TACIT CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS: PROGRESS OR STAGNATION IN THE COMMON-LAW JURISDICTIONS?

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SUMMARY

The English common-law rules of private international law have, to a large extent, been replaced by European conflicts-law regulations in the United Kingdom (UK). Nevertheless, English common law remains highly influential in numerous jurisdictions. In many legal systems, the private-international-law rules are based fundamentally on the common-law rules developed by English courts. This is problematic since the common-law rules of private international law may be outdated. This article examines the English common-law choice-of-law rules – more specifically, the rules and principles concerning the determination of a tacit choice of law in international commercial contracts. The traditional common-law position is compared to selected common-law jurisdictions – namely, Australia, Canada, India, Israel and New Zealand. Finally, the article highlights the progress (or lack thereof) in the aforementioned common-law jurisdictions in addressing the issues related to the determination of a tacit choice of law in international commercial contracts.

1 INTRODUCTION

The English common-law choice-of-law rules have been superseded in the UK by the rules contained in the Rome Convention,[1] and later, the Rome I Regulation.[2] Nevertheless, the traditional common-law rules and principles

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[1] The Rome Convention on the Law Applicable to Contractual Obligations (1980) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:-41998A0126(02)&from=EN. See Bouwers "Brexit and the Implications for Tacit Choice of Law in the United Kingdom" 2018 39(3) *Obiter* 727 733.

[2] The Rome I Regulation on the Law Applicable to Contractual Obligations (2008) http://eur-lex.europa.eu. See Article 24 of the Rome I Regulation: "This Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply." Member States of the European Union include Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungry, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands,

on choice of law in international commercial contracts remain highly influential in numerous jurisdictions "whose law developed along similar lines".[3] This is somewhat problematic, as there exists considerable uncertainty regarding the common-law choice-of-law rules.

This article examines the English common-law rules and principles on choice of law in international commercial contracts, meaning the rules in force prior to the accession of the UK to the Rome Convention. More specifically, the article focuses on the determination of a tacit choice of law in international commercial contracts. All relevant aspects are taken into account, including the level of strictness of the criteria for inferring a tacit choice of law, the factors that may be taken into account, and the weight of such factors. The common-law position regarding the determination of a tacit choice of law is compared to that under Australian, Canadian, Indian, Israeli and New Zealand private international law. The comparative analysis intends to shed light on whether these common-law jurisdictions have progressed in respect of clarifying the issues related to the determination of a tacit choice of law in international commercial contracts.

2 THE ENGLISH COMMON LAW

As previously mentioned, the traditional English common-law choice-of-law rules have been overtaken by European private-international-law regulations in the UK.[4] Whether this framework will continue in the UK post-Brexit remains to be seen. At present, the European Union (EU) regulations remain in force in the UK. In a notice to stakeholders, the European Commission stated:

> "Since 1 February 2020, the United Kingdom has withdrawn from the European Union and has become a 'third country'. The Withdrawal Agreement provides for a transition period ending on 31 December 2020. Until that date, EU law in its entirety applies to and in the United Kingdom."[5]

In the event that the EU regulations cease to apply in the UK post-Brexit, the UK may have to resort to the traditional common-law position to determine the applicable law.[6] Notwithstanding a possible renaissance in the UK, the common-law rules and principles remain influential in numerous jurisdictions, particularly in the context of choice of law.

Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. However, Denmark is the only country that continues to apply the Rome Convention.

3 See Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* II (2012) 1776.

4 See Bouwers 2018 *Obiter* 730: "The impact that EU law has had on the UK is worth mentioning. More precisely, in the commercial arena, it has revolutionised the rules applicable to dispute resolution in a cross-border context, i.e., those that we would identify as rules of private international law". The EU has established a common framework for the jurisdiction of national courts, the determination of the applicable law and the recognition and enforcement of judgments.

5 The European Commission "Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law" https://ec.europa.eu/info/sites/info/files/file_import/-civil_justice_en_0.pdf (accessed 2020-11-16).

