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A TRAP FOR REMITTANCE-BASIS TAXPAYERS: THE SITUS OF CHOSES IN ACTION

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Choses in action are personal rights of property which can only be claimed or enforced by action, and not by taking physical possession.[1] As such these rights of property form the fundamental legal basis of almost all commercial transactions: each contracting party's contractual rights are a chose in action, debts are choses in action, as are shares, and even a cause of action arising from a breach of contract or a civil wrong is a chose in action.

Despite this fact, in many circumstances the potential tax consequences of the existence of contractual choses in action are not considered and this appears to be done with the tacit agreement of HMRC. For example, if a UK resident non-domiciliary agrees to purchase an asset to be delivered abroad, it is not usually analysed whether the chose in action that the taxpayer acquires under the contract is property received in the UK; instead the focus is on where the asset is delivered and where the money is paid. As long as HMRC are content to follow the "real" assets in these sorts of circumstances, no problems will arise in practice, even if as a matter of law things may be more complicated.

One situation in which the intermediate stage involving the choses in action cannot be, and is not, ignored, however, is where the vendor's chose in action is a right to contingent and uncertain consideration. This is a "*Marren v. Ingles* chose in action", after the famous case in which the taxpayer sold his shares for a fixed sum of money plus the right to receive further amounts if certain unpredictable events occurred, calculated by reference to the value of the shares at that later time.[2] When that happens, the explicit capital gains tax analysis is that there are two disposals: first of the shares in return for the right to the uncertain future payment (which may not be worth very much) and second a disposal of the chose in action in return for whatever consideration is eventually received.

The correct remittance analysis of this type of scenario is considered in this article. At the first stage of analysis, the relevant question is whether the *Marren v. Ingles* chose in action has its situs in the UK according to the common law rules on the situs of assets and those rules are the subject-matter of the following section. Whilst an issue could arise as to whether the *Marren v. Ingles* chose in action is a debt for these situs purposes (even though it is not initially a debt for CGT purposes),[3] it will be seen that developments in the European law on jurisdiction are moving the law to a unified question of where is the chose in action enforceable? The previous distinction between a test of "where is the debtor resident?" for debts and "where is the chose in action enforceable?" for other contractual choses in action is thus gradually being eroded.

At the second stage of analysis (the disposal of the chose in action), however, before one even gets into the remittance rules it must be assessed whether the remittance basis can actually apply. That would require a foreign chargeable gain, which in turn depends upon the location of the asset disposed of, but at this point it is a different test of situs to the common law test and taxpayers and their advisers must be alert to that change in focus. This is discussed in the third section.

THE SITUS OF A CONTRACTUAL CHOSE IN ACTION WHEN APPLYING THE REMITTANCE-BASIS RULES

The statutory context

Whether the tax is income tax or capital gains tax, the rules for determining when a gain or income is remitted are contained in ITA 2007 s.809K et seq.[4] The basic provision is that an individual's income or chargeable gains are remitted to the UK when:

a. money or other property is brought to or received or used in, the UK, by or for the benefit of a relevant person (such as the taxpayer); and
b. that property is or derives (wholly or in part and directly or indirectly) from the income or chargeable gains, (and, in the case of derivative property, it must be property of a relevant person).[5]

For present purposes it is condition (a) that is of interest because it requires property to be "brought to, or received or used in, the United Kingdom". Whilst a chose in action would not usually be "brought" to the UK, the courts have accepted that choses in action do have a situs and it ought to follow that they can be received in the UK. [6]

Further, the fact that choses in action may, necessarily, not be enjoyed in possession means that one has to apply a more appropriate definition of "used" which would include the whole or partial fruition of the legal rights that make up the chose in action. From this it follows that, for example, the receipt of money pursuant to a chose in action which is a debt is a "use" of the chose in action and if the debt was situated in the UK at the time, it will have been used in the UK.

In either case, therefore, the crucial factor is going to be where the chose in action is situated and because ITA 2007 does not provide any rules for determining where that is, one must turn to the rules of private international law.

