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The law governing international contractual disputes in the absence of express choice by the parties

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This article examines how, in the absence of the parties’ express stipulation, the governing law of an international contract is to be ascertained under the Rome I Regulation. In particular, it seeks to analyse the consistency and cogency in the current academic views, under UK law, on the interpretation of Art.3(1) and Art.4 of the Regulation. The assessment of these accounts highlights that a fairly settled and coherent framework for the construction of Art.3(1) has been arrived at. However, the same observation cannot be made about Art.4.

As this article seeks to demonstrate, academic opinion is divided (and, hence, points to inconsistent approaches) on the interpretation of that provision. This article attempts to address this confusion. Accordingly, its key contribution is to advance a reasoned case in favour of adopting the general framework which the Court of Justice employed, for the interpretation of Art.4’s predecessor provision under the Rome Convention, in Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV.

I. INTRODUCTION

Those with interest in private international law are all too aware of the significance of the choice of law to the determination of cross-border contractual disputes. The governing law spells out the respective rights and obligations of the contracting parties, both in terms of their (potential) liability and, also, measure of damages. Thus, in a given case, the choice of Arcadian law as against Ruritanian law, for example, could lead to markedly different outcomes for the litigants.

The relevant rules in the United Kingdom, and other EU Member States,1 for identifying the law applicable to international contracts are set out in the Rome I Regulation.2 These rules apply to the majority of cross-border contracts,3 entered into after 17 December 2009. In order to uphold the principle of party autonomy in contracts,4 the first sentence of Art.3(1) of the Rome I Regulation provides that “a contract shall be governed by the law chosen by the parties”. The parties are able to make this choice expressly. The advantage of including an express choice-of-law clause in an agreement is obvious; it gives the parties,

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1 With the exception of Denmark.
3 These are the so-called ‘general’ contracts which exclude carriage-of-goods agreements (Art.5), consumer contracts (Art.6), contracts of insurance (Art.7) and individual employment contracts (Art.8). Additionally, Art.1(2)(a)-(j) contains agreements which are altogether excluded from the material scope of Rome I Regulation. Unless otherwise stated, this article is concerned only with general contracts.
4 According to Recital (11) of the Rome I Regulation, “the parties’ freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.”
from the outset, the certainty that, subject to a handful of limitations,⁵ the stipulated law would govern any potential disputes that may arise from their agreement.

Nevertheless, there are instances where a contract does not include an express choice-of-law clause. As a result, the governing law may need to be determined through litigation. In those circumstances, two distinct avenues for identifying the contract’s governing law are made available under the Rome I Regulation. One is set out in the second sentence of Art.3(1). It provides that the contract’s governing law can be implied from the choice which, though not expressly stipulated, is “clearly demonstrated by the terms of the contract or the circumstances of the case”.⁶ The other is outlined in Art.4, which is, in effect, consulted when a choice cannot be ascertained under Art.3(1). Put simply, Art.4 consists of two (alternative) general choice-of-law rules, in paragraphs (1) and (2),⁷ and an escape clause, in paragraph (3).

The ascertainment of the governing law of a cross-border contract, in the absence of the parties’ express choice, under Art.3(1) and Art.4, is an exercise in statutory construction. Given the Regulation’s fairly recent introduction, there is a dearth of definitive judicial pronouncements at national and European levels on how this exercise should (and, in fact, will) be carried out.⁸ In the meantime, though, the main account about the interpretation of Art.3(1) and Art.4 of Rome I is to be found in the academic commentary.⁹ Until a body of

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⁶ This avenue for determining the governing law is often referred to as the “implied-choice doctrine”.

⁷ If the applicable law cannot be determined pursuant to the rules outlined within these paragraphs, then “the contract shall be governed by the law of the country with which it is most closely connected”: Art.4(4).


case law emerges in this area, these commentaries are likely to provide the main source of assistance for counsel and judges. As such, it is especially important that they set out a clear picture of the law.

The purpose of this article is to analyse the coherence of these accounts – and, in turn, that of UK law on the determination of the governing law of cross-border contractual agreements, in the absence express choice by the parties. The discussion is outlined in three main parts. Part one shows that, in relation to the construction of Art.3(1), the academic sources point to a fairly consistent approach. Part two highlights that the same conclusion cannot be reached in relation to the suggested interpretations of Art.4. Through a detailed analysis of the existing sources, this part goes on to demonstrate that there are clear divergences of opinion within the academic literature on the appropriate framework for the construction of the choice-of-law rules within Art.4. Part three seeks to propose a clearer (and more pragmatic) course of action. In this respect, its main contribution is to advance a reasoned case in favour of adopting the general framework which the Court of Justice employed in *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV*,10 concerning the interpretation of Art.4’s predecessor provision under the Rome Convention.11

II. THE INTERPRETATION OF ART.3(1) OF THE ROME I REGULATION

Art.3(1) of the Rome I Regulation contains one of the two potential routes through which the court can determine the contract’s governing law, in the absence of the express designation by the parties. This route is to be explored in those limited instances in which, despite the lack of an express stipulation in the agreement, the terms of the contract, or the circumstances of the case, clearly demonstrate the governing law. In order to understand the scope of Art.3(1), it is important to know the circumstances which lead to the finding of a clearly-demonstrated choice.