6 See generally, Bouwers 2018 *Obiter* 730 727–746.

2 1 Party autonomy

In the English common law, the legal system by which parties intended their contract to be governed may be termed the proper law of the contract.[7] In *Amin Rasheed Shipping Corporation v Kuwait Insurance Co*,[8] Lord Diplock described the proper law of a contract as "the substantive law of the country which the parties have chosen as that by which their mutually legally enforceable rights are to be ascertained".[9] Frequently cited as the first English authority on party autonomy, the *obiter dictum* of Lord Mansfield in *Robinson v Bland*[10] provided that "[t]he law of the place of contracting can never be the rule, where the transaction is entered into with the express view to the law of another country as the rule by which it is to be governed".[11] The principle of party autonomy has become a significant feature of English private international law.[12] However, a common question is whether the freedom of the parties to select the proper law is completely unfettered.[13] The liberal interpretation of party autonomy starts with the Privy Council decision in *Vita Food Products v Unus Shipping Co Ltd,*[14] where the court held:

> "It is true that in questions relating to the conflict of laws rules cannot generally be stated in absolute terms but rather as *prima facie* presumptions. But where the English rule, that intention is the test, applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy."[15]

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7 The discussion of the English common law is based in part on the article Bouwers 2018 *Obiter* 729 741–745. See, also, Collins *Dicey, Morris and Collins on the Conflict of Laws* II 1777; Graveson *Conflicts of Law* (1974) 405–406; Morris (gen ed) *Dicey and Morris on The Conflict of Laws* (1980) 747–748; North *Cheshire and North Private International Law* (1979) 195. See *Mount Albert Borough Council v Australasian Temperance and General Life Assurance Society* 1938 AC 224 240: "The proper law of the contract means that law which the English court is to apply in determining the obligations under the contract." See also, *Vita Food Products v Unus Shipping Co Ltd* 1939 63 Lloyd's Rep 21 27: "It is now well settled that by English law the proper law of the contract is the law which the parties intended to apply."

8 [1984] AC 50.

9 *Amin Rasheed Shipping Corporation v Kuwait Insurance Co supra* 61–62.

10 1760 2 BURR 1077.

11 As referred to by Morris *Dicey and Morris on The Conflict of Laws* 751. See also Nygh *Autonomy in International Contracts* (1999) 5.

12 Tovey and Spurin "Private International Law Lecture Eleven: The Common Law Rules Governing the Choice of Law in Contract" (11 October 2007) www.nadr.co.uk/articles/articles.php?categories=61 (accessed 2018-07-11) 2; Morris *Dicey and Morris on The Conflict of Laws* 753–754; North *Cheshire and North Private International Law* 199. See, for e.g., *Rex v International Trustee for the Protection of Bondholders Aktiengesellschaft* 1937 AC 500 529; *Vita Food Products v Unus Shipping Co Ltd supra* 27; *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* 1970 AC 583 603.

13 North *Cheshire and North Private International Law* 199; Morris *Dicey and Morris on The Conflict of Laws* 753–754.

14 *Supra*.

15 *Vita Food Products v Unus Shipping Co Ltd supra* 27.

Subject to certain limitations,[16] it appears that the contracting parties have a wide discretion to agree expressly upon a governing law.[17] It seems that a choice of law that bears no connection to the parties or the contract will be permitted.[18] However, it is uncertain whether *dépeçage* (selecting different laws to govern parts of the contract) is allowed under the common law – although common-law jurisdictions have started accepting the possibility of *dépeçage*.[19]

At common law, when parties fail to make an express choice of law, "the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intentions of the parties".[20] Therefore, in the absence of an express choice, it is possible for the court to determine whether there is an implied or inferred choice of law.[21] However, there has been some uncertainty about the applicable test in the absence of an express selection. In *Amin Rasheed Shipping Corp v Kuwait Insurance Co*,[22] the court stated:

> "[T]he first step in the determination of the jurisdiction point is to examine the policy in order to see whether the parties have, by its express terms or by necessary implication from the language used, evinced a common intention as to the system of law by reference to which their mutual rights and obligations under it are to be ascertained".[23]

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16 See generally, Morris *Dicey and Morris on The Conflict of Laws* 753–756 on mandatory rules and public policy considerations. See also North *Cheshire and North Private International Law* 199–202.

