

THE SIGNIFICANCE OF THE DOCTRINE OF ACCESSORY ALLOCATION AS A CONNECTING FACTOR UNDER ARTICLE 4 OF THE ROME I REGULATION

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A. INTRODUCTION

Accessory allocation (AA) or *accessoire aanknopng* (in Dutch) in this article refers to a situation where the court uses a law governing one or more contract(s) to govern or infect another closely related contract(s), where the parties have not made an express choice of law to govern all the contracts they have entered into in a commercial transaction. This doctrine was recognised and applied as a significant connecting factor under the English, French and German domestic private international law (PIL) rules in contractual obligations, and was referred to as the “doctrine of infection” in England, “accessory attachment” (*rattachement accessoire*) or “accessory character” (*caractère accessoire*) in France, and “accessory attachment” (*akzessorische Anknüpfung*) in Germany.¹ Some other EU

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¹ See the English cases of *The Njegos* [1935] Lloyd’s Law Reports 286; *Ilyssia Compania Naviera v Bamaodah* [1985] 1 Lloyd’s Rep 107, 112; and *Wahda Bank v Arab Bank Plc* [1996] CLC 408, 411. For the French approach see H Batiffol, *Les conflits de lois en matière de contrats* (Sirey, 1938) spéc no 523, 424–25; *Sté des grandes minoteries Bassot et Cie v Crédit foncier d’Algérie et de Tunisie*, Judgment of 27 October 1943; *Gnest v Sté Vibram*, Judgment of 14 January 1976; *Sté Total Afrique v Serrure et al* [1982] *Revue Critique de Droit Internationale Privé* 336; S Corneloup, “Choix de loi et contrats liés” in S Corneloup and N Joubert (eds), *Le règlement communautaire ‘Rome I’ et le choix de loi dans les contrats internationaux* (Lexis Nexis, 2011), coll. du CREDIMI spéc 285; V Parisot, “Note sous Civ Ière 12 octobre 2011, no 10-19517” [2012] *Journal de Droit International*, Comm 20, 1335 (Convention de Rome du 19 juin 1980 sur la loi applicable aux obligations contractuelles – loi applicable au cautionnement). For the German approach see E Jayme, *Kollisionsrecht und Bankge-*

Member States such as the UK, Germany, Switzerland, the Netherlands and Belgium also applied the doctrine of AA under their domestic PIL rules as a connecting factor in non-contractual obligations.² Under both Article 3 of the Rome Convention (“the Convention”)³ and the Rome I Regulation (“Rome I”),⁴ the courts of Member States can use the doctrine of AA in implying a choice of law between the parties. Some English, Scottish and French courts also considered and utilised the doctrine of AA as a connecting factor under Article 4(5) of the Convention in determining the applicable law in the absence of choice. Article 4 of Rome I (unlike Article 4 of the Convention) expressly elevates the doctrine of AA as a connecting factor to one of special significance (through the provisions of Recitals 20 and 21) in determining the applicable law of a contract in the absence of an express or implied choice of law when utilising the escape clause or principle of closest connection. By way of analogy, Article 4(3) of the Rome II Regulation (“Rome II”)⁵ also expressly elevates the doctrine of AA to one of special significance in determining the applicable law of a tort/delict in the absence of an express or implied choice of law while utilising the escape clause.⁶ Thus, the doctrine of AA as a connecting factor in determining the applicable law in the absence of an express or implied choice of law of an obligation is very important and deserving of special attention.

As the time to amend the provisions of Rome I approaches closer,⁷ this article seeks to address some fundamental issues concerning the application of the doctrine of AA in determining the applicable law of a contract in the absence of an express or implied choice of law. In doing so, the second part

schäfte mit Auslandsberührung (Duncker & Humblot, 1977); E Jayme, “Komplexe Langzeitverträge und Internationales Privatrecht. Ein Tagungsbericht” [1987] *IPRax* 63; C Von der Seipen, *Akzessorische Anknüpfung und engste Verbindung im Kollisionsrecht der komplexen Vertragsverhältnisse* (Winter, 1989) ; S Michel, *Die akzessorische Anknüpfung. Grundfragen und Grundprobleme*, Thèse Göttingen, 2004. These German articles are cited in Corneloup (*ibid*). Prof Corneloup also observes that Swiss law, though recognising the doctrine of AA under its domestic PIL rules in relation to contractual matters, applied it in a restrictive manner with regard to displacing the presumption of the habitual residence of the characteristic performer.

² S 12(2) of the UK PIL Act; s 41(1)(2) of the German Civil Code; Art 5 of the Dutch PIL Act; Art 133(3) of the Swiss PIL Act; Art 100 Belgian PIL Code. The author prefers to adopt the Dutch (PIL) use of the term “accessory allocation” (*accessoire aaknopng*).

³ On the law applicable to contractual obligations [1980] OJ L266.

⁴ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6. Art 29 of Rome I provides that it shall apply from 17 December 2009. It replaces the Convention.

⁵ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L199. It takes effect in courts of Member States only for events giving rise to damage occurring after 11 January 2009 – as decided by the Court of Justice of the European Union (CJEU) in Case C-412/10 *Homawoo v GMF Assurances SA* [2011] ECR I-11603 [37].

⁶ See also Recital 7 of Rome I which seeks a consistent interpretation of the provisions of Rome I and Rome II.

⁷ Art 27 of Rome I gives the Commission the mandate to submit a report to the European Parliament by 17 June 2013 and if appropriate to make proposals to amend Rome I.

of this article provides a background on the determination of the applicable law in the absence of an express or implied choice of law. The third part of this article considers the legitimacy, relevance and significance of the doctrine of AA under Article 4 of the Convention. The fourth part of this article seeks to provide answer(s) as to why the drafters of Rome I attached the doctrine of AA as a connecting factor with special significance under Article 4(3) and (4) of Rome I. The fifth part of this article addresses the nature of the inquiry a decision-maker would be faced with in utilising the doctrine of AA under Article 4 of Rome I. It also considers the application of the doctrine to contracts with a very close relationship, such as letters of credit, guarantees (or performance bonds) and counter-guarantees, and insurance and reinsurance contracts. The sixth part of this article looks to the significance of the doctrine of AA especially as it relates to the weight the court is to attach to it when utilising the escape clause in Rome I. The writer also exposes the dilemma that is faced between the proponents of the strong and intermediary presumption approach in utilising the doctrine of AA. The seventh part of this article contains the conclusion.

**B. DETERMINING THE APPLICABLE LAW IN THE ABSENCE
OF AN EXPRESS OR IMPLIED CHOICE UNDER THE
ROME CONVENTION AND ROME I REGULATION**

The law that applies to a contract is very important because Article 10 of the Convention and Article 12 of Rome I both provide that it governs the interpretation, the performance, the consequences of a breach of obligations such as assessment of damages, the various ways of extinguishing obligations and prescription and limitation of actions, and the consequences of nullity of a contract. Also, although the applicable law does not automatically determine the existence or exercise of a court's jurisdiction, the applicable law of a contract is very important because it is a significant factor (and it *could be* decisive as well where it is an express choice of law) that an English court takes into account at the interlocutory stage to determine the existence or exercise of its traditional jurisdiction where there is a foreign element.⁸

⁸ Such jurisdiction applies when the Brussels I Regulation, the Lugano Convention and the intra-UK scheme of jurisdiction do not apply. See also the work of P Rogerson, "Problems of the Applicable Law of the Contract in the English Common Law Jurisdiction Rules: The Good Arguable Case" (2013) 9 *Journal of Private International Law* this issue. Rogerson's article focuses on problems associated with English cases (not involving the application of Brussels I, the Lugano Convention or the intra-UK scheme) where the determination of the applicable law took place in interlocutory judgments on the good arguable case standard in determining whether the English courts have jurisdiction over foreign defendants. Some of the English decisions referred to in Rogerson's article also feature in this article. The distinction between the final and interlocutory (stage of) judgments in determining the applicable law is not the focus

Article 3 of the Rome Convention and Rome I in this regard respects the parties' right to make an express choice of law as to the applicable law. International traders, or the solicitors who act on their behalf, usually fail to make an express choice of law for at least two reasons. First, they are unable to reach an agreement on the applicable law due to conflicting interests. Second, they may overlook the possibility of making an express choice of law either because of the haste in which the transaction is concluded, or the commercial transaction is scattered in various jurisdictions such as in cases of back-to-back contracts like letters of credit, or the significance of making an express choice of law is not appreciated.

Where the parties have not made an express choice, Article 3 of both the Convention and Rome I provide that the court can imply such a choice: in the former if it can be "demonstrated with reasonable certainty", and in the latter if it can be "clearly demonstrated",⁹ from the terms of the contract and circumstances of the case. The court is to find that the parties have made a real choice and not infer the choice as was done by English courts prior to entering into the Convention and Rome I.¹⁰

If the court is unable to imply a choice of law between the parties, it is to use the provisions of Article 4 of the Convention or Rome I in determining the applicable law. Article 4 of the Convention provides that the court is to determine the applicable law as the law of the country that is most closely connected with the contract. It also has a proviso which states that a severable part of a contract which has a closer connection with another country may by

of this article. The focus of this article is rather on the significance of the doctrine of AA in determining the applicable law under Art 4 of Rome I irrespective of whether it is utilised at an interlocutory or final stage.

⁹ There is no material or significant difference between Art 3(1) of the Convention and Rome I by the addition of the word "clearly" in Art 3 of Rome I. There is recent authority for the view that the addition of the words "clearly demonstrated with reasonable certainty" in Rome I rather than "demonstrated with reasonable certainty" as was in the Convention is merely to bring the English language text and German language text in line with the French language text that used the word "clearly": Lord Lawrence Collins *et al*, *Dicey, Morris & Collins on The Conflict of Laws*, vol 1 (Sweet & Maxwell, 15th edn, 2012), 1809, para 32-059, fn 217; *Lawlor v Mining and Construction Mobile Crushers Screens Ltd* [2013] EWCA Civ 365 [3]. See also R Plender and M Wilderspin, *European Private International Law of Obligations* (Sweet & Maxwell, 3rd edn, 2009), 144, para 6-024; R Fentiman, *International Commercial Litigation* (Oxford University Press, 2010), 196; PR Beaumont and PE McEleavy, *Private International Law AE Anton* (W Green, 3rd edn, 2011), 444, para 10.70; Okoli and Arishe, *supra* n *, 528, fn 91.

¹⁰ M Giuliano and P Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations* ("Guiliano-Lagarde Report") [1980] OJ C282/1, 17; *Lawlor v Mining and Construction Mobile Crushers Screens Ltd*, *supra* n 9, [28]–[35]. The Guiliano-Lagarde Report (*ibid*) provides that as a guide, the court can imply a choice of law with reasonable certainty by taking into account if the parties entered into an express choice of court or arbitration agreement; or if they used a standard form contract such as the Lloyds policy of insurance in England; or if the contract formed part of a previous course of dealings between the parties; or there is an express choice of law in a related transaction between the same parties; or there is a reference to particular rules in a statute of a country.

way of exception be governed by the law of that country.¹¹ Article 4(2) provides that, subject to Article 4(5), “it shall be presumed that the law of the country that is most closely connected shall be the law of the [habitual residence] of the party who is to carry out the performance which is characteristic of the contract”. Article 4(5) provides that the presumption in paragraph 2 shall not apply if the “characteristic performance cannot be determined” and it shall also be disregarded “if it appears from the circumstances as a whole that the contract is more closely connected with another country”.

On the other hand, Article 4(1) of Rome I has a structure of fixed rules (as opposed to presumptions in the Convention) in determining the law that applies to the contract of the parties in the absence of choice.¹² Article 4(2) functions as an exception to Article 4(1) by providing that the contract shall be governed by the law of the country of the habitual residence of the party who is to carry out the characteristic performance.¹³ Article 4(3) provides that where “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 in paragraphs 1 or 2, the law of that other country shall apply”. Article 4(4) provides that where the “law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected”.

One of the important differences between Article 4 of the Convention and Article 4 of Rome I is set out in Recitals 20 and 21 of Rome I requiring that the court should take into account whether the contract in question has a very close relationship with another contract or contracts in utilising the escape clause or principle of closest connection, respectively, under Article 4(3) and (4).¹⁴ This difference is important because it elevates the doctrine of AA to one of special significance among other factors such as the language or form of the contract, residence of the parties, factors that supervened prior to and

¹¹ This proviso (also known as *dépeçage*) is to be utilised by a court on exceptional grounds, especially where the contract is independent and can be severed from the rest of the contract: C-133/08 *Intercontainer Interfrigo SC (“ICF”) v Balkenende Oosthuizen* [2009] ECR I-9687 [42], [43], [45], [46], [48], [49]; Giuliano-Lagarde Report, *supra* n 10, 23.

¹² It lists eight categories of contract such as contract of sale, provision of services, immovable property, distributorship, franchise, auction sales and financial instruments in which the law of the country of one of the parties is to apply.

¹³ This is based on two conditions. The first is where the contract is not covered by para 1. The second is where the elements are covered by more than one of the subparagraphs (a)–(h) of para 1. See Recital 19 to Rome I.

¹⁴ This difference is singled out because it is a crucial aspect of this article. A second difference is that Art 4(1) of Rome I operates on fixed rules as opposed to the presumptions contained in Art 4 of the Convention. Thirdly, Art 4 of Rome I, unlike Art 4 of the Convention, does not permit *dépeçage*. Fourthly, the escape clause as provided in Art 4(3) of Rome I on the face of it appears to set the threshold of displacement higher by requiring that the court ensures that it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country before it displaces the rules in Art 4(1) or (2).

after the contract, object of the contract, place where the contract was negotiated or concluded, reference to a foreign law, currency of payment, place of payment, and the place of performance.

In interpreting Article 4(5) of the Convention, the Danish, French and English courts generally favoured the weak presumption approach.¹⁵ The prominent French judicial approach to making the presumption weak under Article 4 of the Convention was in applying the doctrine of AA as a *decisive* connecting factor even where other substantial and significant connections strongly favoured the application of the main rule.¹⁶ The French approach was influenced by its domestic PIL rules. The prominent English judicial approach to making the presumption weak was by unduly elevating the place of performance to one of special significance among other connecting factors in easily displacing Article 4(2), where the characteristic performer's place of business is not the place of performance.¹⁷ The English position was also influenced by its domestic PIL rules that gave considerable weight to the place of performance and little weight to the residence of the parties.¹⁸ The approach of the Eng-

¹⁵ In *Credit Lyonnais v New Hampshire Insurance Company* [1997] CLC 909, 914 Hobhouse J labelled it as such. The weak presumption approach also regards the main rule as a tie-breaker that could easily be displaced by the escape clause. There are also alternative approaches to the interpretation of the escape clause in the Convention – the strong presumption approach, the doctrine of commercial expectations and the intermediary approach. The strong presumption approach takes the position that the main rule should not be displaced except if it has no real significance as a connecting factor. The commercial expectations doctrine measures the significance of displacing the main rule based on the commercial context of the contract. The intermediary approach aims at reaching a counter-balance or middle ground between the goals of legal certainty and flexibility in determining whether there are justifiable grounds for displacing the main rule. For an exhaustive and comprehensive discussion of these approaches see also Okoli and Arishe, *supra* n*, 517–24.

¹⁶ *Bloch v Lima* [1992] JCP 21972; *Mayer v Deshoulieries* [2001] *Revue critique de droit international privé* 670. See also *M Serge Fourez v SA Residence Le Verseuil* cited in Parisot, *supra* n 1.

¹⁷ This approach was influenced by Dicey & Morris, *The Conflict of Laws*, vol 2 (Sweet & Maxwell, 13th edn, 2000), para 32-124. See the English cases of *Bank of Baroda v Vysa Bank Limited* [1994] CLC 41, 49; *Definitely Maybe v Marek Lieberberg* [2001] 1 WLR 1745 [15]; *Samcrete Egypt Engineers v Land Rover Exports Limited* [2001] EWCA 2019 [47]; *Kenburn Waste Management Ltd v Bergmann* [2002] EWCA 99 [20]–[23]; *Marconi Communications International v PT Pan Indonesia Bank Ltd* [2005] EWCA 422 [66]; *Habib Bank Limited v Central Bank of Sudan* [2006] EWHC 1767 [43]–[44]; *Mrs Daad Sharab v His Royal Highness Prince Al-Waleed Bin Talal Bin Abdal Aziz Al Saud* [2008] EWHC 1893 [74]–[75]; *Commercial Marine Piling Limited v Piers Contracting Limited* [2009] EHCW 2241 [33]–[37]; *Cecil v Byatt* [2010] EWHC 641 (Comm) [82]–[94] (this aspect of the High court's decision was not overturned by the Court of Appeal in [2011] EWCA Civ 135). See also the cases of *Ennstone Building Products Ltd v Stranger Ltd* [2002] 1 WLR 3059, 3067, 3070 and *Iran Continental Shelf Oil Co Ltd v IRI International Corp* [2004] CLC 696 [20], [87]–[91], [94] where the presumption in Art 4(2) was not displaced by the English Court of Appeal in both cases because the habitual residence of the characteristic performer was also the place of performance.

