

21 *See* Vischer, 14 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 43, 57 (1957).

22 Judgment of Feb. 25, 1975, BGE 101 II 83, 84, 91; Judgment of Nov. 24, 1966, BGE 91 II 354, 358; Judgment of May 10, 1963, BGE 89 II 265, 267; Judgment of June 26, 1962, BGE 88 II 195, 199; Judgment of Aug. 8, 1962, BGE 88 II 325, 326; Judgment of Dec. 3, 1962, BGE 88 II 471, 474; Judgment of July 4, 1953, BGE 79 II 165; Judgment of Aug. 31, 1953, BGE 79 II 295, 297-8; Judgment of Feb. 12, 1952, BGE 78 II 74, 80; Judgment of Mar. 22, 1951, BGE 77 II 83, 84; Judgment of June 26, 1951, BGE 77 II 189, 191; Judgment of July 14, 1951, BGE 77 II 272, 275.

23 Judgment of Feb. 8, 1974, BGE 100 II 18, 20. *See also* BGE 106 II 39; Judgment of Mar. 30, 1976, BGE 102 II 143; Judgment of Sept. 26, 1958, BGE 84 II 553. For the earlier practice, see Judgment of Sept. 18, 1934, BGE 60 II 294, 301. 23 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 396 (1) (1977).

24 Judgment of May 15, 1962, BGE 88 II 169, 170; Judgment of Aug. 8, 1962, BGE 88 II 325,

(iv) private loan—law of lenders' residence or place of business[25]

(v) public loan—law of place of issue[26]

(vi) mandate—law of place where mandatory must carry out his essential duties[27]

(vii) mandate—by check to bank—same[28]

(viii) letters of credit—law of addressee's residence or business—seat of bank[29]

(ix) brokerage-quaere—exceptional circumstances[30]

(x) agency; inter partes—law of agent's residence.[31] effect on third parties—law of place where powers are exercised[32]

(xi) exclusive agency—law of place where agent operates;[33] exception, if contract of long duration, without obligation to make minimum purchases, totally devoted to principal's interests[34]

(xii) carriage of goods—law of carrier's seat[35]

(xiii) deposit—law of place of depositee[36]

(xiv) insurance—law of insurer's place of business or branch[37]

(xv) partnership-civil—law of managing partner's place of business[38]—commercial: law of seat of partnership[39]

(xvi) guarantee—law of residence, place of business, seat of promisor[40]

(xvii) trust—law of residence of trustee[41]

328; Judgment of Dec. 3, 1962, BGE 88 II 471, 474. *But see*, Judgment of Feb. 12, 1952, BGE 78 II 74, 81.

25 Judgment of Aug. 25, 1961, BGE 87 II 194, 201; Judgment of June 10, 1951, BGE 78 II 190, 191.

26 Judgment of Oct. 9, 1962, BGE 88 II 283, 286.

27 Judgment of June 9, 1970, BGE 96 II 145, 149; Judgment of Oct. 5, 1965, BGE 91 II 442, 446; Judgment of Sept. 26, 1961, BGE 87 II 271, 274; Judgment of Mar. 22, 1951, BGE 77 II 83, 93.

28 Judgment of June 29, 1976, BGE 102 II 270; Judgment of July 1, 1974, BGE 100 II 200, 204.

29 Judgment of July 15, 1974, BGE 100 II 142, 145; Judgment of Dec. 5, 1961, BGE 87 II 234, 237; Judgment of Jan. 22, 1952, BGE 78 II 46, 49. *See also* 21 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 273 (1964).

30 Judgment of Oct. 1, 1968, BGE 94 II 355, 361 (licensing agreement).

31 Judgment of May 15, 1962, BGE 88 II 191, 193; Judgment of Feb. 12, 1952, BGE 78 II 74, 81; Judgment of Mar. 7, 1950, BGE 76 II 45, 48.

32 Judgment of May 15, 1962, BGE 88 II 191, 193.

33 Judgment of Mar. 5, 1974, BGE 100 II 34, 38; Judgment of Jan. 29, 1970, BGE 96 II 79, 89.

34 Judgment of Dec. 3, 1962, BGE 88 II 471, 474-5; Judgment of Feb. 12, 1951, BGE 78 II 74, 81.

35 Judgment of Sept. 23, 1959, BGE 85 II 267, 269.

36 Judgment of July 1, 1974, BGE 100 II 200, 208.

37 Judgment of Sept. 23, 1959, BGE 85 II 267, 271; Judgment of June 19, 1952, BGE 78 II 191, 196; BGE 102 II 580; Judgment of Mar. 26, 1953, BGE 79 II 193, 196. Judgment of May 2, 1973, BGE 99 II 315, 319.