The introduction of the Rome I Regulation was not accompanied with (or followed by) the release of any official set of guidelines to assist in its interpretation. As a consequence, the Guliano & Lagarde Report,12 which has been widely consulted as an explanatory guide for the Rome Convention, is still deemed to be relevant for the construction of those provisions within the Regulation which are, in effect, the same as those under the Convention. Art.3(1) of the Regulation is one such provision. As noted by some commentators,13 its wording differs slightly from that of its equivalent – also Art.3(1) – under the Convention: according to the Convention, a choice could be implied if it is “demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case”. The text of the Regulation, though, talks about a “clearly demonstrated” choice.

Notwithstanding this apparent difference in the way the provisions have been phrased, there exists a consensus amongst UK academics that Art.3(1) of the Regulation should be construed in the same manner as its predecessor. Accordingly, the guidelines outlined in the Guliano & Lagarde Report have continued to be relevant in outlining the framework for the application of the implied-choice doctrine in the United Kingdom. What is more, an

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13 See, for instance, *International Commercial Disputes* 4th edn, supra, fn.9, [14.2.12].
assessment of how these guidelines have been adopted and interpreted highlights that, in the main, a consistent (and settled) view on the construction of Art.3(1) of the Regulation has been arrived at in the United Kingdom. For instance, there is a general understanding that a choice is clearly demonstrated where the parties have entered into a standard-form contract which, though silent on the governing law, is of a kind that it is typically subjected to a specific choice of law. The Lloyd’s policy of marine insurance is the oft-cited example in this regard; reference to it, even if not accompanied with an express English choice-of-law clause, is broadly considered as sufficient to indicate that English law applies to the contract. Additionally, it is generally reflected in the UK academic sources that, ceteris paribus, it is possible to imply the law governing an agreement between two parties, under Art.3(1), from an express choice-of-law clause stipulated in an earlier (or related) agreement between them.

However, in at least one important respect, differences of opinion, on the significance to be attached to the relevant indicators for the interpretation of Art.3(1) can be detected in the academic literature. The lack of consensus, in this area, relates to the question of whether the applicable law can be implied from the parties’ adoption of a dispute-resolution clause. The Guliano & Lagarde Report provides that, in a given case, “the choice of a particular forum may show in no uncertain manner that the parties intend the contract to be governed by the law of that forum”. In effect, this guideline has been incorporated into the text of the Rome I Regulation under Recital (12), which provides that:

“an agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.”

Despite the wording of the Recital, the majority of UK commentators have stated that the chosen forum need not necessarily be a Member State. In addition, they suggest that the governing law can be implied from the choice of a seat of arbitration in the parties’ agreement. As a result, for many, an exclusive dispute-resolution clause in favour of the court in Arcadia represents, by implication, that Arcadian laws shall govern the contract.

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14 See, inter alia, Private International Law in English Courts, supra, fn.9, [7–100]; Dicey, Morris & Collins, supra, fn.5, [32–059]; Anton’s Private International Law, supra, fn.9, [10–83]; and, International Commercial Disputes 4th edn, supra, fn.9, [14.2.12]–[14.2.25].
15 This guideline is set out as an example in the Guliano & Lagarde Report: 16. It has been recited in Private International Law in English Courts, supra, fn.9, [7–102]; Dicey, Morris & Collins, supra, fn.5, [32–060]; Anton’s Private International Law, supra, fn.9, [10–88]; and, International Commercial Disputes 4th edn, supra, fn.9, [14.2.13]–[14.2.15].
16 The Guliano & Lagarde Report, 16.
17 Ibid, 17, referred to in Private International Law in English Courts, supra, fn.9, [7–103]; Dicey, Morris & Collins, supra, fn.5, [32–061]; Anton’s Private International Law, supra, fn.9, [10–88]; and, International Commercial Disputes 4th edn, supra, fn.9, [14.2.13] and [14.2.23].
18 The Guliano & Lagarde Report, 16.
19 For a detailed account on how this wording for Recital (12) was arrived at, see McParland’s Rome I Regulation, supra, fn.9, [9.78]–[9.98].
20 See, for example, Dicey, Morris & Collins, supra, fn.5, [32–063]; and Anton’s Private International Law, supra, fn.9, [10–95]. Contrast, however, the more recent observation in McParland’s Rome I Regulation, supra, fn.9, [9.102].
21 See, for instance, International Commercial Disputes 4th edn, supra, fn.9, [14.2.19]–[14.2.21]. In this context, reference is made to common law cases such as Compagnie Tunisienne de Navigation SA v Compagnie d’Armement Maritime SA [1971] AC 572 and Egon Oldendorff v Libera Corp (No2) [1996] 1 Lloyd’s Rep 380.
Professor Briggs is, however, sceptical about this approach to the interpretation of Art.3(1). In his view, such clauses only denote the forum (or venue) in which the court (or arbitral tribunal) can entertain the dispute. In this respect, and especially in so far as it concerns arbitration clauses, he regards it as, “on the face of it, absurd to see an agreement to arbitrate as conveying a choice of law of a particular country when the parties wished to avoid the courts altogether.”