17 Morris *Dicey and Morris on The Conflict of Laws* 753. See, for e.g., an *obiter dictum* in *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd supra* 603. See also *Rex v International Trustee for the Protection of Bondholders Aktiengesellschaft supra* 529; and Lord Diplock's dictum in *Amin Rasheed Shipping Corporation v Kuwait insurance Co supra* 50 61: "English conflict rules accord to the parties to a contract a wide liberty to choose the law by which their contract is to be governed."

18 See Morris *Dicey and Morris on The Conflict of Laws* 755: "There appears to be no reported case in which an English court refused to give effect to an express selection by the parties, merely because the other factors of the case showed no connection between the contract and the chosen law." See also Graveson *Conflicts of Law* 410: "The limitations imposed by many Continental systems on this doctrine take the form, followed in the earlier English cases of requiring that the contract should have some connection in fact with the chosen law, such as through the place of making or of performance, or the domicile or nationality of the parties; but the English doctrine is probably now free from such restrictions." However, see North *Cheshire and North Private International Law* 202: "The courts should, and do, have a residual power to strike down, for good reason, choice of law clauses totally unconnected with the contract."

19 See, for instance, the legal position in Australia, Canada and New Zealand below.

20 *Jacobs, Marcus & Co v Crédit Lyonnais* 1884 12 QBD 589 601 (CA). See also Collins *Dicey, Morris and Collins on the Conflict of Laws* II 1777; Morris *Dicey and Morris on The Conflict of Laws* 761.

21 Collins *Dicey, Morris and Collins on the Conflict of Laws* II 1777 and 1799; Morris *Dicey and Morris on The Conflict of Laws* 761; North *Cheshire and North Private International Law* 203. See, for e.g., *Amin Rasheed Shipping Corporation v Kuwait Insurance Co supra* 50 61; *Bonython v Commonwealth of Australia* 1951 AC 201 221; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572 595.

22 *Supra*.

23 *Amin Rasheed Shipping Corporation v Kuwait Insurance Co supra* 61.

In other words, the search must be for the unexpressed intention of the parties.[24] However, in the very same case, Lord Wilberforce came to a different conclusion when[25] he held:

> "What has to be done is to look carefully at all those factors normally regarded as relevant when the proper law is being searched for, including of course the nature of the [contract] itself, and to form a judgment as to the system of law with which that policy in the circumstances has the closest and most real connection."[26]

In practical terms, Lord Wilberforce endorsed a search for an objective connection in the absence of an express choice of law.[27] Therefore, the fine line between a search for a tacit choice of law and a search for the system of law with which the contract has its closest and most real connection is sometimes blurred.[28]

2 2 How strict are the criteria for inferring a tacit choice of law?

The court in *Jacobs, Marcus & Co v Crédit Lyonnais*[29] provided that, in the absence of an express selection, the "true intention" of the parties must be discovered.[30] In order to discover the true or real intention of the parties, rather than a purely hypothetical one, criteria for identifying the choice of law are required to be articulated clearly and stringently.[31] The traditional common-law test, as declared by Lord Diplock in *Amin Rasheed Shipping Co v Kuwait Insurance Co*,[32] required an examination

> "to see whether the parties have, by [the contract's] express terms or by necessary implication from the language used, evinced a common intention as to the system of law by reference to which their mutual rights and obligations under it are to be ascertained."[33]

Marshall opines that the phrase "by necessary implication" suggests a less stringent test than the "clearly demonstrated" criterion of the Rome I

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24 Davies, Bell and Brereton *Nygh's Conflict of Laws in Australia* (2014) 452; Nygh *Conflicts of Laws in Australia* (1991) 272.