¹⁸ *Definitely Maybe*, *supra* n 17, [15]; *Marconi Communications International*, *supra* n 17, [42]–[43], [66]. Admittedly, it could be said that the place of performance is of considerable significance as a connecting factor under Art 4 for at least two reasons. First, it generally occupies a special place in the scheme of European PIL rules applicable to contracts. For example, Art 5(1) of the Brussels Convention – Convention on Jurisdiction and Enforcement of Judgments in Civil

lish courts in unduly elevating the place of performance as a connecting factor was rejected by Lord President Cullen in the Scottish case of *Caledonia Subsea Ltd v Microperi Srl*¹⁹ when he held that “If the framers of art 4 had intended to attach such significance to the place of performance they could have readily indicated that, but they did not do so.”²⁰ Similarly, Lord President Cullen also considered the application of the doctrine of AA in this case, and in refusing to apply it as a decisive connecting factor held that it is to be considered alongside other factors.²¹

Lord President Cullen’s view in rejecting the elevation of the place of performance and doctrine of AA as *special* or *decisive* connecting factors appears to have been endorsed by the CJEU in *ICF*;²² courts of Member States are required to consider the circumstances as a whole in applying Article 4(5).²³ In other words, the decision in *ICF* did not attach special significance to any connecting factor such as the doctrine of AA or the place of performance while interpreting Article 4(5) of the Convention.

Despite the special significance given to the doctrine of AA as a connecting factor under Article 4 of Rome I, its application under Article 4 of the Convention is by no means free from controversy especially in English courts. Thus, it is imperative to assess the legitimacy, relevance and significance of the doctrine of AA under Article 4 of the Convention as a basis for determining the significance and approach to the doctrine under Article 4 of Rome I.

and Commercial Matters, as amended [1998] OJ C27/1 – and Art 5(1)(a) of the Brussels I Regulation – Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1 – give supremacy to the place of performance as a connecting factor in locating the forum that is closely linked with the contract. Similarly, Art 5(1)(b) of Brussels I gives weight to the *characteristic place of performance* in determining jurisdiction. See also Recitals 7 and 17 to Rome I that seek a consistent interpretation of choice of law and jurisdiction issues in contractual and non-contractual obligations. The same provisions contained in the Brussels Convention and Brussels I are also mirrored respectively in the Lugano Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988 (as given force of law by in UK by s 3A of the Civil Jurisdiction and Judgments Act 1982 as set out in Schedule 3C to that Act, as effected by s 1(1)(3) of the Civil Jurisdiction and Judgments Act 1991) and 2007 (Council Decision/2007/712/EC). Secondly, the place of performance also has commercial significance to the parties involved in a contract. However, unduly elevating the place of performance over other competing connecting factors has no textual legitimacy in Art 4(5) of the Rome Convention. See also Okoli and Arishe, *supra* n *, at 518–19.

¹⁹ *Caledonia Subsea Ltd v Microperi Srl* 2002 SLT 1022.

²⁰ *Ibid*, [41]. He further states that “[I]ndeed when the place of performance is such an obvious candidate as the test, the fact that it is not mentioned suggests a movement away from it. ... No doubt the place where the contract is performed is of relevance, either directly or indirectly, but it may be only one of a number of factors to be assessed in the exercise under para 5.”

²¹ *Ibid*, [44].

²² *Supra*, n 11.

²³ *Ibid*, [61].

C. THE APPLICATION OF THE DOCTRINE OF ACCESSORY ALLOCATION UNDER ARTICLE 4 OF THE ROME CONVENTION

Under Article 3 of the Convention, the courts of Member States as a guide can utilise the doctrine of AA in implying a choice of law if the parties have failed to make an express choice of law. What remains unsettled is if the doctrine of AA is a legitimate, relevant or significant connecting factor for the purposes of Article 4 of the Convention.

Professor Lagarde submitted in an early publication that the doctrine of AA is permissible under Article 4 of the Convention.²⁴ He expressed the view that

“the presumption is not absolute. ... A subcontractor, for example, might be governed by the same law governing the principal contract between the contractor and the employer rather than the law of the country in which the subcontractor has his place of business.”²⁵

Similarly in the early decision of the French case of *Bloch v Lima*,²⁶ the contract of guarantee which had no express choice of law, had strong connections with France. The characteristic performance, place of performance, habitual residence of the debtor and guarantor, and the currency of payment all had connections with France. The Cour d’Appel de Versailles (Court of Appeal) displaced Article 4(2) by applying the doctrine of AA as a decisive connecting factor under Article 4(5) in using the (Italian) law that governed the debts guaranteed to govern the guarantee contract. The first English decision that applied Article 4 of the Convention utilised the doctrine of AA under Article 4(5) in determining the applicable law in the absence of choice with regard to a letter of credit contract.²⁷

Despite the early advancement of the doctrine of AA under Article 4(5) of the Convention, some judges and academics began to question the legitimacy, relevance and significance of applying the doctrine under Article 4 of the Convention.²⁸ The principal basis for the argument against the application of the doctrine is that under Article 4 of the Convention “the applicable law to the contract under consideration must in principle be determined on its own with-

²⁴ P Lagarde, “The European Convention on the Law Applicable to Contractual Obligations: An Apologia” (1981) 22 *Virginia Journal of International Law* 91, 97–98.

²⁵ *Ibid.*

²⁶ *Supra* n 16.

²⁷ *Bank of Baroda*, *supra* n 17, 47–49.

²⁸ *Samcrete*, *supra* n 17, [40]; *Caledonia Subsea Ltd v Microperi Srl* 2001 SLT1186 [30] (Lord Hamilton); THD Struycken, “Some Dutch Reflections on the Rome Convention, Art 4(5)” [1996] *Lloyd’s Maritime and Commercial Quarterly* 18; J Hill, “Choice of Law in Contract under the Rome Convention: The Approach of the UK Courts” (2004) 53 *International and Comparative Law Quarterly* 325, 340; CG Van Der Plas and THD Struycken, “Torts and Conflict of Laws in the Netherlands: Remarks on Haag 12th November, 2004” (2005) 7 *Yearbook of Private International Law* 269, 273; Parisot, *supra* n 1. Lord Hamilton in *Caledonia Subsea Ltd*, *ibid*, regarded the application of the doctrine of AA under Art 4 as “irrelevant” and “illegitimate” except in interdependent contract(s) such as letters of credit.

out reference to any greater transaction of which it forms part or with which it is concerned".²⁹ It is submitted that there are at least four reasons why there was controversy regarding the application of the doctrine of AA under Article 4(5) of the Convention.

First, there was suspicion that some Member State courts were influenced by their domestic PIL rules in interpreting the Convention, which did not represent the international character of the Convention that promotes uniformity by virtue of Article 18.³⁰ Thus, the application of the doctrine of AA to letter of credit contract(s) under Article 4 of the Convention by English courts was influenced by reliance on common law decisions.³¹ Similarly, the attitude of French courts to applying the doctrine of AA as a decisive connecting factor under Article 4 of the Convention to contracts of guarantee was influenced by its domestic PIL approach. Admittedly, the domestic influence of some Member States' PIL rules may have provided some early and valuable insights that may have been relevant to the interpretation of Article 4(5) such as the application of the doctrine of AA. However, the danger of this approach is the possibility of Member State courts interpreting Article 4(5) through the lens of their (individual) domestic PIL law rules, thereby threatening uniformity and legal certainty.

The second reason was that the doctrine of AA was only relevant when determining if the parties made an implied choice of law under Article 3 of the Convention.³² Thus, Potter LJ in *Samcrete*³³ voiced his opposition to the application of the doctrine under Article 4 of the Convention by a lower court judge who applied the law governing a distributorship contract to a contract of guarantee under Article 4(5) of the Convention. Potter LJ was of the view that

“having accepted the position that the choice of (English) law under Article 3 was not established, the judge erred in treating the choice of law clause in the distribu-

²⁹ *Samcrete*, *supra* n 17, [40].

³⁰ *Credit Lyonnais*, *supra* n 15, 914; *Rajffeißen Zentral bank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68 [33]–[34]; *Caledonia Subsea*, *supra* n 19, [3], [6] (Lord Cameron), [2]–[4] (Lord Marnoch); *Samcrete*, *supra* n 17, [25]; *Iran Continental Shelf Oil Co Ltd*, *supra* n 17, [13]–[16]. See also *Lawlor v Mining and Construction Mobile Crushers Screens Ltd*, *supra* n 9, [30].

³¹ *Bank of Baroda*, *supra* n 17, 47–49, in applying the doctrine of infection to a letter of credit contract, placed considerable reliance on the common law decisions of *European Asian Bank AG v Punjab and Sind Bank* [1982] 2 LI Rep 356, 368 and *Offshore International SA v Banco Central SA* [1997] 1 WLR 399, 401–03. *Marconi Communications*, *supra* n 17, [42]–[43] also adopted the same position in placing reliance on the common law cases of *European Asian Bank*, *ibid*, 368; *Offshore International*, *ibid*, 401–03; *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233, 1240–42. See also *Habib Bank Limited*, *supra* n 17, [43]–[44]. Also, the judges in these three cases (*Bank of Baroda*, *Marconi Communications* and *Habib Bank Limited*), while applying Art 4 of the Convention to letters of credit, held that there was no difference between what the position was under English common law and the Convention where considerable significance was placed on the place of performance over the residence of the parties.

³² *Credit Lyonnais*, *supra* n 15, 916; *Caledonia Subsea Ltd*, *supra* n 28, [30]; *Samcrete*, *supra* n 17, [39]–[49].

³³ *Supra*, n 17.

torship contract as largely determinative under Article 4. In doing so, she appears to have overlooked the change of focus when moving from one to the other”.³⁴

The third reason is that Article 4 of the Convention is concerned with geographical connections and not legal systems. In other words, it is concerned with the *country* with which the *contract* has its closest connection and not the *legal system* of a country.³⁵ Potter LJ in *Samcrete*, following the views of Hobhouse LJ in *Credit Lyonnais*,³⁶ emphasised that Article 4 of the Convention connects “the contract to a particular *country* and giving precedence to the residence of the party performing the characteristic obligation, unless the circumstances as a whole demonstrate a closer connection to another country”.³⁷ Thus, while factors such as the residence of the parties, nationality, central administration of a company, place of contracting and the place of performance connecting the contract with a country were relevant, factors such as the language and form of the contract, reference to a particular country’s statute and the closeness of one contract to another connecting the contract to a country’s legal system were irrelevant under Article 4 of the Convention.

The fourth reason was that little or no significance should be given to the doctrine of AA as a factor under Article 4 of the Convention when compared to other factors. This may also explain why some English judges who considered the doctrine of AA under Article 3 of the Convention, even if they could not imply a choice of law between the parties, did not deem it necessary to examine its significance when applying Article 4(5).³⁸ Thus, in the Scottish case of *Caledonia Subsea* counsel for the defense argued that the main contract which had no express choice of law should be governed by Egyptian law since the subcontract subsequently entered into between the parties was expressly governed by Egyptian law. The counsel relied on the views of Professor Lagarde endorsing the doctrine of AA. Lord President Cullen attached little significance

³⁴ *Ibid*, [44]. Although Potter LJ held that it was unnecessary and undesirable to decide on the relevance or significance of the doctrine of AA under Art 4 of the Convention, he was inclined to the view that it may not be a relevant factor and was “satisfied that the judge was wrong in her approach, which failed to distinguish the potential role of a choice of law clause in the contract as between Article 3 and Article 4” [49].

³⁵ *Credit Lyonnais*, *supra* n 15, 914–16; *Caledonia Subsea Ltd*, *supra* n 28, [30]; *Samcrete*, *supra* n 17, [39].

³⁶ *Supra* n 15, 914–16.

³⁷ *Supra* n 17, [39].

³⁸ *Gan Insurance Co Ltd and Eagle Star Insurance Ltd v Tai Ping Insurance Co Ltd* [1998] CLC 1072, 1080–82 (Creswell J) – sustained on appeal, but the doctrine of AA was not considered under Art 4 – [1999] CLC 1270, 1278 (Beldam LJ); *Dornoch Limited and Others v Mauritius Union Assurance Company Ltd* [2005] EWHC 1887 (Comm) [61]–[71] (Aikens J) sustained by the Court of Appeal on appeal [2006] EWCA Civ 389 (Tuckey LJ) [40]–[43]; *Golden Ocean Group Limited v Salgaocar Mining Industries PVT Ltd and Salgaocar* [2011] EHW 56 (Comm) [134]–[136] (Christopher Clarke J); *FR Lurssen Werft GmbH & co KG v Warren E Halle* [2009] EWHC 2607 [24], [37]–[38] (Simon J) – sustained on appeal – [2010] EWCA Civ 587 [20]–[22] (Sir Paul Kennedy); *Pathfinder Minerals Plc and Other Companies v Veloso and Others* [2012] EWHC 2856 (Comm) [46].

to the doctrine by refusing to apply the law of Egypt under Article 4(5) to displace the presumption in Article 4(2) that was in favour of Scotland.³⁹

Despite the above objections to the application of the doctrine of AA under Article 4 of the Convention, some English courts continued to apply the doctrine under Article 4(5).⁴⁰ The decision of the CJEU in *ICF*⁴¹ may have been an opportunity to provide an insight as to what connecting factors are relevant and significant under Article 4(5) of the Convention and the weight to be placed on these factors in displacing the presumption under Article 4(2). However, the CJEU in advocating the intermediary approach did not consider the relevance, significance or weight to be attached to any factor such as the doctrine of AA. Therefore, the controversy on the relevance and significance of the doctrine of AA under Article 4 of the Convention is still ongoing after the decision of the CJEU in *ICF*.

The English High Court in *Emeraldian Limited Partnership v Wellmix Shipping Limited*⁴² utilised the doctrine of AA under Article 3 in using the express choice of English law of a charterparty to govern the contract guaranteeing the obligations in the charterparty. The court in the alternative utilised the doctrine of AA in reaching the same conclusion under Article 4(5) in displacing the presumption in Article 4(2) that was in favour of the application of Chinese law. Similarly, in *Gard Marine and Energy Limited v Glacier Reinsurance AG*⁴³ Gard (claimant/respondent) was a Bermudan insurance company that insured Devon Energy, a US company, against property and business interruption risks. Gard entered into contracts of reinsurance with other companies which subscribed to a line of existing London market excess reinsurance policy subject to English law. Devon Energy sustained damage to some of its properties in the Gulf of Mexico. Gard indemnified Devon with regard to its loss under the insurance contract. Gard in turn was successfully able to claim (full) reinsurance from other companies save for Glacier, a Swiss company (and other companies) that disputed payment based on the manner by which Gard calculated the reinsurance claim. Glacier only made part payment to Gard on its reinsurance claim

³⁹ *Ibid*, [41]–[44]. He held that though it was “true that there was a relationship between the pursuers’ contract and the defenders’ subcontract into which the law of Egypt was imported. However, this is only one of a number of circumstances which fall to be considered” [44]. Lord President Cullen’s approach is significant because, Professor Lagarde, “Le nouveau droit international privé des contrats après l’entrée en vigueur de la Convention de Rome du 19 juin 1980” (1991) 80 *Revue critique de droit international privé* 747, despite his support for the doctrine of AA, criticised the decision in *Bloch v Lima*, *supra* n 16, for using the doctrine of AA as a *decisive factor* under Art 4(5) of the Convention. See also *Caledonia Subsea Ltd*, *supra* n 28, [30].

⁴⁰ In the case of *Ophthalmic Innovations Limited (UK) v Ophthalmic Innovations International Incorporated (USA)* [2004] EWHC 2948, the judge referred to the decision of *Samerete*, *supra* n 17 in his judgment [48], but still utilised the doctrine of AA under Art 4(5) of the Convention by applying the law that governed the distributorship contract to the contract indemnifying the distributorship [53].

⁴¹ *Supra* n 11.

⁴² *Emeraldian Limited Partnership v Wellmix Shipping Limited* [2010] EWHC 1411 [171].

⁴³ *Gard Marine and Energy Limited v Glacier Reinsurance AG* [2010] EWCA Civ 1052.

subject to a reservation of rights. Gard brought proceedings against Glacier in the English High Court on what it regarded as the full reinsurance claim. Glacier had also brought proceedings in Switzerland on the same cause of action against Gard and two other companies, denying liability to Gard, and claiming a refund of the [part payment] reinsurance claim it had already paid to Gard. The Swiss Court of first instance and appeal court both held that the Swiss court had no jurisdiction over Gard. The English High Court assumed jurisdiction under Article 6(1) of the 1988 Lugano Convention in order to avoid a risk of irreconcilable judgment with the other defendants in the Swiss court. Glacier appealed the decision, claiming that it should be sued in its domicile (Switzerland) under Article 2 of the Lugano Convention. The Court of Appeal determined what law applied to the excess reinsurance policy as one of the factors in determining on a good arguable case if the English High Court had jurisdiction under Article 6(1). Gard sought the application of English law, but Glacier argued that its line was subject to Swiss law. The Court of Appeal applied the doctrine of AA under Article 3(1) of the Convention (in implying a choice of law) to the excess reinsurance policy since other parts of the reinsurance policy and the primary insurance policy were governed by English law.⁴⁴ The Court of Appeal also held that the same results would be reached under Article 4(5) of the Convention in displacing the presumption of the characteristic performer that was ordinarily in favour of the law of Switzerland.⁴⁵ The Court of Appeal in reaching this decision relied on the CJEU's decision in *ICF*.⁴⁶ In *British Arab Commercial Bank Plc v Bank of Communications and Commercial Bank of Syria*,⁴⁷ Blair J specifically considered whether the doctrine of AA is precluded "on the basis that such an approach wrongly imports into Article 4 considerations that are only relevant under Article 3(1)".⁴⁸ Blair J answering the question in the negative held that

"the tentative view in *Samcrete* is overtaken by the reasoning in *Intercontainer Interfigo*. The court is not precluded from taking into account any particular type of factor when applying Article 4(5) and is not required to look at the contract in question in isolation from other contracts with which it is connected."