Notwithstanding this one area of disagreement, the discussion in this section has highlighted that UK academics have reached a settled and coherent understanding of what amounts to a “clearly demonstrated” choice, for the purpose of construing Art.3(1). In turn, this general consistency in the reading of the implied-choice doctrine is likely to help to minimise the scope for incoherence and confusion in argumentation and reasoning in cases concerning the interpretation of Art.3(1).

III. THE INTERPRETATION OF ART.4 OF THE ROME I REGULATION

For those cases that fall outside the general scope of the implied-choice doctrine, the governing law of the contract has to be determined based on the choice-of-law rules within Art.4 of the Rome I Regulation. In simple terms, the overall structure of Art.4 comprises two (alternative) general choice-of-law rules, in paragraphs (1) and (2), and an exception to them, in paragraph (3).

The first general rule, which is the starting point in ascertaining the applicable law under Art.4, is set out in paragraph (1). Art.4(1) identifies eight different types of contracts and spells out the law which would govern each of those agreements. Amongst these, contracts for sale of goods and provision of services tend to be more widely in use. As such, they are useful in illustrating how the choice-of-law rule under paragraph (1) operates. In the context of a sale-of-goods contract, under Art.4(1)(a), the contract is governed by the law of the country where the seller has his habitual residence. In contracts for the provision of service, Art.4(1)(b) states that the law of the country where the service provider has his habitual residence shall govern the agreement. Habitual residence, for the purposes of the Rome I Regulation, is defined under Article 19(1): for companies, it is their place of central administration; for individuals, acting in the course of their business, it is their principal place of business.

The second (alternative) general rule is set out in Art.4(2). This general rule is only of relevance for those contracts that do not belong to the eight categories of contract identified under Art.4(1), or are, in fact, those which concern transactions that involve more than one of those eight contracts. Where applicable, Art.4(2) provides that the contract’s governing law is that of the country in which the contract’s characteristic performer has his habitual residence. For the purpose of Art.4(2), characteristic performance is that for which the payment is due under the contract.

22 Private International Law in English Courts, supra, fn.9, [7–104]-[7–108].
23 Ibid, [7–104].
24 Ibid, [7–107].
25 If the applicable law cannot be determined pursuant to paragraphs (1) and (2), then, under Art.4(4), it is to be determined based on the law of the country that is most closely connected with the contract in question.
26 The other categories of contract outlined under Art.4(1) include contracts relating to a right in rem in immovable property, tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months, franchise, distribution sale of goods by auction and specific contracts concerning financial instruments: Art.4(1)(c)-(h), respectively.
27 The Guilian & Lagarde Report, 23. See, also, Dicey, Morris & Collins, supra, fn.5, [32–077].
As indicated earlier, the general choice-of-law rules under paragraphs (1) or (2) of Art.4 are subject to an escape clause, which is set out under Art.4(3). Based on this escape clause, the choice of governing law arrived at under paragraphs (1) or (2) of Art.4 is to be disregarded if “it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated” by those paragraphs.

Given its overall framework, the interrelationship between the application of the (alternative) general rules under paragraphs (1) and (2), on the one hand, and the escape clause, within paragraph (3), on the other, is critical to the understanding of how the law governing the parties’ dispute is to be ascertained under Art.4. In this respect, the key question for consideration, in this section, concerns the readiness (or otherwise) with which the choice of law identified under Art.4(1) Art.4(2) could be trumped by the choice under Art.4(3).

In many ways, this is not a new question. Scholars and practitioners in the field of conflict of laws, in the United Kingdom (and other contracting states to the Rome Convention), have had to contend with it – in a broadly similar form – when considering the interpretation of Art.4 under the Rome Convention. It is, therefore, helpful to examine briefly the position under that instrument before turning our attention to the existing law under the Regulation.

1. The position under Art.4 of the Rome Convention

Over the years, there has been much discussion, in the UK courts\textsuperscript{28} and academic circles,\textsuperscript{29} on the interpretation of the various aspects of Art.4 of the Rome Convention. Due to limitations of space, it is not possible to rehearse all these observations in any degree of detail. Accordingly, this sub-section presents an overview of those key features of the provision, which are likely to be of relevance in the construction of Art.4 of the Regulation.

The main objective at the heart of the determination of a contract’s governing law under Art.4 of the Convention is outlined in its paragraph (1). It states that, where the choice of law is not expressly stipulated, or ascertainable by implication, “the contract shall be governed by the law of the country with which it is most closely connected”. In this respect, Art.4(2) articulates the starting point for identifying the contract’s governing law. According to this provision, the contract\textsuperscript{30} is presumed to be governed by the law of the country where the contract’s characteristic performer “has, at the time of the conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central


\textsuperscript{30} The contracts which fall under Art.4(2) exclude contracts concerning rights in immovable property (Art.4(3)), carriage of goods (Art.4(4)), consumers (Art.5) and employment (Art.6). The agreements which fall outside the material scope of the Rome Convention are set out under Art.1(2)(a)-(h).
administration.” The notion of characteristic performance, under the Convention, is the precursor to that under Art.4(2) of the Regulation. As such, it basically refers to “the performance for which the payment is due, ie … [the performance] which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction.”