38 Judgment of Sept. 26, 1981, BGE 87 II 270, 274.

39 Judgment of Nov. 26, 1959, BGE 85 II 452, 454.

40 *Id.* at 453.

41 Judgment of Jan. 29, 1970, BGE 96 II 79, 86.

(xviii) licence—law of licensor's residence[42]

(xix) *unjustifiable enrichment*—law governing underlying relationship or *lex rei sitae* or law of the place of enrichment.[43]

CRITIQUE AND SUGGESTIONS

Swiss writers support the new technique on the ground that it "requires an examination of the function of a contract with special regard to its specific social purpose." This function is said to be represented by certain rights and duties forming the contract, which are normally those requiring a non-pecuniary performance.[44]

Strong and weighty criticism has been voiced by a Dutch writer against reliance on the concept of characteristic performance.[45] It is contended that

(i) the principle of "characteristic performance" is no more specific than any of those principles it is intended to supersede (proper law, seat of the relationship, place of performance, closest connection, hypothetical intention) and that various categories must be established by ascertaining for each of them the characteristic obligation;

(ii) the connecting factors are chosen arbitrarily, as are the criteria for determining the characteristic performance, which are ill defined;

(iii) the essence of specific types of obligations can be determined no more readily by the new process than by the techniques previously employed;

(iv) legal relationships cannot be individualized by grouping them, but only by analyzing each relationship singly. Some contracts are atypical; others are complex;

(v) the attribution of a contract to a particular category cannot determine its characteristic obligation;

(vi) the duty to pay money may also constitute a characteristic obligation;

(vii) a criterion which relies on the essence and on the function of a relationship or obligation is misconceived. The latter cannot colour the former, since the former must be immutable, while the second must vary;

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42 Judgment of Apr. 22, 1975, BGE 101 II 293, 298; Judgment of Oct. 1, 1968, BGE 94 II 355, 361; 26 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 331 (1969-70).

43 Judgment of Dec. 13, 1967, BGE 93 II 373, 377; Judgment of Nov. 1, 1952, BGE 78 II 385, 387; 10 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 314 (1953).

44 *See* Vischer, *supra* note 10, at 27.

45 d'Oliveira, *"Characteristic Obligation" in the Draft EEC Obligation Convention*, 25 AM. J. COMP. L. 303 (1977), reproducing chapter V of a work by the same author entitled: INTERNATIONAAL OVEREENKMSTENRECHT, BESCHOUWINGEN RONDOM EN HET VOORONTWERP EEG VERDRAG NOPENS DE WETTEN DIE VON TOEPASSING ZIJN OP VERBINDENISSEN UIT OVEREENKOMSTEN EN NIETCONTRACTUELE VERBINDENISSEN (Bulletin No. 71 of the Netherlands International Law Association). *See also* von Hoffmann, *General Report*, EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATIONS 8-10 (Lando, von Hoffmann & Siehr eds. 1975).

(viii) the economic function of a contract differs from its social or sociological function.

In reply to these criticisms, it must be admitted that the description of the criteria for determining the characteristic performance, i.e. of the essence and the function of the obligation involved, is turgid. It conceals the real purpose of the exercise which is the search for one place of performance in order to concentrate the legal relationship there. Such a search is necessary to ascertain those legal provisions which *either* supplement when necessary the terms of the contractual agreement (implied general legal terms; *droit supplétif*)[46] *or* which render it invalid or illegal (mandatory rules). So viewed, the question is whether the implied legal and mandatory rules applying at the seat of the party owing the obligation in kind, or those of the party owing the pecuniary considerations, are to be applied in order to determine the minutiae of the duties owed and the consequences of deficient performance, impossibility or frustration on the part of the former, and illegality.

The problem, therefore, is whether the party owing the performance in kind should look to its own law in order to ascertain the extent and consequences of its substantive obligations, or whether it should look to the law of the party owing the pecuniary obligation.