The High Court in reaching this decision also relied on the Court of Appeal's

⁴⁴ *Ibid*, [39]–[45], [47]. Other factors which the Court of Appeal took into consideration were that the reinsurance involved a London Market placement (and not a separate Swiss placement), the expiring excess of loss reinsurance was a London market placement, and the renewal was a London market placement.

⁴⁵ *Ibid*, [46].

⁴⁶ *Ibid*.

⁴⁷ *British Arab Commercial Bank Plc v Bank of Communications and Commercial Bank of Syria* [2011] EWHC 281 (Comm) .

⁴⁸ *Ibid*, [32].

decision in *Gard Marine*.⁴⁹ In the case of *M Serge Fourez v SA Residence Le Verseuil*⁵⁰ the appellant, a French national habitually resident in France, was a guarantor to an (informal and unwritten) accommodation contract for old people that his mother, Jeanne M Gerard (also a French national habitually resident in France), entered into with SA La Verseuil de résidence (a nursing home). Mr Fourez's mother was in default of payment under the accommodation contract to SA La Verseuil. SA La Verseuil sued Mr Fourez as guarantor under the contract. The Cour de cassation (Supreme Court) in determining the applicable law to the contract of guarantee held that the presumption under Article 4(2) that was in favour of applying French law was displaced in favour of Belgian law. The Supreme Court utilised the doctrine of AA as a decisive connecting factor by holding that as the principal accommodation contract was governed in terms of form and substance by Belgian law – since it was signed in Belgium, and the SA La Verseuil, with its central administration in Belgium, was the characteristic performer under the accommodation contract for the said nursing home – then Belgium also governed the ancillary contract of guarantee.⁵¹

However, in *Golden Ocean Group Limited v Salgaocar Mining Industries PVT Ltd and Salgaocar*⁵² Christopher Clarke J, while determining the applicable law for the purpose of determining if the English High court had jurisdiction based a good arguable case to grant leave to order service of a writ out of jurisdiction on the foreign defendants, applied the doctrine of AA to a contract of guarantee contained within a charterparty that was expressly governed by English law in implying a choice of law between the parties under Article 3. Christopher Clarke J did not consider the relevance of the doctrine under Article 4. There was another issue as to whether the contract between Mr Salgaocar, an Indian party who was alleged to have warranted his authority to enter into (1) the charterparty contract on behalf of a company called Trustworth (a Singaporean company), and (2) a guarantee of SMI (an Indian company) of Trustworth's obligations, was governed by Indian or English law. Christopher Clarke J was unable to imply a choice of law between the parties. In considering the provisions of Article 4 of the Convention, Christopher Clarke J rejected the application of the doctrine of AA as advanced by counsel to the English

⁴⁹ *Ibid.*, [34]. It is respectfully submitted that there is no aspect of the decision in *ICF* that recognised the doctrine of AA as a legitimate, relevant and significant connecting factor under Art 4 of the Convention.

⁵⁰ Cited in Parisot, *supra* n 1.

⁵¹ Parisot criticises this decision on the basis that a contract of guarantee is an independent contract, from the main contract, and it has its own governing law which can be express or implied, or could be determined by the court in the absence of choice. She holds the view that the doctrine of AA should not apply to this type of contract. The author disagrees with this view. The test should be whether the contracts are *intimately connected*, irrespective of whether they are dependent or independent of each other as in the case of back to back contracts (*infra*, 26–35).

⁵² *Supra* n 38, [134]– [135].

party by relying on the reasons earlier on advanced by the Court of Appeal in *Samcrete* and *Credit Lyonnais*.⁵³ Tomlinson LJ overturned the aspect of Clarke J's decision that rejected the application of the doctrine of AA under Article 4. Tomlinson LJ endorsed the view that the doctrine of AA applied with regard to the contract of guarantee contained within the charterparty under Article 3 of the Convention.⁵⁴ However, he further held (though this was not considered by Clarke J) that the same results could be reached alternatively by the application of Article 4(1) and (5).⁵⁵ Tomlinson LJ moved further to consider the applicable law of the contract of warranty of authority. Although "recognising that Article 4 is couched in terms of performing parties, not legal system",⁵⁶ he respectfully doubted if the observations of the Court of Appeal in *Samcrete* and *Credit Lyonnais* "were directed towards the special and perhaps unique case of warranty of authority".⁵⁷ He was of the view that the parties intended the contract to be governed by English law under Article 3 of the Convention because the principal contract(s) which gave rise to the disputed warranty of authority was also governed by English law.⁵⁸ He was also of the view that the same results would be reached under Article 4(5) by the application of the doctrine of AA.⁵⁹

In the recent case of *Lawlor v Mining and Construction Mobile Crushers Screens Ltd*,⁶⁰ the claimant sometime around 1994 was employed by the defendant then known as Extec Screens and Crushers Limited ("Extec"), a UK company, to carry out the marketing and sale of screening and crushing machinery on a commission basis. There was no formal contract of employment in writing

⁵³ *Ibid*, [134]–[136]. Christopher Clarke J held that India was most closely connected with the contract having regard to the fact that Mr Salgaocar and SMI habitually resided in India, and Indian law would ordinarily apply to the parties if it is established that Mr Salgaocar did not warrant his authority on behalf of SMI to enter into the contract of guarantee. The author agrees with Christopher Clarke J's approach to the application of the close connection principle in this case.

⁵⁴ [2012] EWCA Civ 265 [42]–[45].

⁵⁵ *Ibid*, [49]. Cf *Cox v Ergo Versicherung AG (formerly Victoria)* [2012] EWCA Civ 1001 [12]–[13].

⁵⁶ *Supra* n 54, [52].

⁵⁷ *Ibid*.

⁵⁸ *Ibid*.

⁵⁹ *Ibid*, [53]. The implication of the decision in *Golden Ocean* is that there are some special or perhaps unique contracts where the doctrine of AA applies under Art 4 of the Convention such as contracts of guarantee contained within a charterparty expressly governed by English law, and an ancillary contract of warranty of authority arising in connection with the principal contracts of charterparty and guarantee governed by English law, but inapplicable to other types of contracts not specified in the Court of Appeal's decision. The author (respectfully) does not agree with the approach adopted by Tomlinson LJ in applying the doctrine of AA in this case. First, the contracts of charterparty and guarantee were not intimately connected with the contract of warranty of authority. Second, assuming they were intimately connected, the doctrine of AA should not have been used as a decisive connecting factor in applying the principle of closest connection in this case because the application of Indian law had manifestly close ties with the contract of warranty of authority. See also Okoli and Arishe, *supra* n *, 527–28 for a critique of this decision.

⁶⁰ *Lawlor v Mining and Construction Mobile Crushers Screens Ltd* [2012] EWHC 1188; *supra* n 9.

entered into between the claimant and defendant. It was common ground that if the contract of employment was in writing it would probably have been governed by English law, but the parties did not expressly discuss this at the time. The claimant carried out his (informal and unwritten) contract of agency in many countries, but his main base and domicile was Spain, where his activities regarding his relationship with the defendant were largely concentrated. In 2006, Extec due to its success sought to formalise its contractual arrangements with the defendant and other agents by offering formal contracts of employment governed by English law to existing agents. The claimant did not sign up to the contract of employment. The position remained the same when Extec was acquired by a Swedish company called Sandvik, which later changed its name to Sandvik Mining and Construction Mobile Crushers and Screens Limited. Due to the claimant and defendant being unable to reach an agreement on the employment contract, despite protracted negotiations, the defendant terminated the claimant's contract which was to take effect on 1 June 2009.

The High Court was called to determine whether English or Spanish law applied to the contract of agency. All the contracts (save for the contract of employment that had no express choice of law, and an office leasing agreement in Spain that was expressly governed by Spanish law) between the claimant, defendant and other parties were expressly governed by English law. The High Court held that it could not imply a choice of law under Article 3 of the Convention despite the existence of an express choice of English law in other contracts. The court then moved to consider Article 4 of the Convention and did not consider the express choice of law in all other contracts as significant in displacing the presumption in Article 4(2) that was in favour of Spanish law. The court regarded the Spanish connections as much deeper and more extensive.⁶¹ On appeal, the High Court's decision was affirmed.⁶² The Court of Appeal did not regard the employment and agency contract as coexisting or related contracts deserving of the application of the doctrine of AA.⁶³

In summary, if the contracts are intimately connected, it is the view here that the doctrine of AA may be of significant weight under Article 4 of the Convention if it proves insufficient to determine the existence of an implied choice of law under Article 3.⁶⁴ However, a clarification by the CJEU on the relevance and significance of the doctrine of AA under Article 4 of the Convention may eventually prove to be useful to courts of Member States.

⁶¹ *Ibid.*, [58]–[60].

⁶² *Lawlor v Mining and Construction Mobile Crushers Screens Ltd*, *supra* n 9.

⁶³ *Ibid.*, [35].

⁶⁴ This is especially where the contracts have a very close relationship as is the position under Art 4 of Rome I. Another perspective may simply be to regard the application of the doctrine of AA as avoiding the application of *dépeçage* in order to apply a single law solely to *single complex contract(s)* such as letters of credit under Art 4 of the Convention. See also Parisot, *supra* n 1, 1338.

**D. WHY WAS THE DOCTRINE OF ACCESSORY ALLOCATION
GIVEN SPECIAL SIGNIFICANCE UNDER ARTICLE 4(3)
AND 4(4) OF THE ROME I REGULATION?**

Under Article 4(3) and (4) of Rome I, Recitals 20 and 21 respectively state that Member State courts *should* take into account among other connecting factors whether the contract in question has a very close relationship with another contract or contracts.⁶⁵ Therefore, unlike the views expressed by Lord President Cullen in *Caledonia Subsea*⁶⁶ – who rejected the elevation of the place of performance or doctrine of AA as special connecting factors under Article 4 of the Convention because the framers did not indicate that courts of Member States should attach them with such special significance – the elevation of the doctrine of AA to one of special significance under Article 4(3) and (4) of Rome I can be justified while utilising the escape clause or determining the principle of closest connection. The question is: why did the drafters of Rome I choose to give special significance to the doctrine of AA in determining the applicability of the escape clause or the principle of closest connection? No reason is provided by the framers of Rome I as to why the doctrine of AA was given special significance. It is important to address the possible reasons why the doctrine of AA was given special significance because this aids the proper understanding of the application of the doctrine.

It is submitted here that there are at least three possible reasons why the framers of Rome I gave the doctrine of AA special significance. These reasons and other alternative views advanced by judges and academics are examined below.

1. The Doctrine of Convenience, Legal Certainty, and the Need for Sound Administration of Justice

The determination of the applicable law in the absence of an express or implied choice of law under Article 4 of Rome I is by no means an easy exercise. The “margin of discretion”⁶⁷ placed on courts of Member States under Article 4 of Rome I in determining the applicable law presents a greater challenge for the decision-maker faced with the dilemma of applying potentially conflicting laws to contracts that have a very close relationship. In other words, the decision-maker faced with the determination of the applicable law in the absence of an express or implied choice of law is placed in a difficult or incon-

⁶⁵ It is important to note that the language of recitals is always couched in words that look forward to what the text of the Regulation will do. Therefore it is standard practice to use the word “should” to indicate that there will be a provision in the Regulation based on the idea in the recital. It does not indicate that courts *must* use the doctrine of accessory allocation.

⁶⁶ *Supra* n 19, [41].

⁶⁷ Giuliano–Lagarde Report, *supra* n 10, 21.

venient position where he has to apply laws of different countries (instead of a single law of a country) that produce potentially conflicting results to contracts that have a very close relationship such as back-to-back contracts. Similarly, the lawyers in the case will also be faced with the same difficulty of advocating the application of potentially conflicting laws to contracts that have a very close relationship.

The doctrine of convenience in justifying the utilisation of AA in Article 4 is best exemplified by the decision of Mance J (as he then was) in *Bank of Baroda*,⁶⁸ where he applied it to a letter of credit while determining if the English court had jurisdiction in order to grant leave to order the service of a writ of jurisdiction on the foreign defendants. In that case, the application of Article 4(2) led to the application of English law between the issuing bank and confirming bank and as between the confirming bank and the beneficiary/seller. It was argued before Mance J by counsel for the issuing bank that the relationship between the issuing bank and beneficiary should be governed by Indian law by virtue of Article 4(2). Mance J in rejecting that submission and applying the doctrine of AA emphasised that it would involve “wholly undesirable multiplicity of potentially conflicting laws”⁶⁹ that could lead to “wholly undesirable difficulties”.⁷⁰ Mance J stressed the “great inconvenience” that would result if the seller/beneficiary had to apply English law when suing the confirming bank, but apply Indian law when suing the issuing bank, arising out of the same contractual relationship(s) of the letter of credit.⁷¹ Mance J thus displaced the relationship between the issuing bank and beneficiary under Article 4(5) in favour of the relationships between the issuing bank and confirming bank, and beneficiary and confirming bank, by applying English law to the letter of credit contract of the parties.⁷²

A second reason for justifying the utilisation of AA under Article 4 is that it reconciles the requirements of legal certainty and flexibility.⁷³ In other words, the doctrine of AA ordinarily operates as an exception to the main rule(s) to do

⁶⁸ *Supra* n 17.

⁶⁹ *Ibid.*, 48. Approved in *Marconi Communications*, *supra* n 17, [41].

⁷⁰ *Bank of Baroda*, *supra* n 17, 48.

⁷¹ *Ibid.*, 48–49.

⁷² *Ibid.* The Court of Appeal in *Marconi Communications*, *supra* n 17, [55] also endorsed the position in *Bank of Baroda*, *supra* n 17, by emphasising that “it is *desirable* that the same system of law should govern the co-existing contracts between (a) the issuing bank and the beneficiary (b) the confirming bank and the beneficiary, (c) the issuing bank and confirming bank” (my emphasis). See the common law case of *Vesta v Butcher* [1986] 2 Lloyds Rep 179, where the court experienced great inconvenience in potentially applying the law of Norway to a contract of insurance, and the law of England to the contract of reinsurance arising out of the same policy issued, because the breach of warranty under the applicable law of the former did not void the policy issued, but voided the policy under the latter. See also the cases of *Groupama v Catatumbo* [2000] 2 All ER (Comm) 193; *Lexington Insurance Co v Wasa International Insurance Co Ltd* [2009] UKHL 40.

⁷³ See also Recitals 6 and 16 to Rome I.

justice in individual cases,⁷⁴ but also leads to legal certainty, since a single law is applied to contracts that have a very close relationship in a commercial transaction.⁷⁵ Similarly, the idea of reconciling the requirement of legal certainty and flexibility under Article 4 of Rome I is another reason why the framers did not allow courts of Member States to split the applicable law to a contract as was allowed under the Convention in exceptional circumstances.⁷⁶

In this regard, Tomlinson LJ rightly⁷⁷ stated in *Golden Ocean* that the application of the doctrine of AA under Article 4 of the Convention is “conducive to the general requirement of legal certainty in contractual relationships”⁷⁸ and “satisfies the requirement of foreseeability of the law”.⁷⁹ The idea that the presumptions create certainty by giving specific form and content to the vague concept of close connection and thereby greatly clarifying and simplifying the law⁸⁰ does not always hold true, especially where there is the danger of apply-

⁷⁴ In the case of *M Serge Fourez* cited in Parisot, *supra* n 1, the application of the French law to the ancillary guarantee contract (instead of Belgian law), and Belgian law to the principal accommodation contract would have produced an unjust and incongruous result in leading to a situation where the guarantor (who had willingly settled previous debts of his mother under the accommodation contract) by taking a technical advantage could avoid liability under the main accommodation contract for (the Plaintiff) failing to comply with the law of France on formal requirements for contracts of guarantee (which was otherwise valid under Belgian law)! The application of a single law (Belgian law) to the said contracts as between the parties in this case produced a harmonious and just solution. See also the English common law cases of *Vesta*, *supra* n 72 and *Groupama*, *supra* n 72. For a contrasting view, see Parisot, *supra* n 1, 1346–54, who expresses concerns in favour of applying by virtue of Art 4(2) the law of the habitual residence of the guarantor in this case so that he is not stripped of legal protection he may otherwise be entitled to under the mandatory rules of his habitual residence. The answer to this (contrary view) may be for the guarantor to insist on an express choice of law that sufficiently protects him before agreeing to undertake his obligations.

⁷⁵ For example, Art 4(1)(h) provides that a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments shall be governed by a single law. This rule has been justified as “necessary for legal certainty for the market participants” in stock exchange transactions. See the Proposal for a Regulation of the European Parliament and the Council on the law Applicable to Contractual Obligations (Rome I) – Certain financial aspects relating to the application of Article 4 and 5, from services of the Commission to Committee on Civil Law Matters (Rome I) Doc no 741817 of 15 March 2007, 2ff. Similarly, in honouring the aim of legal certainty in commercial transactions, Arts 14–17 of Rome I also expressly favour the application of a single law to contracts that give rise to relationship(s) in contracts of voluntary assignment, legal and contractual subrogation and set-off in order to interpret the parties’ rights, liabilities and obligations predictably and consistently.

⁷⁶ *ICF*, *supra* n 11. See also the Irish case of *ICDL GCC Foundation FZ-LLC and others v European Computer Driving Licence Foundation Ltd* [2011] IEHC 343 [9.7]–[9.8]; Okoli and Arishe, *supra* n *, 530–31.