Where the characteristic performance under the contract cannot be identified, Art.4(5) provides that the choice of law should be determined under Art.4(1) – namely, “by the law of the country with which it is most closely connected”. Art.4(5) also has another (arguably more contentious) function: it has the potential of trumping the presumption set out under Art.4(2). Art.4(5) provides that, the law identified under paragraph (2) is to be “disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country”.

The basic structure of Art.4 – with a starting presumption that is subject to an escape clause – had meant that the interrelationship between Art.4(2), on the one hand, and Art.4(5), on the other, posed one of the more challenging questions of construction under the Rome Convention. Indeed, many had deemed it to be “controversial” and likely to lead to “potential problems”. The difficulties in articulating a clear interpretive framework for Art.4 had been compounded by the fact that the Court of Justice was only given the jurisdiction to rule on the interpretation of the Rome Convention provisions after 1 August 2004. Accordingly, for a considerable period of time, it had been left to the courts of each contracting state to develop its own approach to the interpretation of the relationship between Art.4(2) and Art.4(5) of the Rome Convention. This state of affairs, in turn, led to the emergence of diverging opinions on how this exercise in statutory interpretation should be carried out.

On the one side, there were those who held the view that any departure from the choice of law identified under Art.4(2) should happen in the most exceptional of instances. The proponents of this view – which was widely known as the “strong-presumption model” – often pointed to the Dutch Supreme Court’s decision in Société Nouvelle des Papeteries de l’Aa SA v BV Machinefabriek BOA, as the main source of authority for their position. Based on this case, the law identified under Art.4(5) could only trigger a departure from the presumptive applicable law, under Art.4(2), if there was no meaningful connection between the agreement and its characteristic performer’s principal place of business. The highly restrictive interpretation of Art.4(2), as expressed in the Société Nouvelle case, was also favoured by the Scottish court. Most notably, in Caledonia Subsea Ltd v Microperi SRL, Lord Cameron of Lochbroom considered that the Dutch court’s ruling, on the interface between paragraphs (2) and (5) of Art.4, was “entirely consistent with the intention that so far as possible the Convention should be uniformly interpreted and with the approach to be taken

31 For more discussion on the question of identifying the characteristic performance, see The Guliano & Lagarde Report, 20-21 (at an abstract level); and Hill, supra, fn.8, 334-336 (at UK level).
32 The Guliano & Lagarde Report, 23.
33 Dicey, Morris & Collins 2006, supra, fn.29, [32–125]; and, Dicey and Morris, supra, fn. 29, [32–123].
34 International Commercial Disputes 3rd edn, supra, fn. 29, [14.2.69].
35 For a more detailed exposition of these different approaches see, among others, McParland’s Rome I Regulation, supra, fn.9, [10.62]-[10.66]; Okoli & Arishe, supra, fn.9, 516-522; International Commercial Disputes 3rd edn, supra, fn. 29, [14.2.71]-[14.2.80]; Atrill, supra, fn.29, 550-568; and, Hill, supra, fn.8, 339-346; and, WE O’Brien Jr, “Choice of law under the Rome Convention: the dancer or the dance” [2004] LMCLQ 375.
to the presumption”. 37 Similarly, Lord Marnoch found himself “in complete sympathy with the approach of the Supreme Court of the Netherlands in Société Nouvelle” 38

On the other side, though, were those who considered that the presumed choice of law under Art.4(2) should be ignored, if it could be shown, on balance, that the contract is more closely connected with another country. This reading of Art.4 – which is broadly known as the “weak-presumption model” – appeared to have support amongst some English judges. For instance, in Samcrete Egypt Engineers & Contractors SAE v Land Rover Exports Ltd, Potter LJ considered that “unless Art.4(2) is regarded as a rule of thumb which requires a preponderance of contrary connecting factors to be established before that presumption can be disregarded, the intention of the convention is likely to be subverted”. 39 Similarly, in Ennstone Building Products Ltd v Stanger Ltd, Keene LJ stated that “if the presumption is to be of any real effect, it must be taken to apply except where the evidence clearly shows that the contract is more closely connected with another country”. 40

It was not until the Court of Justice’s ruling in the ICF case that some degree of clarity was restored to the law in this area. The facts of the case are well known. 41 Hence, it is only necessary to revisit those parts of the Court of Justice’s pronouncements which concerned the question of interpreting the interface between Art.4(2) and Art.4(5) of the Rome Convention. 42 In essence, in the ICF case, the Dutch court sought the Court of Justice’s endorsement of its strong-presumption model of construction. In other words, the Court of Justice was asked to rule on whether the presumptive governing law, under Art.4(2), should give way to the choice of law under Art.4(5) only in those instances where the contract in question has no real connection with its characteristic performer’s principal place of business.