25 *Ibid*.

26 *Amin Rasheed Shipping Corp v Kuwait Insurance Co supra* 71.

27 Davies *et al Nygh's Conflict of Laws in Australia* 452; Nygh *Conflicts of Laws in Australia* 272.

28 Collins *Dicey, Morris and Collins on the Conflict of Laws* II 1778 and 1809.

29 *Supra*.

30 *Jacobs, Marcus & Co v Crédit Lyonnais supra* 601.

31 Marshall "Reconsidering the Proper Law of the Contract" 2012 13 *Melbourne Journal of International Law* 501 516; Nygh *Autonomy in International Contracts* 111. See also Graveson *Conflicts of Law* 412: "There is, however, often a 'sense of unreality' in the process of trying to find an intention which may never have existed in respect of the law governing a breach of contract that was never contemplated when the contract was made."

32 *Supra*.

33 *Amin Rasheed Shipping Co v Kuwait Insurance Co supra* 61. See also Marshall 2012 *Melbourne Journal of International Law* 516; Nygh *Autonomy in International Contracts* 111.

Regulation.[34] It is submitted that the former criterion does not go far enough in the pursuance of legal determinability.[35]

2 3 Indicators of a tacit choice of law

The court in *Vita Food Products*[36] stated that, if a choice of law is not expressed, it must "be presumed from the terms of the contract and the relevant surrounding circumstances".[37] To determine whether the relevant intention of the parties is present, the court can infer a choice of law from the terms of the contract, and from the general circumstances of the case.[38]

There are a number of factors from which a court may infer a choice of law. For instance, the use of a standard form that is known to be drafted with reference to a particular system of law may indicate the existence of a tacit choice of law.[39] In *Amin Rasheed Shipping Corp v Kuwait Insurance*,[40] the litigation concerned a claim under an insurance policy that closely followed the wording of the Lloyd's policy schedule to the Maritime Insurance Act, 1906.[41] In finding that English law governed the contract, the court held:

> "There is a strong line of authority from the end of the last century to the present day, showing that the use of a standard form may be a powerful indication of the parties' deemed intention, and a strong connecting link to a particular system of law. The importance attached to this factor arises from the consideration that the terms of a standard form contract may only be interpreted by reference to the system of law under which the standard form has evolved, and that the parties must be deemed to have intended a uniform and predictable interpretation by reference to that system."[42]

However, Nygh believes that "the use of an English standard form, even as peculiarly English as a Lloyd's marine policy, cannot by itself be a useful indicator of a real intention" of the parties in respect of the proper law of the

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34 Marshall 2012 *Melbourne Journal of International Law* 516. See also Bouwers "Tacit Choice of Law in International Commercial Contracts: The Position in South African Law and Under the Rome I Regulation" in Hugo and Möllers (eds) *Transnational Impacts on Law: Perspectives From South Africa and Germany* (2017) 69 74–75 for a discussion of the Rome I Regulation.

35 See Nygh *Autonomy in International Contracts* 111: "In that case, a single factor, such as a choice of jurisdiction clause, may suffice."

36 *Supra*.

37 *Vita Food Products supra* 27.

38 Graveson *Conflicts of Law* 412; Morris *Dicey and Morris on the Conflict of Laws* 761. See *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA supra* 595: "[I]t requires the consideration together of the terms and nature of the contract, and the general circumstances of the case." See also *Rex v International Trustee for the Protection of Bondholders Aktiengesellschaft supra* 529.

39 See, for e.g., *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd supra* 592–595. See also Morris *Dicey and Morris on the Conflict of Laws* 763: "The fact that the form or wording of a contract has been approved or prescribed by the authorities of a given country or by the head office of a commercial undertaking with branches in a number of countries may be a pointer towards the proper law."

40 *Supra*.