The general rule on the situs of debts and rights of action in contract

The general rule for the situs of a debt which is not a specialty has, for over a century, been stated to be simply where the debtor is resident because that is where the debt can be enforced: [7]

> "…bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on these instruments were assets where the debtor lived, and not where the instrument was found. In truth, with respect to simple contract debts, the only act of administration that could be performed by the ordinary would be to recover or to receive payment of the debt, and that would be done by him within whose jurisdiction the debtor happened to be."[8]

> "It is clearly established that a simple contract debt is locally situate where the debtor resides — the reason being that that is, prima facie, the place where he can be sued: *New York Life Insurance Co. v. Public Trustee* [1924] 2 Ch. 101, 114, *per* Warrington L.J."[9]

And this is the rule that HMRC say is applicable,[10] although it should be noted that residence in this context means the private international law concept, not the tax concept. For example, a company is resident, for present purposes, where it carries on its business, where it is incorporated and where it has its registered office, rather than where it has its place of central control and management.[11]

On the other hand, the ordinary rule for a chose in action which is a right of action in contract, but not a debt, is that it is situated in the state where the action may be brought.[12]

Whilst both of these rules appear to be concerned with locating a place where the debtor can be sued, with "residence" being a shortcut to the place where the debt can be enforced, that is not entirely correct and the issue of situs is not as simple as saying that there is a single rule based on enforceability.

In the first place, the fundamental principle of common law jurisdiction in England is (and was) based on the presence of the defendant within England at the time that the claim form (previously the writ) is issued:

> "The root principle of the English law about jurisdiction

> is that the judges stand in the place of the Sovereign in whose name they administer justice, and that therefore whoever is served with the King's writ, and can be compelled consequently to submit to the decree made, is a person over whom the Courts have jurisdiction. In other countries that is different; in Scotland jurisdiction is to a considerable extent made dependent upon the presence within the jurisdiction of property of the defender who may be outside the jurisdiction."[13]

Residence is not and has never been recognised as a sufficient basis for the English courts taking jurisdiction over a defendant – if the Defendant was nimble footed enough to escape the country before the writ could be issued, the Claimant would have to wait for him to return or else seek permission to serve the writ outside of the jurisdiction (a permission which is granted at the court's discretion). Conversely, a non-resident who happened to be in England, no matter how fleetingly, could be served with a writ and subjected to English jurisdiction.[14]

It is more than a little odd, therefore, that the notion that residence is the touchstone for jurisdiction has become so embedded in the case law on the situs of choses in action. One explanation could be that when this area of law was developing it was not unreasonable to suppose that a person would be present where he was "resident" because international travel was a far more lengthy and involved process than it is today. Alternatively, it could be that "residence" was thought to be the best approximation of the varied global rules on jurisdiction. The case law does not provide any clear guidance on this question.

Another reason why "residence" is not simply a derivation from the general rule the contractual choses in action are situated where they are enforceable is that a principle appears to have developed in the case law that a debt cannot be situated in a jurisdiction which would enforce the debt, if the debtor is not also resident there. In other words these cases hold that "residence" has taken on a life of its own and has completely supplanted the original logic.

The origins of this questionable principle can be found in *Deustche Bank und v. Banque des Marchands de Moscou*, where Romer LJ said:[15]

> "The reason for assigning this locality to a simple contract debt was that the place where the debtor resides was in nearly every case the place where it was recoverable. Even in earlier times, it might, of course, occasionally have happened that judgment could be obtained against a debtor in a country where he did not reside. But it was probably thought desirable for the sake of uniformity to adopt in all cases the test of residence rather than the test of recoverability. However, whatever the reason may have been, the rule was laid down, as I have stated it in Attorney-General v. Bouwens…and was recognized by this court as still being the rule in the case of *New York Life Insurance Company v. Public Trustee…*"
>
> "But I know of no authority for the proposition that a simple contract debt is situate in this country at a time when the debtor is not resident here merely because he can be sued by putting into operation the provisions of Order XI. It would be strange if it were so. For it is always in the discretion of the court in cases coming within the rule to give or refuse leave for service out of the jurisdiction, a discretion depending upon the balance of convenience."