In response to this question, the Court of Justice consulted the Giuliano & Lagarde Report, observing that the inclusion of paragraph (5) in Art.4 of the Convention was designed to introduce “flexibility in determining the law which is actually most closely connected with the contract in question”.” 43 Accordingly, it ruled that:

“Article 4(5) must be interpreted as allowing the court before which a case has been brought to apply, in all cases, the criterion which serves to establish the existence of such connections, by disregarding the ‘presumptions’ if they do not identify the country with which the contract is most closely connected.” 44

The Court of Justice accepted that, in order to uphold legal certainty, Art.4(2) must be consulted as the starting point for identifying the contract’s governing law. Nevertheless, it also acknowledged that, ultimately, national courts should be able to disregard the presumptive choice of law in favour of the law of the country with which the contract is more closely connected. 45 In this respect, by adopting this position, the Court of Justice clearly rejected the strong-presumption model for the construction of the interface between Art.4(2) and Art.4(5). The interpretive approach endorsed by the court was, therefore, more in line

37 2003 SC 70, 85.
38 Ibid, 87. Cf, Lord President Cullen, 80-81.
40 [2002] EWCA Civ 916; [2002] 1 WLR 3059, [41]. For a more extensive discussion of these (and other similar) cases see, among others, Hill, supra, fn.8, 341-345.
41 See, eg, McParland’s Rome I Regulation, supra, fn.9, [10.67]-[10.69] and Dickinson, supra, fn.9, 28.
42 The case also concerned questions relating to the interpretation of Art.4(4) of the Rome Convention and whether it was possible to sever the contract, thereby enabling different laws to govern its various sections. These aspects of the ruling fall outside the scope of this article.
43 The ICF case, supra, fn.10, [59].
44 Ibid, [60].
with that which the English court had developed and applied at national level.\footnote{Dickinson, supra, fn.9, 37.} In this respect, the decision has been welcomed for being “robust and sensible”,\footnote{Ibid, 34.} if somewhat thin in its outlining of the relevant factors based on which the court should decide the interface between the presumption and the escape clause.\footnote{P Rogerson, Collier’s Conflict of Laws, 4th edn, (Cambridge: Cambridge University Press, 2013), 314; Penadés Fons, supra, fn.9, 246; and, Dickinson, supra, fn.9, 34.}

2. The position under Art.4 of the Rome I Regulation: the three interpretive models

Notwithstanding the decision in the ICF case, on the interpretation of Art.4 of the \textit{Convention}, and its further reiteration in recent years,\footnote{This reiteration has happened on at least two occasions. One was the decision in Schlecker (t/a Firma Anton Schlecker) v Boedeker (Case C-64/12) [2014] QB 320, a case concerning the construction of the choice-of-law rules in individual employment contracts – which resemble those set out under Art.4(2) and Art.4(5) of the Convention – set out under Article 6(2) of the Rome Convention. The other was Haeger & Schmidt GmbH v Mutuelles du Mans assurances IARD (Case C-305/13) EU:C:2014:2320; [2015] QB 319, which related to a contract for the carriage of goods.} there is considerable uncertainty in the law, concerning the interpretation of the general rules under paragraphs (1) and (2) of Art.4 of the \textit{Regulation}, on the one hand, and the escape clause under paragraph (3), on the other.\footnote{See, for instance, R Fentiman, International Commercial Litigation, 2nd edn, (Oxford: Oxford University Press, 2015), [5–105].} This uncertainty is reflected in the fact that there is no clear consensus, within the existing legal literature in the United Kingdom, on how the different choice-of-law rules within Art.4 of the Regulation should be construed. A close analysis of the existing academic literature illustrates that, in the short period following the introduction of the Regulation, three different models for the interpretation of Art.4 have been proposed. The main factor which differentiates these approaches, it is argued, is their respective conception of the restrictiveness with which they state that Art.4(3) should be construed.

The first model conceives of Art.4(3) of the Regulation in potentially the narrowest possible way. Adopted by Messrs Okoli and Arishe, it states that the interface between the (alternative) general rules and the escape clause within Art.4 should be interpreted in line with the strong-presumption model.\footnote{Okoli & Arishe, supra, fn.9, 531-534.} They consider that, despite the outright rejection of this interpretive model in the ICF case, the introduction of the Rome I Regulation has, in fact, led to its “resurrection”.\footnote{Ibid, 531.} It, therefore, follows from this proposed interpretive framework that, \textit{ipso facto}, the influence of the Court of Justice’s ruling in the ICF case does not go beyond the interpretation of Art.4 of the Convention.

The second interpretive approach, which is more widely held among the UK academic community,\footnote{See, among others, Rogerson, supra, fn.48, 315; Anton’s Private International Law, supra, fn.9, [10–181]-[10–182]; Penadés Fons, supra, fn.9, 244; and, Dickinson, supra, fn.9, 35-36.} is different from the strong-presumption model: it envisages some (albeit a fairly limited) role for the ICF case in interpreting Art.4(3) of the Regulation. For instance, in a case comment on the ICF decision, published in the \textit{Lloyd’s Maritime and Commercial Law Quarterly}, Professor Dickinson noted that, similar to its counterpart provision within the Convention,
“the text of Art.4(3) and its supporting recitals do not support the interpolation of a requirement that the contract have no ‘real’ or ‘genuine’ connection with the country indicated by the basic rules, or alleviate the difficulties inherent in [the Dutch] approach”.