The answer seems to be that absent an express or implied choice of law the selection is centered on the respective *leges solutionis* of the parties, and the party which owes the performance in kind is most likely to look to its own law for guidance as to the duties arising from the specific obligation in kind it has undertaken. The party owing the pecuniary performance, however, owes duties which flow from the bilateral nature of the contract and are precise. They do not need supplementing. The expectation of receiving the stipulated performance in accordance with the standards and implied duties of its own law is more remote[47] than that party's right to refuse payment if the standards imposed by the law of the other party have not been observed.

These considerations, it must be stressed, apply only when the parties have failed to make an express or implied choice of law either in favor of the law of the party owing the pecuniary obligation or of any other. If it should be argued that even in the absence of an express or implied choice of law other legal systems should be taken into account, the answer must be that the law of the place of conclusion of the contract has no special claim to consideration. It is conceded, however,

46 *See* Liverpool City Council v. Irwin, [1977] A.C. 239; Lister v. Romford Ice & Cold Storage Co. Ltd., [1957] A.C. 555. For an example of an English statute supplementing contractual terms, see Sale of Goods 1979 c. 54, §§ 8(2), 10, 12-15, 18, 20, 28, 29, 31(1), 32(3), 36.

47 *Contra* d'Oliveira, *supra* note 44, at 316.

that in all legal systems and in the EEC Draft Convention, stipulated performance in a third country attracts the application of certain stringent rules in force in that country.[48]

The reasons given above favoring the application of the law of the party owing a performance in kind in preference to that of the party owing the pecuniary obligation do not always apply. Where pecuniary obligations exist on both sides, such as in the case of a loan, the obligations of the borrower are precise. The lender's obligations, however, may require supplementing by legal terms implied by law (e.g., the right to recall the loan in certain circumstances); here the lender's position is comparable to that of a party owing a performance in kind, and therefore, the law of the lender's residence or business seat should be applied.

RECENT LEGISLATION

The technique adopted by the EEC Draft Convention is not without historical precedent. It was first employed in Poland when the Law of August 2, 1926 concerning Private International Law[49] produced special choice of law rules for different types of contract in the absence of an express choice of law.[50] This law was superseded by the Law of November 12, 1965[51] which contained a slightly enlarged catalog, though somewhat different in substance.[52] After the Second World War Czechoslovakia followed the same pattern in the Law of March 11, 1948 concerning International and Inter-local Private Law;[53] it was superseded by the Law of December 4, 1963[54] which modified the catalog set out in the previous statute.[55] The Law of December 5, 1975 on

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48 Draft Convention, *supra* note 2, at arts. 3(3), 6(2), and 7.

49 23 REV. CRIT. D.I.P. 190 (1928); 1 QUELLEN DES INTERNATIONALEN PRIVATRECHTS *s.v.* La Pologne/Polen 3 (2d ed. A. Makarov ed. 1953).

50 23 REV. CRIT. D.I.P. at 191, art. 8 (1928); Makarov, *supra* note 49, at 6.

51 55 REV. CRIT. D.I.P. 323 (1966); QUELLEN DES INTERNATIONALEN PRIVATRECHTS 185-195 (3d ed. Kropholler, Neuhaus, Waehler eds. 1978).

52 *Id.* at 326, art. 25(2) (contracts relating to land or supply of goods); *id.* at 326, art. 27(1) (contracts for services, mandate, carriage of goods, deposit, warehousing, insurance, copyright); *id.* at 326, art. 28 (contracts on the stock exchange).

53 38 REV. CRIT. D.I.P. 381 (1949); 31 J. COMP. LEGIS. & INT'L L. 78, pts. III & IV (1949); Makarov, *supra* note 49, at 3 *s.v.*; La Tchechoslovaquie/Tschechoslowakei: Contracts relating to immovables (art. 44); on the stock exchange (art. 45); for sale, work or labor in the course of a mercantile or trade enterprise; of insurance; with professional people; of employment or apprenticeship (art. 46 (i)-(iv)).

54 Loi de 4 Decembre 1963 sur le droit international privé et de procédure, 54 REV. CRIT. D.I.P. 614 (1965); *see also* Makarov, *supra* note 49, at 293-305.