⁷⁷ The view expressed here is subject to the criticism expressed earlier on by some academic(s) on the way the doctrine of AA was applied in using the contracts of charterparty and guarantee to infect another contract of warranty of authority that was not closely related. See Okoli and Arishe, *ibid*, 527–28.

⁷⁸ *Supra* n 54, [54].

⁷⁹ *Ibid*, [55].

⁸⁰ Giuliano–Lagarde Report, *supra* n 10, 21.

ing potentially conflicting laws to contracts that have a very close relationship in a commercial transaction. Since the principal aim of Rome I is to introduce certainty that was otherwise lacking in the Convention,⁸¹ the doctrine of AA was adopted in Recitals 20 and 21 to achieve this aim. This is because there are some contracts that have a very close relationship, and the application of different laws via the presumption(s) to these contracts may produce uncertainty. The doctrine of AA can easily be invoked in utilising the escape clause or the principle of closest connection to apply a single law. This holds true especially in a contract of letter of credit that “is not susceptible to such treatment”⁸² of the blanket presumption of the doctrine of characteristic performance, because it “is the source of a number of bilateral contracts arising successively between the parties and/or banks involved, each of which, considered has a separate characteristic performance”.⁸³ Thus, in *Bank of Baroda* Mance J was concerned with the legal uncertainty that would arise if the seller/beneficiary had to apply different laws as between the issuing and confirming bank as a result of the application of the presumption in Article 4(2) to all the contracts arising out of the relationships in the letter of credit. Mance J emphasised that:

“[I]t is of great importance to both beneficiaries and banks concerned in the issue of and operation of international letters of credit that there should be clarity and simplicity in such matters. Article 4(5) provides the answer. *The Rome Convention was not intended to confuse legal relationships.*”⁸⁴

Thirdly, the application of the same law to contracts with a very close relationship in a commercial transaction, which satisfies the requirements of foreseeability and legal certainty for the parties to a contractual relationship, and does not lead to the great inconvenience of applying a multiplicity of potentially conflicting laws, “accords with good sense and sound policy”⁸⁵ and thus “meets the need for sound administration of justice”.⁸⁶

⁸¹ See Recitals 6 and 16 to Rome I, and the Explanatory memorandum from the Commission, accompanying the Proposal for Rome II, COM(2003) 427 final (“Explanatory Memorandum”) 12.

⁸² *Marconi Communications*, *supra* n 17, [61].

⁸³ *Ibid.*

⁸⁴ *Ibid.*, 48. My emphasis. Lord Hamilton in *Caledonia Subsea Ltd*, *supra* n 28, [30] adopts the same interpretation when he justifies the application of the doctrine of AA in the *Bank of Baroda* case on the basis that “material confusion would be likely to arise by reason of different laws applying to interdependent contracts”. See also *Gard Marine*, *supra* n 43, [42]; *Vesta v Butcher*, *supra* n 72; *Groupama v Catatumbo*, *supra* n 72; *Lexington Insurance Co v Wasa International Insurance Co Ltd*, *supra* n 72.

⁸⁵ *Bank of Baroda*, *supra* n 17, 48.

⁸⁶ Explanatory Memorandum, *supra* n 81, 11–12.

2. Commercial Reasons

One of the reasons advanced for justifying the application of the doctrine of AA under Article 4 is that it is based on commercial reasons. Some English courts and academics adopted commercial reasons as the rationale for applying the doctrine of infection under English common law and the Convention. Thus, in *Bank of Credit and Commerce Hong Kong Ltd v Sonali*⁸⁷ Cresswell J, having spelt out the relationship (among others) between the issuing and confirming bank, issuing bank and beneficiary, and confirming bank and beneficiary, submitted that under a letter of credit, “The authorities recognise that there are *strong commercial reasons* why [these] contracts ... should be governed by the same system of law.”⁸⁸ With respect to a contract of insurance and reinsurance, Hobhouse J in *Vesta v Butcher*⁸⁹ held that:

“[W]here a [reinsurance] contract such as the present provides that its terms and conditions are to be the same as those of another [insurance] contract and where its *clear commercial purpose* is to provide corresponding cover to that provided by the other contract then unless some other powerful consideration is to intervene the conclusion must be that there is an intention that both contracts are to be governed by the same law.”⁹⁰

Dicey and Morris at one time also justified the doctrine of infection under the common law on the basis that the “legal or *commercial connection* between one contract and another may enable the court to say that the parties must be held implicitly to have submitted both contracts to the same law.”⁹¹

Under Article 4 of the Convention, the Court of Appeal in the case of *Marconi Communications*,⁹² while applying the doctrine of AA to a letter of credit, held that

“there was valid reason and *commercial logic* why, rather than simply applying the presumption in Article 4(2) of the Convention, Article 4(5) should be applied between Marconi as seller/beneficiary and Hastin Bank and Panin Bank as issuing and confirming banks respectively.”⁹³

Also, the Court of Appeal in *Gard Marine*, while respectively implying the parties had made a choice of law and in the alternative utilising the escape clause, regarding a contract for excess loss of reinsurance policy, which had an express

⁸⁷ *Bank of Credit and Commerce Hong Kong Ltd v Sonali* [1994] CLC 1171.

⁸⁸ *Ibid*, 1184. My emphasis.

⁸⁹ *Supra* n 72.

⁹⁰ *Ibid*, 193.

⁹¹ Dicey and Morris, *The Conflict of Laws* (Sweet & Maxwell, 11th edn, 1987), 1185. My emphasis. See also the cases of *The Broken Hill Proprietary Co Ltd v Theodore Xenakis* [1982] 2 Lloyd's Rep 304 Bingham J (as he then was); *Attock Cement Co Ltd v Romanian Bank for Foreign Trade* [1989] 1 WLR 1147, 1158–59; *British Arab Bank*, *supra* n 47, [28] (Blair J) for approval of this statement.

⁹² *Supra* n 17.

⁹³ *Ibid*, [66]. My emphasis.

choice of English law in the underlying policy of insurance and other parts of the reinsurance contract, held that “it would make no *commercial sense* for one part of the reinsurance contract to be governed by one system of law and another to be governed by a different system of law”.⁹⁴

Historically, the insertion of the doctrine of AA in Recitals 20 and 21 also rests on commercial reasons. It was influenced by the strong lobbying of the UK through the Financial Markets Law Committee (FMLC) to reflect the English commercial approach in applying the doctrine of infection under the common law and the Rome Convention.⁹⁵ Thus, the Ministry of Justice of the UK justified the rule of AA under Article 4 of Rome I on the basis that “it is of *commercial importance* for a single law to be applied to the whole transaction rather than having different laws applying to each component part of the transaction”.⁹⁶ Similarly, Professor Fentiman strongly advocates the same position when he submits that the accessory allocation principle in Recitals 20 and 21 “avoids the commercially detrimental result that related contracts are governed by different laws. Implicitly commercial effectiveness animates the search for the applicable law”.⁹⁷ Professor Fentiman further states that in “determining the law applicable to any given contract the existence of a related contract, connected with a given country, is thus of commercial considerable significance”.⁹⁸

There is much to commend about justifying the doctrine of AA in Recitals 20 and 21 based on its commercial context. This is because it assists the decision-maker in determining what kind of contracts have a very close relationship and is deserving of the application of the doctrine of AA, while utilising the escape clause or the principle of closest connection. It also explains why English courts under the common law and the Convention consistently do not apply the express choice of law governing an underlying commercial transaction to a letter of credit, demand guarantee or collection contract, on the ground that the underlying commercial transaction is separate and not intimately connected with these contracts.⁹⁹

⁹⁴ *Supra* n 43, [41]. My emphasis.

⁹⁵ Financial Markets Law Committee, “Legal Assessment of the Conversion of the Rome Convention to a Community Instrument and the Provisions of the Proposed Rome I Regulations” – European Commission Final Proposal for a Regulation on the Law Applicable to Contractual Obligations (“Rome I”) (2006) 121(3) 12–14. www.fmlc.org/Documents/April06Issue121.pdf (accessed 26 August 2013).

⁹⁶ Ministry of Justice, “Rome I – Should the UK Opt In? Consultation Paper CP05/08 of 2 April 2008, <http://www.justice.gov.uk/docs/cp0508.pdf> 14. My emphasis.

⁹⁷ R Fentiman, “The Significance of Close Connection” in J Ahern and W Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime* (Martinus Nijhoff, 2009), 85, 95. See also S Atrill, “Choice of Law in Contract: The Missing Pieces of the Article 4 Jigsaw” (2004) 53 *International and Comparative Law Quarterly* 549, 559–60.

⁹⁸ Fentiman, *supra* n 9, 217–18, para 4.115. See also Atrill, *supra* n 97, 558–59.

⁹⁹ *Minorities Finance Ltd v Afribank Nigeria Limited* [1995] 1 Lloyd’s Rep 134; *Bastone & Firminger Limited v Nasima (Nigeria) Ltd* [1996] CLC 1902, 1907–10; *Offshore International SA v Banco Central SA*,

However, the principal objection to justifying the doctrine of AA based on the commercial context of the contract fundamentally rests on the basis that the text of Rome I does not support this rationale, despite its historical foundation.¹⁰⁰ This approach may also lead to legal uncertainty.¹⁰¹ The principal aim of Rome I is to promote legal certainty in judicial proceedings where there is a dispute as to the law applicable.¹⁰² Admittedly, locating a contract in its commercial context could also lead to legal certainty for international traders in judicial proceedings where the court applies a single law to govern contracts that are back to back in order to allocate their legal and commercial risk predictably and consistently. Also, by applying a single law to very closely related contracts, commercial necessity and legal certainty share the similar goals of avoiding the need for international traders to spend more money, time and resources in recruiting legal experts versed in the application of different laws of each applicable country, thereby reducing transaction and litigation costs. However, *in so far as* locating a contract in its commercial context *threatens* the goal of legal certainty, it may be best to reduce the significance of locating a contract in its commercial context. Locating a contract in its commercial context in determining the applicable law may be of considerable value to international traders in cross-border transactions, but in adjudication the principal goal of the court is to achieve legal certainty. For example in a case such as *Vesta v Butcher* where the contracts of insurance and reinsurance were clearly back to back, locating the contract in its commercial context favours applying the law of the market (England) where the reinsurance policy was issued, even though the primary insurance may have been expressly governed by Norwegian law.¹⁰³ This is the legal uncertainty avoided by the framers of Rome I because

supra n 31, 401–02; *Power Curber International Ltd*, *supra* n 31, 1233; *Attock Cement Co Ltd*, *supra* n 91, 1158–59; *Türkiye İş Bankası AS v Bank of China* [1993] ILI Rep 132; *Wahda Bank*, *supra* n 1, 409–12; *Bank of Baroda*, *supra* n 17, 47–49; *Marconi Communications*, *supra* n 17, [63]; *British Arab Bank*, *supra* n 47, [30]–[35].

¹⁰⁰ See also Okoli and Arishe, *supra* n *, 522; *contra* Fentiman, *supra* n 9, 212–16; Atrill, *supra* n 97, 565–68. However, the CJEU has utilised the doctrine of economic criteria in allocating jurisdiction (where the parties have not made a substantive jurisdiction agreement under Article 23 of Brussels I) under Article 5(1)(b) of Brussels I in locating the forum that is proximately connected with a contract of sale and provision of services in the cases of *Color Drack GmbH v Lexx International Vetriebs GMBH* (Case C-386/05) [2007] ECR I-3699 [40]; *Rheder v Air Baltic Corp* (C-204/08) [2009] ECR I-6073 [35]; *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade Sa* (Case C-19/09) [2010] ECR I-2121 [31]. The CJEU in *Electrosteel Europe SA v Edel Centro SPA* (Case C-87/10) [2011] ECR I-4987 [16]–[18] has also taken into account commercial realities among international traders by accepting the use of trade terms and usages such as incoterms created by the International Chamber of Commerce in order to ascertain under the contract where the parties indicated the place of performance to be in allocating jurisdiction under Art 5(1)(b) of Brussels I. It remains to be seen if the CJEU will adopt a commercial approach in interpreting Art 4 of Rome I.

¹⁰¹ See also Okoli and Arishe, *supra* n *, 522.

¹⁰² Recitals 6 and 16 to Rome I.

¹⁰³ See also Atrill, *supra* n 97, 562; Fentiman, *supra* n 9, 202–06.

in that situation the court and parties are both placed in a confusing and inconvenient position of advocating and applying the inconsistent provisions of Norwegian and English law on the legal effect of the term of the breach of warranty on the policy issued that is back to back in both the contracts of insurance and reinsurance, which does not lead to the sound administration of justice. In order to avoid these problems, it may be best to apply the single governing law of one of the principal contracts (Norwegian law) to both very closely related contracts under Article 4.

Another problem with locating the doctrine of AA in its commercial context is that it is obscure.¹⁰⁴ In other words, it is not clear what standard the court should adopt in locating a contract in its commercial context in applying the doctrine of AA. For example, it is unclear if the refusal to apply the law governing the underlying commercial transaction to contracts of letters of credit and demand guarantees is based on whether or not the parties incorporate soft law into their contract published by the International Chamber of Commerce (ICC) such as the provisions of the Uniform Customs and Practice for Documentary Credits (“UCP rules”)¹⁰⁵ and Uniform Rules for Demand Guarantees (“URDG rules”).¹⁰⁶ Where parties incorporate the URDG rules into their contract which provides that a contract of guarantee (or performance bond) and counter-guarantee are separate and independent commercial transactions, is the court mandated to refuse to apply the doctrine of AA if it decides these contracts are intimately connected?¹⁰⁷ These reasons among others expose the problem of uncertainty a decision-maker may face in utilising the doctrine of AA if he pays too much attention to the commercial context of the contract.¹⁰⁸

3. Parties’ Legitimate, Reasonable or Normal Expectations

Tied to the doctrine of locating the contract in its commercial context is the doctrine of the parties’ legitimate, reasonable or normal expectations. The basis of this latter doctrine is that the parties to a commercial relationship will legiti-

¹⁰⁴ Fentiman, *ibid*, 216, para 4.110, 219, para 4.118; Atrill, *ibid*, 568–70; Okoli and Arishe, *supra* n *, 522.

¹⁰⁵ 2007 Revision, ICC Publication no 600. Art 4(a) of the UCP rule abstracts or severs the underlying commercial transaction from the letter of credit as separate and independent transactions.

¹⁰⁶ 2010 Revision, ICC Publication no 758. Art 5(a) of the URDG rule abstracts or severs the underlying commercial transaction from the demand guarantee as separate and independent transactions.

¹⁰⁷ For example, the Court of Appeal in *Wahda Bank*, *supra* n 1, 412 still considered the contract of guarantee and the counter-guarantee as intimately connected despite the incorporation of Art 2(c) of the URDG Rules, No 458 Copyright 1992 (which is similar to Art 5(b) of the URDG Rules 2010) into the parties’ contract. Art 2(c) of the said URDG rules regards the contract of guarantee and counter-guarantee as separate and autonomous contracts. The incorporation of these rules into the parties’ contract did not bar the court from applying the doctrine of infection.

¹⁰⁸ See also Okoli and Arishe, *supra* n *, 522.

mately, reasonably or normally expect that a single law applies to their very closely related contracts.¹⁰⁹ Thus, it is advocated that the application of Article 4 is not intended to “disrupt [the] normal expectations”¹¹⁰ of the parties.

It is possible to advance this argument when determining the real intention of the parties under Article 3. However, even under Article 3 the presumption that the parties intend or expect the same law to govern their closely related contracts is rebuttable.¹¹¹

With respect to Article 4, there are some academics who take the view that the doctrine of AA rests on the parties’ legitimate expectations that a single law should apply to their closely related contracts.¹¹² In support of this position, it could also be argued by way of analogy that the Explanatory Memorandum of Rome II justifies the doctrine of AA under Article 4(3) of Rome II because it “respects the parties’ legitimate expectations”.¹¹³

It is submitted here that advancing the doctrine of the parties’ legitimate expectations as a basis for utilising the doctrine of AA also creates problems in interpreting Article 4(3) of Rome I. It is unclear what the basis of inquiry is. Are the parties’ legitimate expectations subjective or objective?¹¹⁴ Is it subjective in the sense that the parties expect the same law to govern their very closely related contracts? Is it objective in the sense that the court should take into account and ascertain the expectations of international traders from the relevant market? In any event, adopting a subjective or objective approach to the parties’ legitimate expectations creates problems of legal uncertainty.

English domestic case-law dealing with applying the law of different countries to back-to-back contracts of insurance and reinsurance exposes this danger of legal uncertainty in adopting the parties’ legitimate expectations as the basis for justifying the doctrine of AA. In the case of *Vesta v Butcher* Vesta, a Norwegian insurer, entered into a contract to insure A’s fish farm (a contract that was held by the court to be governed by Norwegian law). In a bid to allocate its risk, Vesta entered into a reinsurance contract (mirrored on similar contractual terms with A) with B through London brokers (a contract that was held to be

¹⁰⁹ See also *Gard Marine*, *supra* 43, [42].

¹¹⁰ *Bank of Baroda*, *supra* n 17, 48.

¹¹¹ For example, the parties to a commercial transaction that expressly provide Taiwanese or Mauritanian law to govern their insurance contract cannot legitimately or reasonably expect that an English court will apply the same law to their reinsurance contract (if they do not make an express choice of law) where the contract was negotiated in the London market by London brokers and underwriters, and the parties utilise standard policy of English form of contract such as the Lloyds policy of insurance. See the Court of Appeal cases of *Gan Insurance Co Ltd*, *supra* n 38, 480; *Dornoch Limited*, *supra* n 38, [41]–[43].