41 Sykes and Pryles *Australian Private International Law* 3ed (1991) 605.

42 *Amin Rasheed Shipping Corp v Kuwait Insurance supra* 53.

contract.[43] An express choice of law in related transactions,[44] and the inclusion of language or terminology appropriate to a particular system of law, may also signify a tacit choice of law.[45] Other factors from which a choice may be inferred include the residence of the parties, the nationality of the parties, and the currency in which payment is made.[46] A choice of law in *favorem negotii* (a principle of interpretation whereby an agreement is construed in a manner that sustains its validity) may also be added in this regard.[47] The existence of any of the above-mentioned factors is a mere indication pointing to a common intention of the parties; the inference that a court draws from their existence should depend on all the circumstances of the case.[48]

At common law, the courts have attached considerable weight to the presence of an agreement in the contract stipulating that any dispute shall be submitted to the courts of a particular country, perceiving it as signalling a choice of law.[49] Similarly, a localised arbitration clause also permits the inference that the law of that country was intended as the proper law of the contract.[50] In *Hamlyn v Talisker Distillery*,[51] for instance, Lord Herschell LC stated:

> "[T]he language of the arbitration clause indicates very clearly that the parties intended that the rights under that clause should be determined according to the law of England. The parties agree that any dispute arising out of their contract shall be 'settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way,' it seems to me that they have indicated as clearly as it is possible their intention that that particular stipulation, which is a part of a contract between them, shall be interpreted

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43 Nygh *Autonomy in International Contracts* 115.

44 North *Cheshire and North Private International Law* 206. See also Morris *Dicey and Morris on the Conflict of Laws* 764: "[T]he legal or commercial connection between one contract and another may enable a court to say that the parties must be held implicitly to have submitted both contracts to the same law." See, for e.g., *Re United Railways of the Havana and Regla Warehouses Ltd* 1960 2 All ER 332.

45 *Rex v International Trustee for the Protection of Bondholders Aktiengesellschaft supra* 553–554; *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd supra* 603–608; *Compagnie d' Armement SA v Compagnie Tunisienne de Navigation SA supra* 594. See also Graveson *Conflicts of Law* 427–428; Morris *Dicey and Morris on the Conflict of Laws* 762–763; and North (*Cheshire and North Private International Law* 205) who states that the use of a particular language is a relatively unimportant factor.

46 Morris *Dicey and Morris on the Conflict of Laws* 764; North *Cheshire and North Private International Law* 205–206.

47 Morris *Dicey and Morris on the Conflict of Laws* 765: "[T]he court may incline towards applying a system of law under which the contract would be valid because, so it is said, the parties cannot be assumed to have intended to contract under a law by which their agreement would be invalid. The importance of this argument should not be exaggerated, because the court may find that the intention of the parties was in fact directed towards a law under which, in the event, their contract – or part of it – turned out to be void. It is therefore dangerous to put too much reliance on the argument." See also North *Cheshire and North Private International Law* 206.

48 Morris *Dicey and Morris on The Conflict of Laws* 764.

49 Graveson *Conflicts of Law* 417; Morris *Dicey and Morris on the Conflict of Laws* 761; North *Cheshire and North Private International Law* 203.

50 *Ibid*.

51 1894 AC 202.

> according to and governed by the law, not of Scotland, but of England, and I am aware of nothing which stands in the way of the intention of the parties thus indicated by the contract they entered into, being carried into effect."[52]

This presumption is based on the principle *qui eligit judicem eligit ius* (an express choice of a tribunal is an implied choice of the proper law), which has generally resulted in English courts treating an express choice of a court or arbitral tribunal as an implied choice of the proper law.[53] The principle was pushed to its extreme in *Tzortzis and Sykias v Monarch Line A/B*,[54] where Salmon LJ stated that an arbitration clause raises "an irresistible inference which overrides all other factors".[55] However, this was refuted in *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA*,[56] where the court held that a contract containing an arbitration clause was not necessarily a conclusive factor pointing toward a tacit choice of law, although it was a "weighty" indication that the parties intended the law of that place to govern the contract.[57] Although the court did not go as far as the *Tzortzis* case, it still placed considerable emphasis on a choice of arbitration clause.[58]

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52 *Hamlyn v Talisker Distillery supra* 208. See also *Spurrier v La Cloche* 1902 AC 446 450; *Kwik Hoo Tong Handel Maatschappij v James Finlay & Co Ltd* 1927 AC 604 608–610.