In this respect, the argument is that the position in the ICF case “should be extended to the Rome I Regulation”. Consequently, this interpretive conception is broader in ambit than the one under the strong-presumption model.

At the same time, though, the proponents of this view appear to favour a much more restrictive approach, for the interpretation of Art.4 of the Regulation, than that which was articulated in the ICF case. This observation is based on the fact that their account evidences an understanding that, despite the ICF ruling, it should be more difficult to meet the threshold for the application of Art.4(3) of the Regulation than it is the case under Art.4(5) of the Convention. For instance, the editors of Anton’s Private International Law have noted that, for the escape clause under Art.4(3) to be triggered, the Court of Justice “will almost certainly require … that the country is ‘significantly’ more closely connected to the contract than the country indicated by Art.4(1) or Art.4(2)”.

Similarly, Professor Dickinson has stated that “Art.4(3) sets the bar higher than its predecessor” under the Convention. The restrictiveness of this interpretive approach, relative to the one outlined in the ICF case, is further reinforced by its advocates’ intimation that, practically, only in instances of the same kind as the one envisaged under Recital (20) of the Regulation, will the escape clause under Art.4(3) be triggered. Given its narrower scope than the position under the ICF case, on the one hand, but its breadth, relative to the strong-presumption model, on the other, the second framework, for interpreting Art.4 of the Regulation, can be deemed as a “weak strong-presumption model”.

The third (and final) interpretive approach is one which was first advocated by Professors Clarkson and Hill and, more recently, by Professor Briggs. In an earlier publication in 2013 – namely, the third edition of The Conflict of Laws – Professor Briggs had appeared to hold a very similar view to that at the heart of the weak strong-presumption model. In particular, he had observed that:

"the current version of the escape clause includes the word ‘manifestly’, and as the rules in Article 4(1) and (2) of the Regulation which are to be escaped from are formulated in rather more careful detail than was the case before, it is natural to suppose that there will be rather less escaping from the governing law identified by Article 4(1) in particular."

However, over a year later, in Private International Law in English Courts, he demonstrated a preference for a more nuanced methodology for interpreting Art.4 of the Regulation. According to this approach, which is the same as the one set out in Clarkson and Hill’s The

54 Dickinson, supra, fn.9, 36.
55 Ibid.
56 Anton’s Private International Law, supra, fn.9, [10–182] (emphasis added).
57 Dickinson, supra, fn.9, 35.
58 Recital (20) provides that, in determining the country with which the contract is manifestly more closely connected, “account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts”.
60 Private International Law in English Courts, supra, fn.9, [7–292]–[7–293].
Conflict of Laws, the general framework underpinning the Court of Justice’s ruling in the ICF case should govern the interaction between the general rules and the escape clause under Art.4.

As the above analysis reveals, although perhaps subtle, there are clear divergences of view, within the academic commentary, on the appropriate framework for the construction of the choice-of-law rules within Art.4 of the Rome I Regulation. This divergence, in turn, signifies that the law is unclear. On one level, of course, this lack of coherency is understandable; after all, a body of precedent concerning the interpretation of this particular provision has yet to emerge. Thus, there is a wide scope for the outlining of different accounts on the construction of Art.4. On another (more pragmatic) level, though, this state of affairs is undesirable, as it renders it much more challenging to develop a clear and principled methodology for the determination of the law governing international contracts, in the absence of an express (or implied) choice in the parties’ agreement.

IV. HOW SHOULD ART.4 OF THE ROME I REGULATION BE INTERPRETED?

In these circumstances, and in order to respond to these uncertainties, the next step ought to be towards identifying the model, from within the ones considered earlier, which would provide the most prudent framework for the interpretation of the various choice-of-law rules within Art.4. This section of the discussion seeks to take that step by analysing the (un)persuasiveness of the respective approaches. Its ultimate objective is to advance a reasoned case for the adoption of the most suitable interpretive model in this area.

As discussed in the previous section, in so far as the application of the escape clause under Art.4(3) is concerned, the strong-preservation and weak strong-preservation models take different positions on the degrees of discretion available to the national courts. Be that as it may, a close assessment illustrates that they are premised on an identical set of considerations which are broadly twofold.

The first one points to the overall restructuring of the choice-of-law rules within Art.4 of the Regulation. In particular, the change from presumptions, under Art.4(2)-(4) of the Convention, to specific rules, spelt out under Art.4(1) of the Regulation, has been regarded as signifying a desire, on the part of the instrument’s drafters, for more certainty (rather than flexibility) in the application of the different components of Art.4. This development, together with the absence of a provision within Art.4 of the Regulation such as that under Art.4(1) of the Convention – which stated that, in the absence of an express or implied choice under Art.3(1), the contract shall be governed by the law of the country with which it is most closely connected – has been seen as lending support to the view that it should be more difficult to effect an escape under Art.4(3) of the Regulation than is the case based on its counterpart within the Rome Convention.

According to Professors Clarkson and Hill, “the objective of Article 4 of the Regulation is no different [from that of the Convention] and a good argument can be made for applying the approach adopted by the Court of Justice in the ICF case to the situations falling under the Regulation”: Clarkson & Hill, supra, fn.59, 224.