¹¹² S Dutson, “A Dangerous Proposal: The European Commission’s Attempt to Amend the Law Applicable to Contractual Obligations” [2006] *Journal of Business Law* 608, 610–14; G Alferéz, “The Rome I Regulation: Much Ado About Nothing?” (2008) 2 *European Legal Forum* 61, 70 para 50; Fentiman, *supra* n 9, 219, para 4.118; Atrill, *supra* n 97.

¹¹³ See the Explanatory Memorandum, *supra* n 81, 11–12.

¹¹⁴ Fentiman, *supra* n 9, 216, para 4.118; Atrill, *supra* n 97, 568–70.

governed by English law). There was an express term of warranty contained in the insurance and reinsurance contracts that voided the policy issued if A did not keep a 24-hour watch over the fish farm. Norwegian law only recognised voiding the policy in that situation if the breach of the warranty caused the loss; while under English law it was immaterial if the breach of the warranty caused the loss with regard to voiding the policy issued. Due to terrible weather conditions, A lost a substantial part of its fish. A did breach the warranty contained in the insurance policy by not keeping a 24-hour watch of the fish farm, but its failure to keep a 24-hour watch did not cause the loss. A successfully claimed indemnity from Vesta under Norwegian law. Vesta, on the other hand, claimed reinsurance from B. B refused to pay, contending that English law applied in discharging the reinsurer of its obligations under the contract. The House of Lords held that as a matter of construction, the parties when entering into the contract expected or anticipated that the term of warranty in the insurance contract being back to back with the reinsurance introduced the application of Norwegian law instead of English law.¹¹⁵ The Court of Appeal in *Groupama v Catatumbo*, faced with similar material facts to *Vesta*, on similar grounds applied Venezuelan law to a term of warranty in a reinsurance contract to give it a back-to-back effect with the insurance contract.¹¹⁶ However, in *Lexington Insurance Co v Wasa International Insurance Co Ltd*, the House of Lords, overturning the Court of Appeal (which had applied *Vesta* and *Groupama* regarding the parties' expectations or anticipations on the applicable law), reached a different decision. In this case the insurer, Lexington, a Massachusetts company, agreed to insure A and its subsidiary for a period of three years (1 July 1977–1 July 1980) in relation to environmental damage to property in Massachusetts. Lexington, in turn, obtained reinsurance (mirrored on similar contractual terms with A) from two London reinsurers, B and C, for the same period of time in relation to the property insured. A and its subsidiary were exposed in liability to the United States Environmental Protection Agency for clean-up costs arising from contamination and pollution to sites generated by waste products occurring during a 44-year period from 1942 to 1986. A sued Lexington (and other insurance companies) in the United States in order to claim US\$180 million indemnity from Lexington under the insurance. The Supreme Court of Washington, applying Pennsylvanian law to the policy issued under the insurance contract, held that damage within the period of three years was broad enough to cover damage that *manifested* during the said period of cover. The implication of the decision was that Lexington was

¹¹⁵ *Vesta v Butcher* [1989] AC 852, 892 (Lord Templeman); 901, 911 (Lord Lowry). The court of first instance ([1986] 2 Lloyds Rep 179), (Hobhouse J) was unsure whether to treat it as a conflicts-of-law issue, or contractual construction or interpretation of the parties' expectations or intention.

¹¹⁶ *Supra* n 72, [20] (Tuckey LJ); [30] (Mance LJ).

exposed in liability for damage that occurred before and after the three-year cover period. Lexington settled with A for the significant sum of US\$103 million and claimed indemnity from B and C in English courts. It was accepted by the parties that English law applied to the reinsurance contract. The decision reached by the Supreme Court of Washington was regarded as strange to English eyes by the House of Lords, as English law would only hold the reinsurer liable during the period of time of the cover, excluding pre-existing or post-existing events. The House of Lords refused to give the time of cover under the insurance contract as applicable under Pennsylvanian law a back-to-back effect in the reinsurance contract. The House of Lords in refusing to apply *Vesta* and *Groupama* held that when the parties entered into the contract they could not have contemplated or expected that the (unidentified) law applicable to the insurance would produce a result that radically differs from the legal effect of the period of cover under English law.¹¹⁷

Although the House of Lords in *Vesta*¹¹⁸ and *Lexington Insurance Co*¹¹⁹ held that it did not approach the issues from a conflict-of-laws perspective, but simply as a matter of contractual construction, these decisions raise an analogy appropriate to challenging the justification of the application of the doctrine of AA under Article 4 of Rome I based on the parties' legitimate expectations. Can it be said, on the one hand, that international traders expect that the law of the market should always govern the reinsurance contract even if a different express choice of law is provided in the insurance contract, because that is where the reinsurance policy was issued with the relevant brokers and underwriters habitually residing and performing their obligations in said market? On the other hand, can it be said that international traders expect that as a matter of commercial necessity or efficacy a single choice of law governing the principal insurance contract could easily infect the terms of the reinsurance contract so that the liability and risk of the insurer and reinsurer are consistently allocated and given effect to? Which of these commercial expectations of international traders should the court give effect to in the relevant market?

In order to reduce the problems of legal uncertainty, the proponents of the doctrine suggest that the courts, in taking into account the parties' expectations, should aim at reaching a commercially effective and convenient solution.¹²⁰ Again, this solution appears to be circular, obscure and is also an invitation to courts to go beyond the scope of Rome I in order to ascertain these objectives.¹²¹

¹¹⁷ *Supra* n 72, [5]–[8] (Lord Philips); [13] (Lord Brown); [42]–[46], [49] (Lord Mance); [55]–[58], [107]–[111], [116] (Lord Collins).

¹¹⁸ *Supra* n 72, 891 (Lord Templeman); 901 (Lord Lowry).

¹¹⁹ *Supra* n 72, [4] (Lord Philips); [15] (Lord Brown); [38]–[49] (Lord Mance); [58], [63] (Lord Collins).

¹²⁰ Fentiman, *supra* n 9, 216, para 4.118; Atrill, *supra* n 97, 570–71.

¹²¹ See also Okoli and Arishe, *supra* n *, 522.

On this basis, justifying the doctrine of AA based on the parties' legitimate expectations has no place in Article 4 of Rome I. The principal goal of legal certainty should not be jeopardised or threatened under Rome I while utilising the escape clause. This perhaps explains why the doctrine of parties' legitimate expectations was suggested as a connecting factor to the drafters of Rome I and II in interpreting the escape clause, but was rejected and excluded from its final text.¹²² The context in which Article 4 of the Rome I is drafted, requiring the court to utilise the escape clause in exceptional circumstances in a bid to produce legal certainty, is also good reason to hold that justifying the doctrine of AA on the basis of the parties' legitimate expectation is not the correct approach to adopt both under Article 4 of Rome I and Rome II.¹²³

E. THE NATURE OF THE INQUIRY

Recitals 20 and 21 simply provide that the court should take account (among other connecting factors) of whether a contract in question has a very close relationship with another contract or contracts while utilising the escape clause or principle of closest connection. It does not provide further guidance as to how the doctrine of AA is to be utilised. This section seeks to explore the nature of the inquiry the decision-maker may be faced with in determining the significance of the doctrine of AA. The first part of this section examines the issues that may arise in determining when to apply the doctrine of AA under Articles 3 or 4. The second part of this section is concerned with whether the distinction between legal system and geographical connections is of significance when applying the doctrine of AA under Article 4. The third part of this section is concerned with how the court is to determine what is meant by "very close relationship". Special attention is given to three types of contracts with a very close relationship in commercial transactions: (i) insurance and reinsurance, (ii) letters of credit, (iii) and guarantee (or performance bond) and counter-guarantee to illuminate on the application of the doctrine of AA.

¹²² The UK lobby group FMLC, *supra* n 95, 12–14 also wanted the drafters of Rome I to take into account the parties' expectations in the relevant market when utilising the escape clause. The same approach was suggested to the drafters of Rome II – European Parliament Legislative Resolutions on the Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations (Rome II) COM(2006) 83 final – 2003/0168 (COD).

¹²³ A Dickinson, "Rebuttable Assumptions" [2010] *Lloyd's Maritime and Commercial Quarterly* 27, 36; A Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Oxford University Press, 2008), 341; Okoli and Arishe, *supra* n *, 536–37. For contrasting opinions, see RJ Weintraub, "Rome II: Will it Prevent Forum Shopping and Take Account of the Consequences of Choice of Law?" in Ahern and Binchy, *supra* n 97, 47, 54–55; Fentiman, *supra* n *, 610.

1. Articles 3 or 4 of the Rome I Regulation?

A major challenge that will confront a decision-maker called upon to apply the doctrine of AA is whether he is to utilise it primarily under Article 3 or Article 4. Under the Convention, the doctrine of AA as a guide had primary significance under Article 3 especially as it concerned an express choice of law in a related transaction between the same parties. The application of the doctrine under Article 4 of the Convention was usually utilised as a secondary connecting factor by the English courts. It is uncertain if the application of AA takes primary or principal significance under Article 4 of Rome I, or if its application is to be used as a secondary mechanism.¹²⁴ Although there are no easy solutions in this area, some suggestions are made here.

First, the principal difference is that the doctrine of AA must be applied under Article 3 to imply a real choice of law between the parties. Where the court cannot determine the real intention of the parties from the terms of the contract and circumstances of the case through the application of the doctrine of AA, it must move on to Article 4 and utilise the doctrine solely on an objective basis to determine the applicable law. It should no longer be concerned with the intention of the parties under Article 4.

Secondly, there are cases where the doctrine of AA may be sufficient to imply a choice of law under Article 3 and a further consideration of Article 4 becomes academic or secondary. For example, an express choice of law governing a contract between the same parties may be sufficient to imply a choice of law in governing the underlying transaction that is proximately connected with it, and dispense with the need to consider Article 4.¹²⁵ However, unlike the position under Article 4 of the Convention, the successful application of the doctrine of AA under Article 3 of Rome I should ordinarily produce the same results under Article 4 because of the presence of Recitals 20 and 21.¹²⁶

Thirdly, where the doctrine of AA is insufficient to imply a choice of law under Article 3, its application may not be decisive under Article 4, especially

¹²⁴ Giuliano-Lagarde Report, *supra* n 10, 17 groups such factors as matters under Art 3, but Recitals 20 and 21 to Rome I expressly group it under Art 4. See generally Fentiman, *supra* n 9, 200–01, para 4.72; Okoli and Arishe, *supra* n *, 528.

¹²⁵ *FR Lurssen Werft*, *supra* n 38, [20]; *Pablo Star Limited v Emirates Integrated Telecommunications Company* [2009] EWCA Civ 1044, [14]–[17]; *Star Reefers Pool Inc v JFC Group Co Ltd* [2010] EWHC 3003 (Comm) [13]–[15] decision reversed on appeal in [2012] EWCA Civ 14 (however, this aspect of the decision was not reversed, so it remains relevant); *Alliance Bank JSC v Aquanta Corp* [2012] EWHC 3281 [54].

¹²⁶ For example, the High Court in *FR Lurssen Werft*, *supra* n 38, [20] applied the same law (English Law) that governed the prior vessel construction contract, and subsequent termination agreement to govern the commission agreement that had no express choice of law under Art 3 of the Convention. The court, however, observed that English law would be inapplicable if it was to move further to consider the provisions of Art 4.

where the contract(s) sought to be governed does not have a very close relationship with the one that has an express choice of law.¹²⁷

Fourthly, the doctrine of AA simply should not apply under Article 3 where there is no express choice of law in one of the contracts, and where the contracts are not between the same parties.¹²⁸ Furthermore, under Article 4, it is easier to apply the doctrine of AA where there is an express choice of law in one or more contracts that have a very close relationship. This is because in infecting the other contract(s) the court can easily identify one of the laws the parties have expressly chosen and conveniently apply it to the very closely related contract(s). Thus, it is immaterial which of the contracts that have a very close relationship is dominant or greater where an express choice of law is provided in respect of the other contract(s). The principal or main contract that has an express choice of law can govern the ancillary or subcontract. In the same vein, the subcontract or ancillary contract(s) that has an express choice of law can govern the main or principal contract.

The major challenge in the application of the doctrine of AA under Article 4 is faced by the decision-maker where there is no express choice of law in any of the contracts being used to infect the other contract(s) with a very close relationship. There are at least two possible solutions to this problem. The first is to identify the dominant contract or principal contract in the web and use its applicable law to govern the other ancillary contract(s) that have a very close relationship. The second is to identify and weigh the significant connecting factor(s) that tie the contractual relationship between the parties, and apply the law of the country that contains the significant connecting factor(s)

¹²⁷ For example, another basis of justifying the decision in *Lawlor's* case, *supra* n 9, under Arts 3 and 4 of the Convention is that the other contracts in question (expressly governed by English law) that may have been used to infect the agency contract did not have a very close relationship with the contract of agency.

¹²⁸ *Lawlor, ibid.*, [28], [34] and [35]; Giuliano-Lagarde Report, *supra* n 10, 17; Fentiman, *supra* n 9, 201, para 4.72; Corneloup, *supra* n 1, 307, para 24; Parisot, *supra* n 1, 1343. The reason is that the requirement that the implied choice of law of the parties being demonstrated with *reasonable certainty* is a significant requirement under Art 3. First, the absence of an express choice of law in the contract being used to govern another closely related contract under Article 3 leaves the court in considerable doubt as to whether the parties impliedly made a choice of law to govern the contract in question. Secondly, where the contract is not between the same parties there is also considerable doubt as to whether the parties (including those not privy to the contract) made an implied choice of law as regards the contract that is sought to be infected. In other words, it cannot be said with reasonable certainty that party A had the real intention of applying the law of a related contract(s) (A was never privy to) between B and C to the contract A has solely with B. On this basis, the author respectfully regards the decision reached by Tomlinson LJ in *Golden Ocean*, *supra* n 54, [51]–[55] that he could imply a choice of law under Art 3 by importing the law (English law) governing both the contracts of charterparty and guarantee to the contract of warranty of authority (which *Golden Ocean* was not privy to) that was between Mr Salgaocar, Trustworth and SMI as wrongly decided. Remarkably, (all) the parties at the High Court and Court of Appeal did not advocate the application of Art 3 to the contract of warranty of authority. The parties' arguments were confined to the application of Art 4.

(that tie the parties' contractual relationship) to all the contracts that have a close relationship.

Each of these solutions has its associated problems. As regards the first solution, identifying the principal contract among the web of other contracts is by no means an easy exercise especially where there are more than two very closely related contracts involved.¹²⁹ Secondly, there is the danger that a court may read too much into the application of the principal contract in governing another contract that actually has no close relationship with the principal contract.¹³⁰ As regards the second solution, weighing and identifying the significant connecting factor(s) that tie all the contracts together places too much discretion in the hands of the decision-maker and could lead to tailoring the applicable law to suit the forum. For example, English judges under Article 4 of the Convention were influenced by common law decisions¹³¹ in unduly elevating the place of performance as a significant connecting factor in determining the law applicable to a web of closely related contracts under a letter of credit, which always led to the application of English law.¹³²

This is an area where the guidance of the CJEU would be welcome. The author is inclined to the view that where there are two contracts with a very close relationship, it is easier to apply the dominant or principal contract in governing the other contract, but where there are more than two contracts with a very close relationship, it is easier to weigh the significance of the connecting factors in determining the law of the country that should apply to the web of contracts.

2. Legal System or Country

Article 4(3) speaks of the court displacing the main rule in favour of another *country* that has a manifestly closer connection. Article 4(4), however, speaks of applying the *law of the country* that has the closest connection where the rules are inapplicable. This raises the question whether the distinction created between legal system and geographical connections as was done under the

¹²⁹ See also Plender and Wilderspin, *supra* n 9, 200, para 7-083.

¹³⁰ With respect, the decision in *Golden Ocean*, *supra* n 54, [52]–[53] is open to objection on the basis that Tomlinson LJ appears to have been excessively concerned with what he regarded as the principal contract(s) of charterparty and guarantee in inferring another contract of warranty of authority. The contract of warranty of authority was primarily concerned with whether Mr Salgaocar, was alleged to have warranted his authority to enter into (1) the charterparty contract on behalf of Trustworth, and (2) a guarantee of SMI of Trustworth's obligations. The said principal contracts of charterparty and guarantee, and the other contract of warranty of authority were separate contracts and not intimately connected. See also Okoli and Arishe, *supra* n *, 527–28.

¹³¹ *Offshore International SA*, *supra* n 31, 401–02; *Power Curber International Ltd*, *supra* n 31, 1240–42; *European Asian Bank AG v Punjab*, *supra* n 31, 656–57.

¹³² *Bank of Baroda*, *supra* n 17, 47–49; *Marconi Communications*, *supra* n 17, [41]–[43]. See also *Habib Bank Ltd*, *supra* n 17, [43]–[44].

Convention¹³³ and common law¹³⁴ in determining the applicable law is of significance under Article 4 of Rome I.¹³⁵ This issue is of importance because the doctrine of AA primarily concerns itself with the legal system that applies to the contract, rather than the country itself.¹³⁶

The author is of the view that if the doctrine of AA is to be of considerable significance under Article 4 of Rome I, then creating such distinctions between geography and legal systems will subvert the intention of the framers of Rome I as can be found in Recitals 20 and 21. In other words, the presence of Recitals 20 and 21 implies that courts should not be bothered with distinctions between country and legal system as was done by some courts and academics under the Convention and common law.