One can agree that a debt ought not to be situated in a state where jurisdiction over that debt would only be taken on a discretionary basis, but if jurisdiction would be taken in a state where the debtor was not resident, on a non-discretionary basis, there is no reason (other than pure convenience) to reject that particular jurisdiction as a possible location of the debt. Indeed, the use of an exclusive jurisdiction agreement could mean that the debt is only enforceable in, for example, the state of residence of the creditor, not that of the debtor, in which case the rule based on residence would become completely detached from the rule based on enforceability.

The potential for detachment between a rule based on residence and an explanation based on jurisdiction/enforceability has become even more apparent since the English common law rules on jurisdiction were replaced in many private law circumstances, by the European rules on jurisdiction. Those rules originally came into force in the UK in 1978,[16] and the current rules can be found in Brussels I Regulation (Council Regulation (EC) No 44/2001).

Under the Brussels Regulation, the general basis of jurisdiction is the defendant's domicile, if he is domiciled in an EU Member State.[17] For individuals, the national law definition of domicile is applicable, which in the UK requires a person to be resident in the UK and to have a substantial connection with the UK.[18] For corporations there is an autonomous EU definition which provides that a company is domiciled in the place where it is incorporated, where it has its central administration *and* where it has its principal place of business.[19] The general rule is also supplemented by a number of restrictive and expansive rules. Thus, for example, the Claimant can choose to sue the Defendant in a matter relating to a contract in the courts of the place of performance of the contractual obligation in question.[20]

Given the overhaul of jurisdiction rules in Europe which the Brussels Convention and Regulation have led to, it ought to be expected that this change has or will precipitate a change in the approach of the English courts to the situs of debts and there are, indeed, signs that that is happening. For example, in *Hillside (New Media) Ltd v. Baasland*, Andrew Smith J noted the old rule based on residence but said that the new primary ground of jurisdiction was domicile and thus situs depended upon the debtor's domicile:

> "The general rule stated in Dicey, Morris & Collins in The Conflict of Laws, 14th Ed, Vol 2, Rule 120 is that "Choses

> in action are generally situate in the country where they are properly recoverable and enforceable". Although at common law this principle led to the general rule that (with some exceptions that are irrelevant for present purposes) debts are situate where the debtor resides (see Dicey, Morris & Collins, loc cit, at para 22-026), its application in a case such as this, where the debtor is a corporation and the case is covered by the Lugano Convention, depends, as I see it, upon the debtor's domicil. That is the primary ground on which a court takes jurisdiction under article 2 of the Lugano Convention."[21]

Of course, references to residence in the case law post-Brussels Convention can still be found, but one needs to be careful when relying on them. For example, *Kwok* was a decision of the Privy Council in an appeal from the Court of Appeal of Hong Kong. Under the terms of the Brussels Convention at the time when the facts in *Kwok* occurred (and, indeed, when the judgment was handed down), Article 60 provided that the Convention only applied to the European territories of the signatory states.[22] There would have been no reason, therefore, for the Privy Council to express any view on the effect of the European developments in England.

Evidence of a developing area of law can also be found in Dicey and Morris, where the authors suggest that "residence" should be interpreted to fit with these new jurisdictional rules.[23] They say that for individuals, domicile (in the private international law sense) will very often coincide with residence and for corporations, although a company may be resident in a place where it is not domiciled, the result of applying the situs rule based on residence will normally be a state with jurisdiction over the debt because the debt is payable there, so situs and jurisdiction will coincide.[24]

This approach has the merit that old case law references to residence do not have to be abandoned, but also has a number of disadvantages. First, there is an obvious risk that if the rule continues to be framed in terms of residence, those applying the law may not be alert to the change in meaning.[25]

Second, the aim of refining the definition of residence is to make it correspond with the jurisdictional rules in the Brussels Regulation, where they apply. Whilst it is fair to say that the domicile and residence of an individual will often match up when applying the UK definition of domicile, the Regulation requires domicile in each state to be established on the basis of the national rules of that state. Thus, domicile in France is determined by the national rules in France, even if the question is being asked in an English court. Establishing that the concepts of domicile and residence correspond in English law is not sufficient to show that they generally match up across the whole EU, and is therefore not sufficient to show that residence is still capable of coinciding with jurisdiction.[26]