Private International Law in English Courts, supra, fn.9, [7–293]. See, also, McParland’s Rome I Regulation, supra, fn.9, [10.392],[10.393].

This rearrangement has been seen as step in order to “reduce the possible discretion [available under the escape clause] and to create greater certainty with respect to the objectively applicable law”: Magnus, supra, fn.9, 30.

The second (and arguably more fundamental) consideration, in shaping the strong-presumption and weak strong-presumption models’ much more restrictive interpretation of Art.4(3), relative to its predecessor provision under the Rome Convention, is the actual wording of the escape clause. Much weight has been attached to the inclusion of the word “manifestly” in the text of that provision. For instance, Professor Dickinson has pointed to the wording of Art.4(3) as an example in opining that the threshold for triggering an escape under Art.4(3) of the Regulation is higher than that under Art.4(5) of the Convention. Likewise, Dr Rogerson has stated that the addition of the word manifestly to the escape clause, together with the changes to the wording of the general rules, suggest that Art.4(3) should be triggered “only very exceptionally”. In arriving at this standpoint, these, and a number of other commentators, have adopted a very restrictive reading of the word manifestly, thereby envisaging a fairly narrow scope for the operation of the escape clause under Art.4(3).

On the face of things, these arguments may tempt one to conclude that the general framework for interpreting Art.4 of the Convention, which was employed by the Court of Justice in the ICF case, should not be extended to the construction of Art.4 of the Regulation. This conclusion would be unpersuasive, however. Rather, it is argued that, for at least four reasons, the approach in the ICF case, as opposed to the ones under the strong-presumption or weak strong-presumption models, should be embraced as providing the basis for the governance of the interface between the relevant choice-of-law rules under Art.4 of the Regulation.

The first reason stems from the weakness in the consideration, underpinning the strong-presumption and the weak strong-presumption approaches, that the replacement of the presumptions, within Art.4(2)-(4) of the Convention, with hard-and-fast rules, under Art.4(1)(a)-(h) of the Regulation, should be regarded as representing the raising of the bar for satisfying an escape under Art.4(3) of the Regulation. This observation takes as given that the introduction of these rules has brought about a change of substance to this aspect of Rome I. It is argued, however, that this assumption is misplaced. A close analysis of Art.4(1) of the Regulation shows that, in effect, the rules within it point to the law of the place where the characteristic performer of the contract has its principal place of business. Put simply, the new rules are in fact the same, old presumptions, but outlined much more elaborately. In these circumstances, the real significance of this development is that it all but entirely addresses the uncertainties which could have arisen under Art.4(2) of the Convention, concerning the identification of the contract’s characteristic performer and its habitual residence. As a result, it is difficult to accept that the evolution from presumptions to rules should be seen as elevating the threshold for triggering the escape clause under Art.4(3).

The second reason in favour of extending the application of the ICF approach to the interpretation of Art.4 of the Regulation is based on the shortcomings which arise from the

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67 Dickinson, supra, fn.9, 35.
68 Rogerson, supra, fn.48, 315.
69 See, for example, Anton’s Private International Law, supra, fn.9, 10–182; and, Okoli & Arishe, supra, fn.9, 533. For similar observations, in sources published before the decision in the ICF case, see Magnus, supra, fn.9, 30 and 48; and, R Plender and M Wilderspin, The European Private International Law of Obligations, 3rd edn (London: Sweet & Maxwell, 2009), 7–075.
70 See, also, Private International Law in English Courts, supra, fn. 9, 7.292.
71 One such area of confusion related to the identification of the characteristic performer in the context of a distribution agreement. In Print Concept GmbH v GEW (EC) Ltd [2001] EWCA Civ 352; [2002] CLC 352, the English Court of Appeal had ruled, somewhat curiously, that the manufacturer (rather than the distributor) was the characteristic performer in a distribution contract. The introduction of Art.4(1)(f) under the Regulation, though, means that the decision in Print Concept is no longer a reliable authority.
way in which the proponents of the strong-presumption or the weak strong-presumption models have conceived of the inclusion of the word “manifestly” in the text of Art.4(3). As discussed earlier, their conception has led to the formation of the view that the escape clause should, in the case of the strong-presumption model, have virtually no scope of operation, or a highly-circumscribed one, in the case of the weak strong-presumption approach.

This state of affairs is, however, at odds with the broader position within the Rome I Regulation. It is true that, in the run up to the Regulation’s introduction, the European Commission had proposed not to include an escape clause in the context of what is now Art.4 Ultimately, though, the text of the finalised instrument did contain such a provision. This development, read together with what is set out under Recital (16) of the Regulation,74 evidence a desire on the part of Rome I’s drafters to leave room for a degree of flexibility in determining the contract’s governing law in the absence of express (or implied) choice by the parties.