55 Contracts involving Sale or Work to be executed, relating to land, carriage of goods, insurance, agency and brokerage, and barter, art. 10, 54 REV. CRIT. D.I.P. at 616.

the Application of Laws[56] enacted by the German Democratic Republic is more elaborate, and its detailed provisions are similar to the rules established by the Swiss practice,[57] especially in its reliance upon the characteristic performance as a subsidiary test.[58] The Austrian Law of June 15, 1978 concerning Private International Law[59] generally provides that absent an express or implied choice of law, bilateral contracts are governed by the law of the party which does not owe an obligation expressed preponderantly in pecuniary terms. Thereby, the statute follows the Swiss example.[60] More specifically, the detailed provisions as to which party's law is to govern a particular type of transaction, once again reflects the Swiss practice, supplemented by some sophisticated additions.[61] The Swiss Draft of a Federal law of Private International Law (1979)[62] following the previous practice, naturally relies in the first place on the law of the closest connection, which is determined *inter*

56 Act Concerning the Law Applicable to International Private, Family and Labor Law Relationships as well as to International Commercial Contracts—Act Determining the Applicable Law—of 5 December, 1975, 25 AM. J. COMP. L. 354 (1977); 66 REV. CRIT. D.I.P. 200 (1977); Wengler, *Note Introductive*, 66 REV. CRIT. D.I.P. 191 (1977). For discussion, see Juenger, *The Conflicts Statute of the German Democratic Republic: An Introduction and Translation*, 25 AM. J. COMP. L. 332, 347-8; Makarov, *supra* note 49, at 78-81.

57 Sale: law of vendor; services, advice: law of producer; commercial agency: law of principal; carriage of goods: law of carrier; forwarding: law of forwarding agent; loading, unloading: law of enterprise carrying out the task; warehousing: law of warehousemen; carriage of persons: law of carrier; banking: law of banking institution; leases, licenses: law of grantor; copyright licenses: law of user, § 12(1), 25 AM. J. COMP. L. at 357, 66 REV. CRIT. D.I.P. at 201 (1977).

58 *See* § 12(2), 25 AM. J. COMP. L. at 358, 66 REV. CRIT. D.I.P. at 202 (1977).

59 Bundesgetz vom 15, Juni 1978 über das internationale Privatrecht (IPR-Gesetz) 28 AM. J. COMP. L. 222 (1980) (with Eng. transl.); 68 REV. CRIT. D.I.P. 176 (1979) (Fr. transl. only); 43 RABELS Z. 375 (1979). For a discussion, see Palmer, *The Austrian Codification of Conflicts Law*, 28 AM. J. COMP. L. at 197 (1980).

60 *See* pp. 1106-1108.

61 Banks: law of places of business; between banks: law of place of requesting business (art. 38(1)); insurance: law of place of insurer's business (art. 38(2)); stock exchange: law of place of exchange (art. 39); sale by auction: law of place of auction (art. 40); contracts with consumer: law of consumer's ordinary residence, if it protects the latter by rules of private law and the supplier has acted in the country of the consumer (art. 41(1)), irrespective of any express choice of law (art. 41(2)); use of immovables: *lex rei sitae*, even if the parties have chosen another law (art. 41(1), (2)); patents, copyrights, etc.: law of place where the assignment or license is to operate (art. 43(1), (2)); employment: law of the place where the work is to be carried out (art. 44(1)); if carried out in several countries, or if the place cannot be ascertained: law of the employer's ordinary residence (art. 44(1)); mandatory rules applicable according to articles 44(1) and (2) cannot be excluded by an express choice of law (art. 44(3)); unjustifiable enrichment: law of the place where the enrichment occurred, if the result of a contract, the law of the latter applies (art. 46); same for *negotiorum gestio* (art. 47); agency, effect upon third parties: law of the country where the principal clearly intended to act, otherwise law of the place of acting (art. 49), 28 AM. J. COMP. L. at 231-234 (1980); 68 REV. CRIT. D.I.P. at 182-184 (1979); 43 RABELS Z. at 382-384 (1979).