Third, the possibility of an exclusive jurisdiction agreement significantly undermines the argument that jurisdiction will match up with residence because the parties may choose to give exclusive jurisdiction to a state where the debtor is not resident (for example, the place of the creditor's domicile).[27]

A full consideration of these issues may in future lead the courts to hold that "residence" is no longer the touchstone it once was and that either a new touchstone is to be used, such as domicile (which was the approach of Andrew Smith J in *Hillside (New Media)*) or that it would be more sensible to fall back on the principle that has, at least according to the case law, been the driving force all along: jurisdiction. In my view the latter approach is the most natural result because it would assimilate the rules for contractual choses in action and, as Greer LJ observed in *Sutherland v. Administrator of German Property*, there ought to be no difference in the rule applicable depending on whether one classes a contractual chose in action as a debt or otherwise:

> "The situs of the chose in action cannot be different when we are dealing with the case in which the obligation is to pay damages from that which it is where the obligation is to pay a sum of money as a debt." [28]

Further, domicile would itself be an imperfect approximation of jurisdiction because it is only a universal ground of jurisdiction in the EU (subject to restrictive rules such as those for exclusive jurisdiction agreements) and even for EU member states there are circumstances when the Brussels Regulation does not apply, and states must use their traditional rules of jurisdiction.[29]

One should not expect this development to happen overnight, it will most likely be an incremental change. In the meantime, taxpayers and their advisers can have the best of both worlds. On the one hand, HMRC's explicit position in their manuals is that debts are situated where the debtor is resident and they ought not to be able to decide otherwise where a taxpayer relies on that statement. On the other hand, if the residence test gives rise to an undesirable result, the taxpayer will be perfectly entitled to point out that the law on jurisdiction has moved on and HMRC's view on situs is no longer correct.

Multiple residences or multiple places of enforcement

Whether the test for situs is based on residence (for simple debts) and jurisdiction (for other contractual choses in action) or on jurisdiction alone, it is obvious that there will commonly be situations in which the debtor has multiple residences or there are multiple jurisdictions which can enforce the contractual obligation in question. For example, under the private international law rules on residence, a company is located wherever it carries on business, as well as where it is incorporated – if it carries on business in more than one state, it will be resident in more than one state. Similarly, under the Brussels Regulation, a person may be domiciled in more than one state and other jurisdictional rules may give jurisdiction to states in which neither party is domiciled.

As a result of this potential problem, a tie-breaker test has been established which attributes the situs to the place where the primary obligation under the contract is agreed to be performable or, if there is no express or implied agreement on this point, where it would be performed in the ordinary course of business.

Thus in *Jabbour v. Custodian of Israeli Absentee Property*, where the cause of action was a claim for unliquidated damages, Pearson J held that:

> "Where a corporation has residence in two or more countries, the debt or chose in action is properly recoverable, and therefore situated, in that one of those countries where the sum payable is primarily payable, and that is where it is required to be paid by an express or implied provision of the contract or, if there is no such provision, where it would be paid according to the ordinary course of business; Rex v. Lovitt; New York Life Insurance Company v. Public Trustee."[30]

And similarly in *Kwok*:

> "At least, therefore, it is resident in Liberia and accordingly, making the above assumption, has two places of residence. In that situation it is clearly established that the locality of the chose in action falls to be determined by reference to the place — assuming it to be also a place where the company is resident — where, under the contract creating the chose in action, the primary obligation is expressed to be performed...In the instant case the expressed contractual obligation is to pay after 60 days in Liberia and upon presentation in the city of Monrovia."[31]

The difference between the reference in *Kwok* to the place of performance of the primary obligation under the contract and the reference in *Jabbour* to the place where the sum is payable is interesting but probably not material. One is considering the situs of a chose in action owned by one party to the contract and thus its location ought to depend on the primary obligation under that chose in action rather than the contract as a whole.