3. Very Close Relationship

Recitals 20 and 21 require that the contracts have a very close relationship in applying the doctrine of AA. There is, however, no guidance as to what is meant by a “very close relationship”. It is submitted that this may create uncertainty among courts of Member States, where different standards are adopted in determining which contracts have a very close relationship. However, the rule appears suitable as it does not fetter the discretion of the decision-maker in determining which contract(s) have a very close relationship with another contract(s) in the circumstances of the case. It is a rule that must be left flexible and from which case-law will create stability.

It has been submitted elsewhere that in determining whether the contracts have a very close relationship under Article 4, the court should generally be concerned with substantive connections between the contracts and not succeeding contracts or string sales that arise from a previous course of dealing because they are independent or not depending on another.¹³⁷ The author respectfully

¹³³ *Credit Lyonnais*, *supra* n 15, 914–16; *Samcrete*, *supra* n 17, [39]; *Golden Ocean*, *supra* n 54, [52].

¹³⁴ *Bonython v Australia* [1951] AC 201, 221–23; *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] 2 AC 583, 603, 606.

¹³⁵ See also Plender and Wilderspin, *supra* n 9, 195; JJ Fawcett and JM Carruthers, *Cheshire, North and Fawcett, Private International Law* (Oxford University Press, 14th edn, 2008), 710; Beaumont and McEleavy, *supra* n 9, 462, 10.129; Collins *et al*, *supra* n 9, 1821, para 32-073.

¹³⁶ *Credit Lyonnais*, *supra* n 15, 914–16; *Samcrete*, *supra* n 17, [39].

¹³⁷ ZS Tang, “Law Applicable in the Absence of Choice: The New Article 4 of the Rome I Regulation” (2008) 71 *Modern Law Review* 785, 798–99. This view is supported by the opinion of Lord Hamilton in *Caledonia Subsea Ltd*, *supra* n 28, [40] that justifies the application of the doctrine of AA solely to interdependent contracts such as letters of credit. Similarly, Parisot, *supra* n 1, 1338–39 even takes the view that the doctrine of AA should only apply to *single complex contract(s)* with multiple rights, liabilities and obligations, which may be compared to the refusal to apply *dépeçage*. The advantage of this approach is that the doctrine of AA should be utilised as an exceptional remedy to avoid the rules being displaced too easily and unjustifiably such as the English Court of Appeal’s decision in *Golden Ocean*, *supra* n 54, discussed above. However, taking a narrow view of what contracts with a “very close relationship” means greatly limits the significance of the application of the doctrine AA. Contracts could be independent

disagrees with this view to the extent that it appears to take a narrow view of contracts with a very close relationship in applying the doctrine of AA. This is because in considering whether or not to apply the escape clause or principle of closest connection, the court “is not precluded from taking into account any type of connecting factor”¹³⁸ nor is it “limited by any categorisation of the relevant factors”¹³⁹ such as the prior and subsequent conduct of the parties in entering into contracts that have a very close relationship in a commercial transaction.¹⁴⁰

It is suggested that the test in determining whether the contracts have a very close relationship is to examine the object, terms of the contract and surrounding circumstances of the case objectively. Where the court finds that the contracts are closely linked, coexist or are intimately connected either because the contracts are contained within the same legal document or share the same purpose in the commercial transaction, it should apply the doctrine of AA. Examples of such contracts are joint venture and joint operating agreements especially in oil and gas transactions, charterparty and guarantee contracts contained within the same legal instrument,¹⁴¹ bills of lading and charterparty,¹⁴² distributorships and the contracts indemnifying the obligations therein,¹⁴³ lease contracts and the contracts guaranteeing the obligations therein,¹⁴⁴ commission contracts, vessel construction contracts and termination contracts that share the same purpose,¹⁴⁵ contracts of indemnity and guarantee aimed at securing

of each other (eg insurance and reinsurance, and performance bond and counter guarantee), but *intimately connected* by (contractual) terms mirroring the rights, obligations and liabilities of the parties under the contracts, and thus deserving of the application of AA.

¹³⁸ *British Arab Bank*, *supra* n 47, [34].

¹³⁹ *Apple Corps Ltd v Apple Computers Inc* [2004] EWHC 768 (Ch) [59].

¹⁴⁰ Giuliano-Lagarde Report, *supra* n 10, 21. See also *FR Lurssen Werft GmbH*, *supra* n 38, [37]–[38]. It is submitted here that the position under the common law as decided by the House of Lords in *Whitworth Street Estates*, *supra* n 134, 603, 616 that precluded subsequent conduct of the parties as a connecting factor in determining the country or legal system with the closest connection should have no bearing on the interpretation of Art 4 of the Convention and Rome I. See also Art 18 of the Convention. *Cf* CGJ Morse, “The EEC Convention on the Law Applicable to Contractual Obligations” (1982) 2 *Yearbook of European Law* 107, 125 n 90; Peter Stone, *EU Private International Law: Harmonization of Laws* (Edward Elgar, 2006); Plender and Wilderspin, *supra* n 9, 195, para 7-072; Collins *et al*, *supra* n 9, 1795–96, para 32-05.

¹⁴¹ The High Court’s decision in *Star Reefers Pool Inc*, *supra* n 125, [13]–[15]; *Golden Ocean*, *supra* n 54, [42]–[45], [49]. Compare Arts 15 and 16 of Rome I.

¹⁴² *The Njegos*, *supra* n 1; *Pacific Molasses and United Trading Co Ltd v Entre Rios Compania Naviera SA (“The San Nicolas”)* [1976] 1 Lloyd’s Rep 8; *Navig 8 Pte Ltd v Al-Riyadh Co for Vegetable Oil Industry* [2013] EWHC 328 (Comm).

¹⁴³ *Ophthalmic Innovations Limited (UK)*, *supra* n 40, [53].

¹⁴⁴ *Sté Total Afrique v Serrure*, *supra* n 1; *Lionbrook Property Partnership Number 1 Limited v La Maille Aubeise SAS*, Judgment of 22 September 2009 in Beaumont and McElevay, *supra* n 9, 454, para 10.96; *M Serge Fourez v SA Residence Le Verseuil*, *supra* n 1. Compare it with Arts 15 and 16 of Rome I.

¹⁴⁵ *FR Lurssen Werft*, *supra* n 38, [20].

the same contract,¹⁴⁶ insurance and reinsurance contracts¹⁴⁷ guarantees (or performance bonds) and counter-guarantees,¹⁴⁸ collection contracts,¹⁴⁹ and letters of credit.¹⁵⁰ The contracts specified here are in no way exhaustive. Contracts of insurance and reinsurance contracts, guarantees and counter-guarantees, and letters of credit are given special consideration hereinafter. These types of contracts are singled out for special attention because they are intimately connected with each other, and the obligations carried out by the parties to the contract are intended to be back to back the same as their liability. In other words, these back-to-back contracts usually contain the terms of the obligation and liability of the parties to the contract that materially mirror each other.

(a) *Reinsurance and Insurance Contracts*

Contracts of reinsurance and insurance are contracts with a very close relationship. This is because a reinsurance contract is usually back to back with the primary insurance contract and the terms and nature of cover in both contracts are in most respects the same.¹⁵¹ Determining the applicable law that applies to the contract of reinsurance could be easy in at least two cases. First, the reinsurance contract could simply incorporate all the terms of the primary insurance including the applicable law.¹⁵² Thus, the court called upon to interpret the reinsurance contract simply applies the law of the insurance contract

¹⁴⁶ *Alliance Bank JSC*, *supra* n 125, [54].

¹⁴⁷ *Vesta v Butcher*, *supra* n 72, 193, (Hobhouse J); *Groupama*, *supra* n 72, [20] (Tuckey LJ); [30] (Mance LJ); *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50; *Pine Top Insurance Co Ltd v Unione Italiana Anglo Saxon Reinsurance Co Ltd* [1987] 1 Lloyd's Rep 476; *Tiernan v The Magen Insurance Co Ltd* [2000] ILPr 517; *ACE v Zurich Insurance Company and Zurich American Insurance Company* [2001] 2 Lloyd's Rep 423; *Gan Insurance Co Ltd*, *supra* n 38; *Dornoch Limited*, *supra* n 38; *Lexington Insurance Co*, *supra* n 72; *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange* [2010] EWHC 2279 (Comm) [22]–[24]; *Faraday Reinsurance Co Ltd v Howden North America Inc* [2011] EWHC 2837 (Comm) [61]–[63], this decision was not disturbed on appeal [2012] EWCA Civ 980; *Gard Marine*, *supra* n 43, [39]–[46].

¹⁴⁸ *British Arab Bank*, *supra* n 47, [30]–[35].

¹⁴⁹ *Minorities Finance Ltd v Afribank Nigeria Limited*, *supra* n 99; *Bastone & Firmininger Limited*, *supra* n 99.

¹⁵⁰ *Bank of Baroda*, *supra* n 17, 47–49; *Marconi Communications*, *supra* n 17, [41]–[43].

¹⁵¹ *Vesta v Butcher*, *supra* n 72, 852, 895 (Lord Griffiths); *Lexington Insurance Co*, *supra* n 72, [55]. See also *Tryg Baltic International (UK) Ltd v Boston Compania de Seguros SA* [2004] EWHC 1186 (Comm). However, Rome I provides a separate choice of law rule in Art 7 of Rome I to govern contracts of insurance as distinct from contracts of reinsurance that respectively falls into the general choice of law and applicable law rules in Arts 3 and 4 of Rome I.

¹⁵² Where only the terms and conditions of the policy of insurance are incorporated or mirrored into the contract of reinsurance without an unequivocal reference to the applicable law, the court both under the Convention and Rome I should not apply the law of the contract of insurance to the reinsurance contract as an express choice of law: *Gan Insurance Co Ltd and Eagle Star Insurance Ltd*, *supra* n 38, 480; *Dornoch Limited*, *supra* n 38, [40]–[43]. This is unlike the position at common law where Lord Denning in *San Nicolas*, *supra* n 142, regarded the express choice of law of a bill of lading as simply incorporated into the charterparty (that had no express choice of law) because the contracts were intimately connected and the terms of both contracts mirrored each other.

to the reinsurance contract as an express choice of law. Secondly, a court can imply a choice of English law through the doctrine of AA to the contract of reinsurance that contains no express choice of law, where the parties negotiate a contract of insurance (governed expressly or impliedly by English law) and reinsurance in England, in the London Market, with London brokers and underwriters, and with well-known English form and terms provided in the contract such as Lloyd's policy of insurance.¹⁵³ The same results could easily be reached in the alternative under Article 4.¹⁵⁴

The major problem arises where the parties provide a choice of law that is not English in the insurance contract, and do not provide for an express choice of law in the reinsurance contract that is negotiated in England, in the London Market, with London brokers and underwriters, and with well-known English form and terms provided in the contract such as Lloyd's policy of insurance. It is uncertain how the court is to approach the application of the doctrine of AA under Articles 3 and 4 of Rome I.

Under the common law and the Convention, English courts attached importance to both factors of AA and the use of a standard English form of policy insurance in a London Market, but gave special preference to the latter factor(s) in implying a choice of English law. In this respect, the English courts' position is that "there remains something surprising and improbable about the conclusion that Lloyd's slip and Lloyd's policy are governed by anything other than English law".¹⁵⁵ Thus, the English Court of Appeal in the case of *Gan Insurance Co Ltd and Eagle Star Insurance Ltd*,¹⁵⁶ in applying Article 3 of the Convention to a contract of reinsurance negotiated in the London market with London brokers and underwriters in which the primary insurance was expressly governed by Taiwanese law, held that it was improbable that a contract of reinsurance "made in London between London underwriters and brokers [where] their agreement is based on the well known duty of disclosure and the right of the insurer to avoid a policy for misrepresentation ... would introduce any term of Taiwanese law".¹⁵⁷ However, in another decision in *Dornoch Limited and Others*

¹⁵³ *Stonebridge Underwriting*, *supra* n 147, [22]–[24]; *Gard Marine*, *supra* n 43, [39]–[47]. It is important to note that English law has been selected here as an example because of England's well-known reputation and expertise in the insurance and reinsurance business spanning over a period of three centuries. Thus, "English law" could be used interchangeably with the "law of the market where the policy was issued" which may be the law of any other country as the case may be.

¹⁵⁴ *Stonebridge Underwriting*, *supra* n 147, [24]; *Gard Marine*, *supra* n 43, [46].

¹⁵⁵ *Vesta v Butcher*, *supra* n 72, 193 (Hobhouse J); See also *Citadel Insurance Co v Atlantic Union Insurance Co SA* [1982] 2 Lloyd's Rep 543; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50; *Pine Top Insurance Co Ltd*, *supra* n 147; *Tiernan*, *supra* n 147; *ACE*, *supra* n 147; *Stone Bridge Underwriting Ltd*, *supra* n 147, [22]–[24]; *Faraday Insurance Co. Ltd*, *supra* n 147, [61]–[63] (this decision was not disturbed on appeal [2012] EWCA Civ 980); *Gard Marine*, *supra* n 43, [39]–[46].

¹⁵⁶ *Supra* n 38.

¹⁵⁷ *Ibid.*, 1278. Beldam LJ did not consider the application of the doctrine of AA under Art 4 of the Convention. The lower court judge, Creswell J, *supra* n 38, 1080–82 also held in favour

*v Mauritius Union Assurance Company Ltd and Another*¹⁵⁸ a different approach was adopted while determining if the court had jurisdiction on a good arguable case to grant leave to order service of a writ out of jurisdiction on the foreign defendants. The primary insurance policy was expressly subject to Mauritius law and jurisdiction. The reinsurance policy was also expressly governed by Mauritius law, but the excess reinsurance policy which was negotiated in the London market with a standard form of English contract was not governed by a choice of law. Aikens J, in considering whether to apply English law or Mauritius law under Article 3 of the Rome Convention, considered the application of the doctrine of AA having regard to the very close relationship between the contract of the primary insurance policy and reinsurance policy expressly governed by Mauritius law, and considered its application to the excess reinsurance policy, which was, however, negotiated in the London market with a standard form of English contract, but was not governed by an express choice of law.¹⁵⁹ Aikens J concluded that there was a stalemate in implying a choice of law under Article 3 in favour of English law or Mauritius law.¹⁶⁰ Aikens J moved on to consider the applicable law under Article 4 and held that under Article 4(2) the characteristic performer was the English party with its central administration in England, and on that basis simply applied English law without any (further) consideration of the doctrine of AA under Article 4(5).¹⁶¹ On appeal, this aspect of Aiken J's decision was sustained and approved by the Court of Appeal.¹⁶²

Should a case similar to *Dornoch Limited Gan Insurance Co* and *Gan Insurance Co* present itself under Rome I, it is submitted that the same stalemate expressed by Aikens J in *Dornoch* in refusing to imply a choice of law between the parties in respect of the law of England or Mauritius also applies under Article 3 of Rome I. However, the court, being duty bound to consider and give special weight to the application of the doctrine of AA by virtue of Recital 20 with regard to contracts that have a very close relationship, should apply the law of Mauritius or Taiwan (as the case may be) to the contract of reinsurance under Article 4(3) of Rome I to achieve the principal goals of legal certainty, convenience and sound administration of justice. In other words, English courts in this situation should jettison the narrow-minded position that a policy of reinsurance issued in the London Market retains "a stubbornly English [legal or commercial] significance".¹⁶³ This view is also of considerable practical impor-

of the application of English law under Art 4(2) of the Convention, but did not consider the application of the doctrine of AA under Art 4(5).

¹⁵⁸ *Supra* n 38.

¹⁵⁹ *Ibid.*, [61]–[68].

¹⁶⁰ *Ibid.*, [68].

¹⁶¹ *Ibid.*, [70].

¹⁶² [2006] EWCA Civ 389 (Tuckey LJ) [40]–[43].

¹⁶³ The author borrows the phrase of Mance LJ (as he then was) in *Groupama*, *supra* n 72, [30] used

tance as it also ensures that the risks of international traders' in back-to-back contracts are allocated predictably and consistently. Thus, in the cases of *Vesta* and *Groupama* discussed above, the implication of applying English law to the term of breach of warranty under the reinsurance contract instead of the law of the principal insurance contract leads to the absurd and unjust result where the reinsurer is able to take a technical advantage over the insurer by avoiding his liability to pay the insurer who has already paid the insured in a contract of insurance which is clearly back to back with the contract of reinsurance in its terms. Of particular significance is that the solution worked out by the House of Lords in *Vesta* in treating the issue as simply a matter of construction of the terms of a back-to-back insurance and reinsurance contract does not apply under the Convention and Rome I, because the application of section 10 of the Convention and section 12 of Rome I renders it a private international law matter in recognising the applicable law as one that interprets the terms of the contract. Resorting to splitting the applicable law as a last resort is not recognised under Article 4 of Rome I in order to apply the law of the insurance to the term of the warranty in the contract of reinsurance. Moreover, it is highly doubtful even under the Convention if the court in such a situation can resort to splitting the applicable law under Article 4.¹⁶⁴ Applying Article 4(3) through Recital 20 appears to be the best solution.