An identical framework has been envisaged in relation to the process of identifying the law governing tortious or delictual obligations under Rome II Regulation. According to the European Commission’s explanatory memorandum on Rome II,76 Art.4(3) of Rome II – which, similar to Art.4(3) of Rome I, acts as an escape clause to the general rules under Art.4(1) and Art.4(2) of Rome II – allows “the court to adapt the rigid rule to an individual case so as to apply the law that reflects the centre of gravity of the situation”.77 Furthermore, the explanatory memorandum goes on to indicate that the word manifestly has been included to prompt the national courts to start their search, for the governing law, from the general rules rather than the exception clause.78 Although the explanatory memorandum relates to an instrument concerning the law applicable to non-contractual obligations, by virtue of Recital (7) of the Rome I Regulation,79 it is regarded as providing a useful source for the interpretation of the provisions within the Rome I Regulation.

In these circumstances, it is difficult to be persuaded that the word manifestly should be given such a narrow conception, thereby making it more difficult to effect an escape under Art.4(3) of the Regulation than is the case based on its counterpart within the Convention. Rather, it is more plausible to regard the addition of the word manifestly in Art.4(3) as a signal to the national courts, making it plain that the search for the contract’s governing law

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72 See, also, Private International Law in English Courts, supra, fn. 9, [7.293].
74 Recital (16) provides that “To contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict-of-law rules should be highly foreseeable. The courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation”. See, also, Private International Law in English Courts, supra, fn. 9, [7.148].
77 Ibid, 12 (emphasis added).
78 Ibid.
79 Recital (7) of the Rome I Regulation states that there should be a “consistent” reading of “the substantive scope and the provisions” of Rome I and II Regulations.
80 For instance, the editors of Anton’s Private International Law have observed that “the effect of Recital 7 of the Rome I is that the explanatory memorandum of the Commission explaining the purpose of the escape clause in Rome II is relevant in interpreting the escape clause in Rome I”: Anton’s Private International Law, supra, fn.9, [10–182]. See, also, Garicimartín Alférez, supra, fn.66, 1-62.
must start from Art.4(1) Art.4(2); the law identified under Art.4(1) or Art.4(2) is then only to be disregarded if, on balance, there is a stronger gravitational pull from another state.81

In the same vein, a third argument in favour of continuing with the ICF approach for the interpretation of Art.4 of the Regulation can be made. The foregoing analysis in this section has, on one level, highlighted the weaknesses in the strong-preservation and the weak strong-preservation models’ founding arguments. On another level, though, (and more significantly) the discussion illustrates that, despite some changes – which have tended to be of an elaborative nature – there are very small differences between Art.4 of the Regulation and its predecessor provision under the Convention. If this observation is to be accepted, then it would be doctrinally unappealing to have two different approaches for the construction of two identical sets of choice-of-law rules. What is more, much uncertainty would creep into this area of the law if two different bodies of precedent under the Convention and the Regulation were to be developed.

The fourth (and final) reason in support of the continued relevance of the ICF approach to the interpretation of Art.4 of the Regulation derives from the decision in the case itself. Rome I had been published in the Official Journal in 2008. The ICF ruling was made late in 2009. The Court of Justice must have been aware of the content of the new Art.4 under the Regulation, when deciding on the construction of its predecessor provision within the Convention. Consequently, it is entirely reasonable to expect that the Court of Justice would have intended to give a ruling in the ICF case which would be relevant for Art.4 of the Regulation as well as Art.4 of the Convention. It follows, it is argued, that the interpretive model, favoured by the Court of Justice in the ICF case, should continue to provide the basis for balancing between certainty and flexibility under the various choice-of-law rules within Art.4 of the Regulation.

V. CONCLUSION

The main purpose of this discussion has been to analyse how the governing law of an international contract, in the absence of the parties’ express designation, is to be ascertained under UK law. In this context, Art.3(1) and Art.4 of the Rome I Regulation were the relevant principles under consideration. In view of these provisions’ recent introduction, there is little which can be learnt from judicial pronouncements about their application and scope. As such, the examination of the law, as evidenced in the sizeable body of academic commentary, has provided the basis for developing the analysis in this article.

The discussion has highlighted that a generally consistent (and settled) view on the interpretation of Art.3(1) of the Regulation has been arrived at. Based on this understanding, it is widely accepted that Art.3(1) should be interpreted in the same way as its counterpart provision under the Rome Convention. The same clarity and consensus of opinion, though, does not exist with regards to the construction of Art.4 of the Regulation. As this article has sought to illustrate, there are clear divergences of view, within the academic commentary, on the appropriate framework for the construction of the choice-of-law rules within Art.4 of the Rome I Regulation. These divergences – which point to three different approaches to the interpretation of the provision – signify that the law in this area lacks certainty and cogency.

This article has sought to address this problematic state of affairs. In this regard, its key contribution has been to advance a reasoned case in support of embracing the general framework which the Court of Justice employed in the ICF case, in respect to the

81 See, also, Professors Clarkson and Hill who observe that “if it is clear that a contract is more closely connected with country X than with Country Y, it is only a very small step to the conclusion that the contract is manifestly more closely connected with country Y”: Clarkson & Hill, supra, fn.59, 224.
interpretation of Art.4’s equivalent provision under the Rome Convention. It is argued that this interpretive framework provides the most appealing (and prudent) basis for balancing the competing values of certainty and flexibility which are at the heart of the interface between the various choice-of-law rules within Art.4 of the Regulation.