The place of payment will normally be a place which would have jurisdiction over the chose in action,[32] but it is possible that the place of performance would not have jurisdiction, for example, if the parties entered into an exclusive jurisdiction agreement that gave "exclusive" jurisdiction to two states, neither of which was the place of performance. In those circumstances other supplementary tests would have to be applied.

Conclusion on the situs of contractual choses in action

On the basis that the law has moved or is moving towards a single test for the situs of both simple debts and other contractual choses in action, based on enforceability, the law may be summarised as follows:

a. the chose in action is located where it may be enforced.
b. if there is more than one place in which it may be enforced, it is located where the primary obligation is expressly or impliedly agreed to be performable.
c. if there is no express agreement as to where it must be performed, the chose in action is situated in the place where the primary obligation would be performed in the ordinary course of business.

A* Marren v. Ingles *situation

Consider the following situation: C, a UK-resident non-domiciliary owns shares in a company (X Ltd) which are situated abroad and which are pregnant with a large capital gain. C sells those shares to a foreign branch (in the EU) of a UK bank ("D") in return for an amount equal to the eventual sale proceeds of a UK property owned by X Ltd.

In this case, where there is a disposal for uncertain and contingent consideration, the stage involving the chose in action is explicitly recognised for capital gains tax purposes pursuant to the decision in *Marren v. Ingles*:

> "I think that the Crown is correct in analysing this transaction into an acquisition of an asset (viz a chose in action) in 1970 [the time of the initial disposal] from which a capital sum arose in 1972 [the time that the contingency was satisfied] and that there is no question of a debt being disposed of at any time."[33]

One therefore needs to assess where that chose in action is situated in order to determine whether it is property received in the UK deriving from the gain. Whilst the chose in action is not initially a debt for capital gains purposes, "debt" is a word that takes its meaning from context[34] and it is possible that the chose in action could be a debt for situs purposes.

Under the residence test, the debtor (D) is resident in both the foreign country and the UK because it carries on business in both. Under the enforceability test, the right is enforceable in both the UK (because D is domiciled in the UK) and in the foreign country because the state of the foreign branch would have jurisdiction in relation to disputes arising out of the operations of that branch.[35]

The question is, therefore, where the obligation is to be performed and it is thus crucial for C to agree with D that payment will occur in the place where the branch is, in order to ensure that the chose in action is situated there – requiring payment outside the UK may not, by itself, be enough. This analysis would be further bolstered by giving the courts of that state exclusive jurisdiction over disputes in relation to the contract.

That is not the *Marren v. Ingles* trap, however. The trap arises when one comes to consider what happens when the chose in action is disposed of. Having just worked out that for remittance purposes the asset is situated outside of the UK, it would be tempting to conclude that the same must be true at the second stage. This would be a mistake.

Whilst ITA 2007 forces us into the private international law when determining whether foreign income and gains has been remitted, the question at this second stage is whether the chose in action gives rise to foreign chargeable gains within TCGA s.12. If the gain is not originally a foreign chargeable gain, then the rules on remittance never become relevant – it is a UK gain and subject to full capital gains tax.

A foreign chargeable gain means a chargeable gain accruing from the disposal of an asset which is situated outside the UK,[36] and for this purpose it is the TCGA rules on situs that are relevant, not the private international law rules. There are two rules that are potentially relevant. The first states that a debt is situated in the UK if the creditor is resident in the UK (s.275(1)(c)). The second provides that an intangible asset whose situs is not otherwise determined is situated in the UK if it is subject to UK law at the time it is created (s.275A(3)).

Based on *Marren v. Ingles*, there are good grounds for thinking that s.275(1)(c) only applies to assets which are debts when they are acquired by the asset-holder, not assets that subsequently mature into debts. The alternative would be that a chose in action could shift its situs at the time that the amount due under it becomes fixed and certain. In the event that the *Marren v. Ingles* chose in action is a debt for the purposes of s.275, however, it is on the present facts a debt owed by a person resident in the UK (because C is dealing with the foreign branch of a UK bank), and the gain is not a foreign gain.