Admittedly, this solution does not always serve the needs of justice as was seen in *Lexington* case where the reinsurers were potentially exposed to a huge liability by the application of Pennsylvanian law in the contract of insurance to the term of the reinsurance contract concerning the legal effect of the period of cover, which the reinsurers may never have expected or anticipated, and for which they could not protect themselves against. Another challenge with this solution, as was demonstrated in *Lexington*, is where the first court identifies a choice of law between the parties in the absence of an express choice of law to the principal (insurance) contract that the second court does not agree with by the application of its own (second court) PIL rules in a bid to infect the ancillary contract (reinsurance). For example, in *Lexington* Lord Mance and Lord Collins both held that by English domestic conflict-of-law rules, Massachusetts law should be applied to the insurance policy (based on the connecting factors of the place where the insurer carried on his business or head office is situated, and the place where the policy was issued with relevant brokers and underwriters performing their obligations there) instead of Pennsylvanian law

in relation to giving effect to the term of the warranty in a back-to-back contract of insurance and reinsurance. In the House of Lords, Lord Mance in *Lexington*, *supra* n 72, [50], and Lord Collins [73] approved the phrase.

¹⁶⁴ Splitting the applicable law (also known as *dépeçage*) is to be utilised by a court on exceptional grounds, especially where the contract is independent and can be severed from the rest of the other contracts. C-133/08 *Intercontainer Interfrigo SC ("ICF") v Balkenende Oosthuizen*, *supra* n 11, [42], [43], [45], [46], [48] and [49].

as identified by the trial US Judge and the US Supreme Court which applied the domestic conflict-of-law rules of the State of Washington (based on the connecting factor(s) of the place of incorporation, and headquarters (or central administration) of the assured's company).¹⁶⁵ At least two positions may arise. First, in the case of courts within Brussels I and Rome I, the doctrine of mutual trust, confidence and practical effectiveness of the Regulations should enable the second court to accept the choice of law identified by the first court as infecting the ancillary contract so as to allocate the parties obligations, liabilities and risk predictably and consistently.¹⁶⁶ Second, where the first court (as in *Lexington*) is not a party to Brussels I and Rome I, it may be difficult to advocate the use of a foreign PIL rule to infect the ancillary contract. To do so may be to import different considerations used in a foreign PIL rule to infect another very closely related contract.¹⁶⁷

Again, the answer to these problems lies in international traders making a single express choice of law for the contracts of insurance and reinsurance. In the alternative, Lord Mance in *Lexington's* case rightly suggests that the parties can make an express choice of law that clearly applies to a given term in the reinsurance contract to give the insurance and reinsurance contracts a full back-to-back effect.¹⁶⁸ Fortunately, this position is also recognised under both Article 3 of the Convention and Rome I, which allows the parties to split the applicable law to their contract(s) in so far as it does not produce logically inconsistent results.

(b) Letters of Credit

This section seeks to explore two crucial issues regarding the application of the doctrine of AA with regard to letters of credit. The first concerns the contracts that have a very close relationship under a letter of credit. The second concerns the proper approach to determining the doctrine of AA in a letter of credit.

¹⁶⁵ *Supra* n 72, [46] (Lord Mance), [91]–[93], (Lord Collins).

¹⁶⁶ See the CJEU's decisions in *Van Uden Maritime BV (t/a Van Uden Africa Line) v Kommanditgesellschaft in Firma Deco-Line* (C-391/95) [1998] ECR I-7091; *Erich Gasser GmbH v MISAT Srl* (C-116/02) [2003] ECR I-14693; *Turner v Grovit* (Case C-159/02) [2004] ECR I-3565, [24]–[31]; *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) v West Tankers Inc* (C-185/07) [2009] ECR I-663, [27]–[34]. Admittedly, this solution is easier where proceedings on the determination of the applicable law to the principal contract have been decided already in one of the Member State courts. Where proceedings are running concurrently by each court properly exercising its jurisdictional competence under Brussels I to determine the law that applies to very closely related contracts, unless a consolidation of proceedings is achieved, it is likely that conflicting results may be reached on the parties' obligations, risk and liability with regard to very closely related contracts. See also Corneloup, *supra* n 1.

¹⁶⁷ See also Corneloup, *supra* n 1, para 37.

¹⁶⁸ *Supra* n 72, [51].

On the first issue, leaving aside the contract of sale, a letter of credit is usually composed of about four component contracts. First, there is the contract between the issuing bank and the buyer. Second, there is the contract between the issuing bank and confirming bank. Third, there is a contract between the confirming bank/advising bank and seller/beneficiary. Fourth, there is a contract between the issuing/reimbursing bank and seller/beneficiary. English courts for commercial reasons, both under the common law and the Convention, have consistently considered the second, third and fourth contracts as having a very close relationship because a letter of credit contract is primarily concerned with the security of the seller's payment.¹⁶⁹ For the same reasons, the English courts have been consistent under the common law and the Convention in refusing to apply (even) the express choice of law of the underlying commercial transaction between the buyer and seller to govern the letter of credit, because the underlying contract is independent and autonomous from the letter of credit.¹⁷⁰ It is uncertain if this rule merely restates the common law position or if it was influenced by the UCP rules.¹⁷¹ It is, however, submitted that the rule is also conducive to legal certainty in commercial transactions.¹⁷²

It is uncertain if the English position will be accepted by other Member State courts called upon to apply the doctrine of AA to a letter of credit. For example, Professor Struycken in his early publication suggested that the governing law of the contract between the seller/beneficiary and issuing bank is the dominant contract that should govern the other contracts because "the beneficiary's acceptance of that contract is the first and most important step in the whole transaction".¹⁷³ In the alternative, he argues that the law governing the underlying contract of sale which gives rise to the letter of credit could also be the dominant contract, which is capable of governing the letter of credit depending on the level of abstraction.¹⁷⁴ A clarification by the CJEU in this area would be welcomed.

¹⁶⁹ *Bank of Credit*, *supra* n 87, 1184; *Bank of Baroda*, *supra* n 17, 47–49; *Marconi Communications*, *supra* n 17, [62].

¹⁷⁰ *European Asian Bank*, *supra* n 31, 368; *Offshore International SA*, *supra* n 31, 401–03; *Power Curber International Ltd*, *supra* n 31, 1240–42; *Bank of Credit*, *supra* n 87, 1184; *Bank of Baroda*, *supra* n 17, 47–49; *Marconi Communications*, *supra* n 17, [62]; *Habib Bank Ltd*, *supra* n 17, [43]–[44].

¹⁷¹ *Power Curber International Ltd*, *supra* n 31, 1239 (Lord Denning); *Cf Attock Cement Co Ltd*, *supra* n 91; *Edward Owen Engineering Limited v Barclays Bank International Ltd* [1978] QB 159; *Marconi Communications*, *supra* n 17, [63].

¹⁷² "[A] seller should not be kept out of his money by litigation against him at the suit of the buyer. In the absence of fraud the seller is entitled to be paid on presentation of genuine documents": Griffiths LJ in *Power Curber International*, *supra* n 31, 1243. See also *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127; *Edward Owen Engineering Ltd*, *supra* n 171, 169.

¹⁷³ *Supra* n 28, 23. See also Van Der Plas and Struycken, *supra* n 28, 273. Similarly, Jayme, *supra* n 1, also supports the identification of the dominant contract in banking transactions such as letters of credit in utilising the doctrine of AA.

¹⁷⁴ *Supra* n 28, 23, fn 30. The author is, however, inclined to support the application of the English position under Art 4 of Rome I. It cannot be authoritatively stated either in law or commerce that the contracts of sale and letters of credit have a very close relationship for the purposes of Recital 20 or 21.

On the second issue, the application by English courts of the doctrine of AA under Article 4 of the Convention was approached with a common law flavour. In other words, English courts simply applied their old PIL rules to letters of credit. Thus, in *Bank of Baroda* Mance J determined the characteristic performer between the issuing bank and the confirming bank under Article 4(2) as English law by placing reliance on a common law decision.¹⁷⁵ Mance J was of the view that the party (confirming/advising bank) charged with the responsibility of adding its confirmation to make payment against the presentation of compliant documents by the seller is the characteristic performer, and the duty of reimbursement by the issuing bank was merely a consequential obligation.¹⁷⁶ Mance J further considered the relationship between the confirming bank and seller and held that it was governed by English law, and applied these contracts that were governed by English law to govern the contract between the issuing bank and the seller that will ordinarily have been governed by Indian law if Article 4(2) was applied as well. Similarly, in *Marconi Communications* the case was concerned with whether the court had jurisdiction based a good arguable case to grant leave to order service of a writ out of jurisdiction on the foreign defendants. The seller/beneficiary claimed against the confirming bank for refusing to pay against apparently compliant documents despite the advice of the negotiating bank. The application of the presumption under Article 4(2) with regard to the contracts between the seller/beneficiary and issuing bank, issuing bank and confirming bank, and confirming bank and seller led to the application of Indonesian law, and the inconvenience and legal uncertainty envisaged by Mance J if the presumption had simply been applied to these very closely related contracts would not have arisen. However, the Court of Appeal, influenced by English common law that gave considerable weight to the place of payment and performance, instead of the place of contracting and residence of the parties, held that since the place of payment and performance was in England, where the presentation and checking of the documents was carried out through the bank negotiating on behalf of the seller, Article 4(5) should displace Article 4(2) and govern the relationship between the parties under the letter of credit.¹⁷⁷

Despite the valuable impact the doctrine of AA has made in letter of credit contracts, some objections should be made to the English approach. First, the view that the characteristic performer in the relationship between the issuing bank and confirming bank is that of the confirming/advising bank is contro-

¹⁷⁵ *Supra* n 17, 47–49. Reliance was placed on *European Asian Bank*, *supra* n 31, 368.

¹⁷⁶ Approved in *Marconi Communications*, *supra* n 17, [42]–[43]. Although Mance J claimed to have been following the Giuliano–Lagarde Report, *supra* n 10, in determining the characteristic performance for obligations of mutual performance, it was apparent from the decision that heavy reliance was placed on the common law proper law of contract in determining the law applicable for a letter of credit between an issuing and confirming bank.

¹⁷⁷ *Marconi Communications*, *supra* n 17, [42]–[43], [66]–[67].

versial.¹⁷⁸ It is submitted that it is preferable to apply the principle of closest connection under Article 4(4) of Rome I since the characteristic performer cannot readily be identified. Secondly, the undue elevation of the place of payment/performance (place where the documents are checked and payment made against compliant documents) as influenced by English common law¹⁷⁹ in both using that factor to determine the characteristic performer and utilising it as a significant factor in applying the doctrine of AA may not be accepted by other courts under Article 4 of Rome I.¹⁸⁰ Thus, the Court of Appeal in *Marconi Communications* should simply have applied Indonesian law through the application of Article 4(2) to the three component contracts that formed the core of the letter of credit transaction where no inconvenience or legal uncertainty would have arisen as was the case in *Bank of Baroda*.¹⁸¹ The Court of Appeal's undue reliance on the contract between the seller and negotiating bank based on the place of payment/performance appears to give too much weight to the exception.¹⁸²

(c) *Demand Guarantee (or Performance Bonds) and Counter-Guarantee*

English courts under the common law applied the doctrine of infection to contracts of guarantee (or performance bonds) and counter-guarantees. They

¹⁷⁸ For example, in the Northern Irish case of *Governor & Company of the Bank of Ireland v State Bank of India* [2011] NIQB 22 [17]–[25] the High court did not follow the decision in *Bank of Baroda* (though it referred to it) by holding that in a contract between an issuing/reimbursing bank and a confirming/advising bank the characteristic performer is the issuing/reimbursing bank.

¹⁷⁹ *European Asian Bank*, *supra* n 31, 368; *Offshore International SA*, *supra* n 31, 410–12; *Power Curber International Ltd*, *supra* n 31, 1240–42.

¹⁸⁰ In a Rome Convention case the Northern Irish court in *Governor & Company of the Bank of Ireland*, *supra* n 178, [17]–[25] considered the contract between the issuing/reimbursing bank and the confirming bank/advising bank and held that the issuing/reimbursing bank was the characteristic performer and its principal place of business was India. Weatherup J also held that India was the place of characteristic performance and the country with which the contract was most closely connected. The Northern Irish High Court did not follow the English decision in *Bank of Baroda* (though it referred to it). Struycken, *supra* n 28 and Corneloup, *supra* n 1, para 14 view Mance J's approach in *Bank of Baroda* as an excuse to apply the law of the forum.

¹⁸¹ The application of Art 4(2) to the three component contracts that formed the core of the letter of credit transaction in this case should be the correct position both under the Convention and Rome I. Furthermore, the application of the doctrine of AA can also be utilised through the presumption(s) or rules (instead of utilising the escape clause) to contracts with a very close relationship. In other words, if the Court of Appeal in *Marconi Communications* had applied the presumption in Art 4(2) to the component contracts that formed the core of the letter of credit transaction (seller/beneficiary and issuing bank, issuing bank and confirming bank, and confirming bank and seller) as the applicable law (Indonesian law), it will also have been utilising the doctrine of AA in identifying a single law that governed all the contractual relationship of the parties under the letter of credit, including the negotiating bank's transaction with the seller that was governed by English law. In this regard see also *Cox v Ergo Versicherung AG*, *supra* n 55, [12]–[13]. This approach strengthens the goal of legal certainty in commercial transactions.

¹⁸² In other words, it is a clear manifestation of the weak presumption approach rejected by the CJEU in *ICF* under Art 4 of the Convention and inapplicable under Art 4 of Rome I. See also Okoli and Arishe, *supra* n *. 531.

applied it in either inferring a choice of law or determining the legal system of the country that had the closest and most real connection with the contract.¹⁸³ Thus, English courts under the common law applied the law that governed the guarantee (or performance bond) to infect the contract of counter-guarantee.¹⁸⁴ For the purpose of applying the doctrine of infection under the common law, the English courts for commercial reasons consistently did not consider the law governing the underlying commercial transaction capable of infecting either the guarantee (or performance bond) and the counter-guarantee contract as the said contracts were separate and not intimately connected.¹⁸⁵ The English High Court appears to have adopted the same position under the Convention.¹⁸⁶ It is very likely that an English court called upon to apply the doctrine of AA under Article 4 of Rome I will adopt the same position. It is, however, uncertain if other courts of Member States will adopt the same position bearing in mind that it has been argued by Professor Struycken that the underlying commercial transaction should be capable of infecting this kind of contract depending on the level of abstraction.¹⁸⁷

Another issue of particular importance relates to the URDG rules which regard the contract of counter-guarantee as separate from the contract of guarantee¹⁸⁸ and determine the applicable law based on the place where the guarantee or counter-guarantee was issued.¹⁸⁹ The URDG rules thus envisage the possibility that different laws may govern both contracts.¹⁹⁰ The English courts under common law rejected this position by treating both contracts as intimately connected and deserving of the application of the doctrine of infection.¹⁹¹ The High Court under the Convention has adopted the same position by treating them as related contracts and thus applying a single law to both contracts.¹⁹² It is very likely that the English court will follow the same path under Article 4 of Rome I.

¹⁸³ *Attock Cement Co Ltd*, *supra* n 91, 1158–59; *Turkiye Is Bankasi AS*, *supra* n 99, 135–36; *Wahda Bank*, *supra* n 1, 409–12.

¹⁸⁴ *Turkiye Is Bankasi*, *supra* n 99, 135–36; *Wahda Bank*, *supra* n 1, 409–12.

¹⁸⁵ *Attock Cement Co Ltd*, *supra* n 91, 1158–59; *Turkiye Is Bankasi AS*, *supra* n 99, 135–36; *Wahda Bank*, *supra* n 1, 409–12. Again it is uncertain if this was influenced by the UCP rules or merely a restatement of what the position was at common law. See *Power Curber International Ltd*, *supra* n 31. (Lord Denning) at 11239; *Cf Attock Cement Co Ltd*, *ibid*; *Edward Owen Engineering Limited*, *supra* n 171, 159; *Marconi Communications*, *supra* n 17, [63].

¹⁸⁶ *British Arab Bank*, *supra* n 47, [30]–[35].

¹⁸⁷ *Supra* n 28, 23, fn 30.

¹⁸⁸ Art 5(b).

¹⁸⁹ Art 34.

¹⁹⁰ This rule may be of considerable importance where the parties incorporate the URDG Rules into their contract.

¹⁹¹ *Attock Cement Co Ltd*, *supra* n 91, 1158–59; *Turkiye Is Bankasi AS*, *supra* n 99, 135–36; *Wahda Bank*, *supra* n 1, 409–12.

¹⁹² *British Arab Bank*, *supra* n 47, [30]–[35].