62 Projet de loi fédérale sur le droit international privé, 68 REV. CRIT. D.I.P. 185 (1979); 42 RABELS Z. 716 (1978). For discussion, see McCaffey, *The Swiss Draft Conflicts Law*, 28 AM. J. COMP. L. 235 (1980) (biblography at n.9).

alia by the nature of the characteristic performance;[63] and is centered on the law of the place of business or of the ordinary residence of the debtor owing this performance.[64] The closest connection may, however, exist with another law such as that of the purchaser who enters into an installment contract, a borrower taking up a small loan, a surety (otherwise than for a commercial transaction) and an employee engaged in a contract of employment,[65] for the reason that these parties deserve special protection.[66]

CONCLUSION

The search for the characteristic performance to pinpoint the legal system governing the contract as a whole is neither new nor unknown to the common law as practiced in the United States. Only the terminology is novel. Articles 189-197 of the Restatement Second, Conflict of Laws, express the same attitude.[67] As early as 1938, the present writer drew attention to the use of contractual typology as a means of ascertaining the law governing contracts absent an express or implied choice of law.[68] This technique introduces an element of objectivity for the purpose of ascertaining which performance among the two contracting parties is of predominant importance and therefore attracts the law of the place of that debtor's residence or place of business. The objective element is also functionally justifiable. The implied legal terms, or *droit supplétif*, of the residence or place of business of the contracting party owing the relevant obligation in kind, must supplement the obligation undertaken by that party; the pecuniary obligations of the other contracting party are precise and do not require supplementation. Therefore, the synallagmatic right of refusing performance, absent performance by the other side, suffices, and no supplementation of the law governing that party's duties is required. No expectation can exist on the part of the debtor owing the pecuniary duty that the duties

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[63] Art. 120(1), (2). Sale: performance of transferor; licenses and user: performance of grantor; labor: performance of a work; deposit: performance of depositee; security: performance of the pledgor, etc. (art. 121(2)(a)-(e)); agency, between principal and third party: place of business of agent or place of acting, subject to certain exceptions (art. 127); unjustifiable enrichment: law governing the underlying transaction (art. 128(1)), otherwise: law of the place where the enrichment occurred (art. 128(2)). *See* 68 REV. CRIT. D.I.P. at 212-14 (1979); 42 RABELS Z. at 739-41 (1978).

[64] *See, e.g.*, art. 121(1), 68 REV. CRIT. D.I.P. at 212 (1979); 42 RABELS Z. at 739 (1978).

[65] *See, e.g.*, art. 122, 68 REV. CRIT. D.I.P. at 213 (1979); 42 RABELS Z. at 739 (1978).

[66] *See, e.g.*, art. 120(2), 68 REV. CRIT. D.I.P. at 212 (1979); 42 RABELS Z. at 739 (1978).

[67] *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS, §§ 189-97 (1971). For a comparison of the Restatement with the original 1972 Draft, see Cavers, *supra* note 3, at 622.

[68] Lipstein, Brunschvig, Jerie & Rodman, *The Proper Law of Contract*, 12 ST. JOHN'S L. REV. 242, 247-48, 263 (1938).

of the party owing the performance in kind will be supplemented and determined by the law of the residence or place of business of the party owing the pecuniary performance. Any such expectation can and should be put into practice by an express choice of law.

It is interesting to note that Swiss practice has always allowed an exception in favor of a legal system having an even closer connection, although experience has shown that such cases are rare. It is, therefore, not surprising that the same exception appears in the recent Swiss draft. What is surprising is that the effect of the characteristic performance principle has been much watered down by the reference to the law of the party deserving special protection.[69] If it is true that certain parties require special protection, it does not necessarily follow that their own law offers them greater protection than the law of the other contracting party. Although in allowing an express choice of law it may be advisable to curtail the stronger party's power to select the law most favorable to him, such is not the problem where the parties have failed to choose the applicable law. All that can be said in favor of applying the law of the weaker party in cases where the stronger party has not insisted on an express choice of law is that the weaker party will be in a better position to know the law it has to deal with, even though this may not be the better law for its situation.

If it should be argued that a legal system other than that of a contracting party may be applicable, as for instance when performance is to take place in a third country where mandatory rules of a hybrid character are in force—partly of a private law and partly of a dirigist character affected by administrative or political considerations—the answer is that additional conflict rules must provide for this contingency principally connected with an extraneous place of performance. The Draft Convention handles such contingencies through a series of provisions which cannot be examined here.[70]

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[69] This was first introduced by Lando, *supra* note 1, at 32. *See also* Lando, *The Substantive Rules in the Conflict of Laws: Comparative Comments from the Law of Contracts*, 11 TEX. INT'L L. J. 505, 523 (1976).

[70] Draft Convention, *supra* note 2, at arts. 3(3), 5(2), 6(2) & 7.