In the more likely event that it is not a debt, but merely an intangible asset, the applicable law becomes relevant. Section 275B(3) provides that an intangible asset is subject to UK if it is governed by, otherwise subject to, or enforceable under the law of any part of the UK.

There is no guidance on what "governed by or otherwise subject to or enforceable under the law of any part of the UK" means. Read literally it might be asking: could an interested party go to an English court and ask them to enforce rights relating to the asset? That, however, would be an extremely broad interpretation because English law (including its private international law) will enforce any legal right, subject to jurisdiction and certain exclusions (mainly relating to public policy).

Instead, it is submitted that s.275B is posing a choice of law question: which national law would be applied when deciding a claim seeking to enforce a right forming part of that asset?[37] For UK courts (which is presumably the correct reference point) in relation to an intangible asset which is a cause of action in contract, this will be decided by reference to the Rome I Regulation (EC) No 593/2008 (for contracts concluded after 17 December 2009). If the parties expressly choose the law, that will usually determine the issue. Failing that, if the terms of the contract clearly demonstrate a choice of law that is the law which will be applied.[38]

Where there is no express or implied choice of law, there are a number of specific rules (none of which would normally apply to the sale of shares as they are unlikely to be regarded as "goods" within Article 4(1)) and then, in default of those, it is the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.[39]

Assuming that there is no choice of law in C's contract, the characteristic performance would be the transfer of the shares which is carried out by C.[40] There is no definition of the place of habitual residence for natural persons not acting in the course of business. Nevertheless, on the facts posited, C is resident in England (for tax purposes) and it is likely, therefore, that he is also habitually resident in England for the purposes of the Rome I Regulation. The law governing the contract would therefore be English law and the asset would be a UK situs asset for CGT purposes. The gain on disposal of that *Marren v. Ingles* chose in action would consequently not be a foreign gain and would be chargeable to capital gains tax irrespective of whether the money is remitted.

The way to avoid this trap is to make sure that the contract for sale of the shares explicitly choses a non-UK governing law and it is crucial that advisers recognise this at the time of drafting the agreements because s.275A(3) looks to the time that the asset is created.

CONCLUSION

Once the potential traps that *Marren v. Ingles* type situations involve have been identified they are not especially difficult to avoid, usually by simply drafting the contract of sale to take them into account – the trick is identifying the risks in the first place. The more difficult question is whether these steps should also be taken in cases involving choses in action which do not normally feature explicitly in the tax analysis? A particularly cautious taxpayer might wish to do so, but for now, at least, there are no signs that HMRC have a general policy of analysing the contractual choses in action with a fine toothcomb.

Endnotes

1 *Torkington v. Magee* [1902] 2 KB 427 – reversed in the Court of Appeal on other grounds.

2 [1980] STC 500

3 It does later become a debt, when the contingency is satisfied and the amount becomes certain. The House of Lords, however, in *Marren v. Ingles* were not prepared to countenance the possibility that no chargeable gain could accrue at this later time due to what is now TCGA s.251 – their Lordships said that that provision only applies to assets which are debts when they are first acquired.

4 Applied by TCGA 1992, s.12 for CGT purposes.

5 See ss.809L(2), (3) – the above is, necessarily a summarised and abridged version of the actual rules.

6 There is also some merit in the idea that where the common law applies a fiction (that a chose in action has a situs), one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, by extension of the rule applying to statutory deeming provisions – see *Marshall v. Kerr* [1995] 1 AC 148 at 164 per Lord Browne-Wilkinson.

7 A different explanation of the debtor-residence situs rule was given in *Commissioner of Stamps v. Hope* [1891] AC 476, where Lord Field said that the reason was that the assets to satisfy the debt would "presumably" be where the debtor resided (at 482). Although quoted by Lord Macmillan in *English Scottish and Australian Bank Ltd v. IRC* [1932] AC 238 (at 257), this explanation seems to have fallen by the wayside. Presuming that a person's assets would be situated where he was resident was always slightly ironic given that, following the debt situs rule through, if the debtor was also a creditor, the situs of his debt assets could be anywhere and did not depend upon his residence. Now that a person's tangible and intangible assets can be spread throughout the world and do not have any necessary link with residence, the explanation has even less of a grip on reality.