The application of the doctrine of AA to a contract of guarantee and counter-guarantee has only been considered once by an English court under the Convention in the case of *British Arab*. In that case, there was a contract between GOLD, a Syrian owned entity, and a Chinese company, Sichuan Machinery Corporation, in respect of a project in Syria. GOLD was the owner of the project, while Sichuan Machinery was the contractor. In order to secure the performance of the contractor in the project, the owner required the contractor to issue a performance bond from a Syrian Bank in the owner's favour. The contractor got a Syrian Bank ("CBS") to issue a performance bond in the owner's favour which was governed expressly by Syrian law. CBS, in a bid to allocate its risk, also got an English Bank ("BACB") to issue a counter-guarantee in its favour, which contained no express choice of law. BACB in turn got a Chinese Bank to issue a counter-guarantee in its favour, which was governed by English law. As a term of the performance bond, the owner made claims for extension or payment under the performance bond to CBS. CBS notified BACB, and BACB in turn notified BOC. When BACB made a demand for extension or payment on the second occasion to BOC, BOC stated that the claim under the performance bond had expired and declined to make payment. There was thus a dispute on the chain of liability of the banks that issued the performance bond and counter-guarantees for the Syrian project. What came for determination before the court was whether Syrian law or English law applied to the contract of counter-guarantee between CBS and BACB. BACB sought the application of English law that expressly governed the counter-guarantee with BOC to govern the counter-guarantee with CBS.¹⁹³ On the other hand, CBS sought the application of Syrian law that expressly governed the performance bond issued by BACB in favour of CBS.¹⁹⁴

Blair J did not find the doctrine of AA sufficient to imply a choice of law in favour of either party under Article 3 of the Convention.¹⁹⁵ Blair J moved on to consider its application under Article 4 and weighed the significance of the connecting factors as advanced by the parties. Blair J did not consider the express choice of English law governing the counter-guarantee between BOC and BACB as relevant because case-law "emphasized the importance of the connection to the guarantee rather than the counter-guarantee bank's own security arrangements".¹⁹⁶ Blair J, on the other hand, favoured the argument

¹⁹³ *Ibid.*, [26]. The other connecting factors were: (i) any payment by BACB to CBS was due to be made in BACB's account in London, and (ii) the key element of performance under the counter-guarantee was the honouring of the undertaking of BACB as guarantor, which was located in England

¹⁹⁴ *Ibid.* The other connecting factors were: (i) the underlying contract and infrastructure project was in Syria, (ii) the place of payment under the bond was to be in Syria, and (iii) the fact that for the counter-guarantee to be triggered there must be a "claim" under the performance bond, and what counts as a claim was a matter of Syrian law

¹⁹⁵ *Ibid.*, [30].

¹⁹⁶ *Ibid.*, [35].

of CBS in applying the (Syrian) law of the performance bond to the counter-guarantee. Blair J also emphasised that it “was a condition of liability under the counter-guarantee that CBS received a claim under the performance bond from the beneficiary on or before the expiry date”¹⁹⁷ and “the court would need to look to Syrian law in relation to the meaning of ‘claim’ as used in both instruments [performance bond and counter-guarantee]”.¹⁹⁸ Blair J held on this ground that Syrian law was more closely connected in displacing the applicability of English law under Article 4(2) by the application of Article 4(5).

It is uncertain how this case will play out if it is to be determined under Article 4 of Rome I. It has been argued based on the strong presumption approach that English law is of real significance and has a substantial connection with the contract of counter-guarantee because the English party was the characteristic performer located in England, and England was both the place where the claim for payment was made under the counter-guarantee and where the key element of performance of honouring the payment undertaken as guarantor was to be effected.¹⁹⁹ Thus, the presumption in favour of English law should not be displaced because the law of Syria does not *manifestly* or sufficiently outweigh the English connections because they are of similar weight or evenly balanced.²⁰⁰ On the other hand, proponents of the intermediary approach could argue that Article 4(3) and Recital 20 apply because even if the English connections are of real and substantial significance, the application of the doctrine of AA in favour of Syrian law manifestly connects the contract with Syria, since the performance bond and counter-guarantee are very closely related contracts. Adopting this position will also be honouring Recital 16 which aims to balance legal certainty and flexibility in deploying the escape clause – a position favoured by the CJEU in *ICF* under Article 4 of the Convention.²⁰¹

F. THE SIGNIFICANCE OF RECITAL 20 AS IT RELATES TO THE RULES IN ARTICLE 4(1) AND (2) OF ROME I

The application of the doctrine of AA under Recital 21 should ordinarily not present considerable difficulty in so far as the contracts have a very close relationship. For example, assume party A from England enters into a joint venture with party B from France to drill oil in Imo State, Nigeria. The contract of joint venture has no express choice of law, but another joint operating

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ Okoli and Arishe, *supra* n *, 533, n 112.

²⁰⁰ *Ibid.*

²⁰¹ See also Recital 14 to Rome II. For academic support of the intermediary approach see Dickinson, *supra* n 123, 36; Beaumont and McEavey, *supra* n 9, 475.

agreement (between the parties) connected with the joint venture agreement is expressly governed by Nigerian law. The decision-maker would simply move to determine the principle of closest connection since neither Article 4(1) or (2) applies.²⁰² Among other connecting factors the court may consider, considerable weight should be given to the application of Nigerian law to govern the joint venture agreement because of its significance in Recital 21.

Thus, this section is concerned with exposing the dilemma that courts of Member States may face in applying the doctrine of AA under Article 4(3) of Rome I. It is particularly concerned with whether the doctrine operates automatically as a connecting factor where it is established that the contracts in question have a very close relationship, or whether the court must weigh and compare the significance of other connecting factors in deciding whether or not to apply the doctrine. In this regard, the author prefers to take a tentative view by adopting the position that the application of the doctrine of AA should be most decisive where it is established that the application of different laws will produce conflicting results as was demonstrated in the English cases of *Vesta* and *Groupama*, and the French case of *M Serge Fourez*. This section also uses concrete examples to illuminate on the disagreement that may arise between proponents of the strong presumption approach and the intermediary approach. It also considers cases where the doctrine of AA is insignificant despite the contracts having a very close relationship.

1. Accessory Allocation in Article 4(1)

It is easier to displace the presumption in Article 4(2) compared to Article 4(1).²⁰³ Proponents of the strong presumption approach at the very extreme may even argue that the fixed rules in Article 4(1) should never be displaced except when its connection to the contract is so weak that it is of no significance whatsoever to the contract.²⁰⁴ It may be difficult to utilise the doctrine of AA under Article 4(3) in displacing Article 4(1) where it is quantitatively outweighed by other connecting factors. Let us consider the following scenario below.

Assume a contract is entered into by a Norwegian Company (“the Operator”) habitually resident in Aberdeen, Scotland with a Scottish company habitually resident in Aberdeen, Scotland (“the Contractor”) for the supply of heat exchangers to use in North Sea operations in Aberdeen. The main con-

²⁰² *Scott v West and others; Mackie v Baxter and Others* [2012] EWHC1890 (Ch) [10]–[11].

²⁰³ This is because it is easier to apply the fixed rules in Art 4(1) since the contracts are not as complex as the contracts under Art 4(2), where the application of the escape clause is a more attractive solution. See also Okoli and Arishe, *supra* n *, 534.

²⁰⁴ *Société Nouvelle des Papeteries de l'AA SA v BV Machinefabriek BOA* [1992] Nederlandse jurisprudentie 750; reaffirmed in *Baros AG (Switzerland) v Embrica Maritim Hotelschiffë GmbH* [Hoge Road, 17 October 2008, No C07/037HR; LJN: BE7201]; *Caledonia Subsea*, *supra* n 19, [3], [6] (Lord Cameron), [2]–[4] (Lord Marnoch).

tract for the supply of heat exchangers has no express choice of law, but there is a Mutual Indemnity and Hold Harmless (MIHH) agreement contained in the main contract between the Operator and Contractor that is to be construed in accordance with Norwegian law. However, the contract for the supply of heat exchangers is negotiated and concluded in Aberdeen. The place of performance for the supply of the heat exchangers is in Aberdeen. The place of payment is in Aberdeen and payment to be made in Scottish pounds sterling. The contract is also written in the English language. A dispute subsequently arises between the parties. The Operator sues the Contractor for breach of contract in supplying defective component parts for the heat exchangers. There is an argument as to the applicable law before the court. The Operator in relying on the doctrine of AA argues that Norwegian law should apply (under Article 4(3) and Recital 20) to the contract of supply of heat exchangers based on the MIHH contract that is to be construed in accordance with Norwegian law. The Contractor, on the contrary, argues that Scots law should apply under Article 4(1)(a) since its habitual residence is in Scotland. In the alternative, under Article 4(3) Scots law should apply since the connecting factors of the place of performance, place of payment, currency of payment, residence of the parties and language of the contract all have Scottish connections that outweigh the application of the doctrine of AA.

If the court is to favour the strong presumption approach, it may simply hold that the law of Scotland applies under Article 4(1)(a) since the Contractor was habitually resident in Scotland. In the alternative, the court could also hold that under Article 4(3) the Norwegian connections do not outweigh the Scottish connections under the contract despite the MIHH agreement contained in the contract that is to be governed by Norwegian law. This is because both parties were habitually resident in Scotland, contract was written in English, the place of payment was in Scotland, the currency was that of Scotland, and the place of performance had very strong connections with Scotland where the contractor performed his services. If the court is to favour the intermediary approach, it may hold that the contracts for the supply of heat exchangers and the MIHH (having a very close relationship) between the same parties should lead to the application of Norwegian law under Article 4(3) and Recital 20 through the doctrine of AA that is of special and considerable significance as a connecting factor. The court may further hold that despite the real and substantial Scottish connections that support the application of Article 4(1)(a), the law of Norway is manifestly more closely connected with the contract, and the place of performance, the language of the contract, currency of payment and habitual residence of the parties should not be given considerable significance, where contracts that have a very close relationship are involved, as it is the doctrine of AA that should be the significant and decisive connecting factor in that circumstance from the reading of Recitals 20 and Recital 16. In other

words, the court should consider and weigh the significance of the connecting factors in the circumstance and not mechanically utilise the connecting factors in a quantitative manner.

2. Accessory Allocation in Article 4(2)

The same scenario referred to in Article 4(1) may also arise in Article 4(2), where the doctrine of AA is quantitatively outweighed by other competing connecting factors. Let us consider the following scenario below.

Assume a US company (“the Operator”), habitually resident in Aberdeen, enters into a contract of charterparty for the supply of a vessel at the North Sea with a Scottish company (“the Charterer”), habitually resident in Scotland. The contract of charterparty is expressly governed by Massachusetts law, but there is a contract of guarantee contained in the charterparty without an express choice of law. The party guaranteeing the obligations of the charterer is also another Scottish company (“the Guarantor”), habitually resident in Scotland. The contract of guarantee is negotiated and concluded in Aberdeen. The place of performance of the Guarantor’s obligation is in Aberdeen. The place of payment is in Aberdeen and payment is to be made in Scottish pounds sterling. A dispute subsequently arises between the Operator and Charterer because the Charterer delayed in supplying the Vessel. The Operator sues the Charterer and Guarantor. There is a dispute as to what law applies to the contract of guarantee. The Operator advocates the application of Massachusetts law to the contract of guarantee, but the Charterer and Guarantor advocate the application of Scots law. If the court is to apply the strong presumption approach, it may simply hold that the law of Scotland applies under Article 4(2) since the Guarantor, as the characteristic performer, is habitually resident in Scotland.²⁰⁵ In the alternative, the court could also hold that under Article 4(3) the US connection(s) does not outweigh the Scottish connections under the contract despite the contract of charterparty that is expressly governed by Massachusetts law. This is because the Operator, Charterer and Guarantor are habitually resident in Scotland, the place of payment is in Scotland, the currency of payment is that of Scotland, and the place of performance has very strong connections with Scotland where the Guarantor is to perform his obligation. If the court is to favour the intermediary approach, it may hold that the contracts of charterparty and guarantee (having a very close relationship)

²⁰⁵ A contract of guarantee is neither a contract of sale nor one for the provision of services under Art 4(1) of Rome I and is therefore to be determined under Art 4(2) of Rome I. *Commercial Marine Piling Ltd*, *supra* n 17. The decision in *Commercial Marine*, *ibid*, approached the application of Art 5 of Brussels I from the perspective that the contract of guarantee was neither a contract for sale nor provision of services, and applied Art 5(1)(a) of Brussels I instead of Art 5(1)(b). See also Recital 17 and 7 of Rome I that emphasises a synergy in the interpretation of sale of goods and provision of services in Brussels I and Rome I.

between the same parties should lead to the application of Massachusetts law under Article 4(3) and Recital 20 through the application of the doctrine of AA that is of special significance as a connecting factor. The court may further hold that despite the real and substantial Scottish connections that support the application of Article 4(2), the law of Massachusetts is manifestly closely connected with the contract, and the place of performance, currency of payment and habitual residence of the parties should not be attributed considerable significance, where contracts that have a very close relationship are involved, as it is the doctrine of AA that should be the significant and decisive factor in that circumstance from the reading of Recital 20 and Recital 16. In other words, the court should consider and weigh the significance of the connecting factors in the circumstances and not mechanically utilise the connecting factors in a quantitative manner.

3. Where Accessory Allocation Is Insignificant

It is submitted that the doctrine of AA should not be utilised despite the contracts having a very close relationship in at least three situations.

First, where there are more than two contracts that have a very close relationship and they are governed by the express choice of law of two different countries, the doctrine of AA should not be utilised to govern another contract that has a very close relationship with both those contracts. The court should regard such a situation as a stalemate and look to the significance of other connecting factors. Let us assume that in a letter of credit contract, the issuing bank (a Nigerian bank habitually resident in Nigeria) and beneficiary (a Nigerian seller) in their correspondence expressly choose Nigerian law to govern their contract, the confirming bank (a French bank habitually resident in France) and beneficiary in their correspondence expressly choose French law to govern their contract, but the confirming bank and issuing bank make no express choice of law. It is submitted here that in this case neither Nigerian law nor French law should automatically lay claim to being manifestly more closely connected with the contract of the confirming and issuing bank based on the application of the doctrine of AA. There is a stalemate and the doctrine of AA should be regarded as insignificant. The court must weigh the significance of other connecting factors such as the place of payment and performance, terms of the contract and object of the contract, place of negotiation and conclusion, and language of the contract in determining which law applies under Article 4.

Second, where the express choice of law has been vitiated by the court on grounds of fraud, duress, undue influence or failure to protect a weaker party, the court should not use that express choice of law that has been vitiated to infect the other contract(s). For example, assume a lease contract governed by French law is entirely voided by the court because the landlord made the tenant sign the contract (including the applicable law) under duress. In this case

the court should not use that same express choice of law to govern the contract guaranteeing the lease agreement by the application of the doctrine of AA. It is indeed possible that if the court applies Article 4, it may reach the conclusion that French law applies to the contract of guarantee. But this must not be done by the application of the doctrine of AA. This view produces just results in protecting weaker parties and also produces certainty in making the escape clause an exceptional remedy.²⁰⁶

Third, Professor Corneloup considers three scenarios (distribution contract followed by successive sales, joint venture agreement followed by successive loan and sales agreement, and loan agreement secured by a real estate collateral) where the (principal) contract falls within the scope of Rome I, but the other (ancillary) contract(s) falls to be determined by another PIL statute such as the Hague Convention that the Member State court is also a party to. Professor Corneloup submits that Recital 20 or 21 cannot apply in this situation. To do so would be to import considerations that determine the applicable law from one PIL statute into another.²⁰⁷ It is submitted that the same position should also apply to situations where the law applicable to the principal contract in the absence of an express choice of law has already been determined in a (first) court that is not a party to Rome I or Brussels I, or one that applies a different PIL rule in the determination of the applicable law as was the case in *Lexington* discussed above. It may be illegitimate for the second court to utilise the law applicable to the principal contract in the absence of choice as determined under a foreign PIL rule to infect the ancillary contract under consideration.

G. CONCLUSION

The framers of Rome I elevated the doctrine of AA as a special connecting factor under Article 4(3) and (4). The application of the doctrine under the Convention is by no means free from controversy, especially in English courts. The author takes the position that the rationale for elevating the doctrine of AA to one of special significance among other connecting factors in determining the applicable law in the absence of choice principally rests on

²⁰⁶ A similar view has been expressed in respect of the application of the doctrine of AA under Art 4(3) of Rome II: Okoli and Arishe, *supra* n *, 539–41; see also *Hillside (New Media) Limited v Biarte Baasland* [2010] EWHC 1941 (QB) [42], [43], [46]; T Kadner Graziano, “Freedom to Choose the Applicable Law in Tort – Articles 14 and 4(3) of the Rome II Regulation” in Ahern and Binchy, *supra* n 97, 125–27; *Cf Sapporo Breweries Ltd v Lupofresh Ltd* [2012] EWHC 2013 (QB) [41]–[46]; Th M De Boer, “Party Autonomy and its Limitations in the Rome II Regulation” (2007) 9 *Yearbook of Private International Law* 19, 27–28; Fawcett and Carruthers, *supra* n 135, 802–03; Dickinson, *supra* n 123, 345–47; A Rushworth and A Scott, “Rome II: Choice of Law for Non-contractual Obligations” [2008] *Lloyd’s Maritime and Commercial Law Quarterly* 274, 280–01, 303–05.

²⁰⁷ *Supra* n 1, paras 16–19.

convenience, reconciling the goals of legal certainty and flexibility, and enhancing the sound administration of justice.

There are, however, certain challenges or issues that will confront Member State courts in honouring Recitals 20 and 21 to Rome I. The first is the determination of whether the doctrine of AA takes principal significance in Article 3 or Article 4. The second is the determination of whether the distinction between connections to legal system or geography is of significance in applying the doctrine of AA under Article 4. The third is the guide or measure to determining which types of contracts have a very close relationship and are deserving of the application of the doctrine of AA. Furthermore, even where the contracts are certainly very close (such as back-to-back contracts), problems arise as to whether the doctrine of AA applies in all cases, and where it applies, the proper approach to utilising the doctrine. The fourth challenge is to measure how significant the doctrine of AA is under Article 4 in displacing the main rule(s) when compared with other important factors. The final issue is the possibility that the doctrine may turn out to be insignificant in certain cases even where the contracts in question have a very close relationship.

The above issues, though discussed and analysed in this article, expose the danger that uniformity and legal certainty may be threatened among Member State courts under Article 4 while honouring Recitals 20 and 21. Indeed, if the doctrine of AA is to be taken seriously by courts of Member States while interpreting Article 4(3) and (4), the European legislators, the CJEU and academics need to take the challenge further by providing more clarity on the relationship between Recitals 20 and 21, and Article 4 of Rome I.