8 *Attorney General v. Bouwens* (1838) 4 M & W 171 at 191-2 per Lord Abinger. See also Conflict of Laws, Dicey & Morris, 15th Edition, at Ch.22-026.

9 *Kwok v. Commissioner of Estate Duty* [1988] STC 728 at 732 per Lord Oliver.

10 IHTM27091

11 *Kwok* at 733.

12 Dicey & Morris at Ch.22-046.

13 *John Russell & Co Ltd v. Cayzer Irvine & Co Ltd* [1916] 2 AC 298 at 302, per Viscount Haldane.

14 For example, the defendant was visiting London for a few days in *Colt Industries Inc v. Sarlie (No.1)* [1966] 1 WLR 440 when he was successfully served.

15 (1931) unreported but cited and applied by Roxburgh J in *Banque des Marchands de Moscou (Koupetschesky) (No.3)* [1954] 1 WLR 1108. It was also mentioned in *Re Claim by Helbert Wagg* [1956] 2 WLR 183, but on a purely obiter basis, as Upjohn J recognised at 342.

16 Following the UK's accession to the Brussels Convention (OJ 1978 L 304/1).

17 Article 2.

18 Civil Jurisdiction Order 2001, Schedule 1(9). Note that this is not the common law conception of domicile that tax advisers are familiar with.

19 Article 60 – these are alternatives, so a company can be domiciled in more than one state.

20 Article 5(1).

21 [2010] EWHC 3336 (Comm) at paragraph 33. The Lugano Convention is a similar document to the Brussels Convention that applies between EU Member States and other members of the European Free Trade Area (Denmark, Iceland, Norway and Switzerland).

22 Except for certain French overseas territories. Article 60 was removed by Article 21 of the 1989 Accession Convention.

23 Ch.22-031, 22-032

24 See further below for cases where a debt or chose in action has multiple potential locations.

25 For example, Lord Hobhouse quoted passages from Dicey and Morris in *Societe Eram Shipping Co Ltd v. Compagnie Internationale de Navigation* [2004] 1 AC 260, including the statement that a debt cannot be situated in England if the debtor is not resident here, without mentioning that "residence" may require a special meaning (at paragraph 72).

26 The Jenard Report (published in the Official Journal of the EC in 1979, No C59/2) noted the difficulties that would be encountered in defining domicile and gave examples demonstrating the differences in rules from state to state. For detailed consideration of the definitions of domicile in other contracting states see European Civil Practice, Layton and Mercer, 2nd Edition (2004), Vol.2, chapters 47 – 64.

27 Exclusive jurisdiction agreements are enforceable under Article 23 of the Regulation, subject to certain form requirements. In truth, however, the residence test has never taken into account exclusive jurisdiction agreements.

28 [1934] 1 KB 423

29 There are also circumstances when the Regulation does apply but states are told to use their traditional rules. This will generally only occur when the Defendant is not domiciled in an EU Member State – Article 4(1).

30 [1954] 1 WLR 139 at 146

31 At 733.

32 For example, under Article 5(1) of the Brussels Regulation.

33 *Marren v. Ingles* [1980] STC 500 at 503, per Lord Wilberforce.

34 Ibid at 506 per Lord Fraser.

35 Article 5(5) of the Brussels Regulation.

36 TCGA s.12(4)

37 This is supported by the reference to "the law of any part of the UK". Jurisdiction is concerned with identifying a location where an action may be brought, not the law that will apply in that action. Thus, for example, a right may be enforceable under English law even if an action to enforce it can only be brought in, say, France. Conversely, English courts will enforce contractual rights that may not be enforceable under English law if the governing law is French law, assuming that they have jurisdiction. Only on a wide (and slightly misleading) interpretation of "English law" could this latter scenario be described as a right being enforceable under English law.

38 Article 3(1).

39 Article 4(2).

40 This is because most contracts involve payment of money, so the distinguishing feature of any particular contract will be what the money is paid for. In this case it is paid for the transfer of the shares.