53 North *Cheshire and North Private International Law* 203–204. See also Graveson (*Conflicts of Law* 417) who writes that English courts have generally treated the choice of arbitrators as an automatic choice of the proper law. A choice of jurisdiction clause contains a powerful implication that the law of that country should be applied. See also Morris *Dicey and Morris on the Conflict of Laws* 761: "If they (the parties) agree that the courts of a given country shall have jurisdiction in any matters arising out of a contract, they can – in the absence of evidence to the contrary – be assumed to have intended those courts to apply their own law and thus to have selected that law as the proper law of the contract."

54 1968 1 Lloyd's Rep 337.

55 *Tzortzis and Sykias v Monarch Line A/B supra* 341. See also Graveson *Conflicts of Law* 418–420; Morris *Dicey and Morris on the Conflict of Laws* 762; North *Cheshire and North Private International Law* 204.

56 *Supra*.

57 *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA supra* 596. See also Graveson *Conflicts of Law* 420–424; Morris *Dicey and Morris on the Conflict of Laws* 762; North *Cheshire and North Private International Law* 204–205.

58 For instance, Lord Reid remarked at 584 (*Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA supra*): "[T]he fact that the parties have agreed that arbitration shall take place in England is an important factor and in many cases it may be the decisive factor. But it would in my view be highly anomalous if our law required the mere fact that arbitration is to take place in England to be decisive as to the proper law of the contract." Lord Wilberforce observed at 600: "Always it will be a strong indication; often, especially where there are parties of different nationality or a variety of transactions which may arise under the contract, it will be the only clear indication. But in some cases it must give way where other indications are clear." Finally, Lord Diplock stated at 604: "The fact that they have expressly chosen to submit their disputes under the contract to a particular arbitral forum of itself gives rise to a strong inference that they intended that their mutual rights and obligations under the contract should be determined by reference to the domestic law of the country in which the arbitration takes place, since this is the law with which arbitrators sitting there may be supposed to be most familiar. But this is an inference only. It may be destroyed by inferences to the contrary." See, also, *Bangladesh Chemical Industries Corp v Henry Stephens Co Ltd* 1981 2 Lloyd's Rep 389 (CA) 392, in which the court acknowledged that an arbitration clause choosing London as the seat of arbitration no longer automatically led to the inference that English law was the law chosen by the parties.

3 AUSTRALIA

Subsequent to British settlement in 1788, the various British colonies recognised in Australia were subject to the common law as developed by British courts.[59] The modern Australian system "has increasingly developed an independent common law, distinct from that applied in the courts of the United Kingdom".[60] Nevertheless, in the realm of private international law, Australia is still greatly influenced by English common-law rules relating to the determination of the applicable law.[61] Therefore, Australian "choice of law rules are principally the product of the common law".[62]

3 1 Party autonomy

Following the traditional English-law rule,[63] Australian courts refer to the "proper law of the contract" to describe the law that creates and governs an international commercial contract.[64] In the leading case of *Akai Pty Ltd v The People's Insurance Co Ltd*,[65] the court held that the proper law of the contract is the system of law that the parties intended to apply.[66] Therefore, the principle of party autonomy is generally accepted in Australian private international law.[67] The Australian Law Reform Commission (ALRC) has also recommended that the parties' right to choose the law governing their

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The court did state, however, that an arbitration clause in the contract "is of the very first importance".

59 The discussion on Australia is based in part on Bouwers *Tacit Choice of Law in International Commercial Contracts: A Global Comparative Study* (2021). See Mills "Australia" in Basedow, Rühl and Asensio (eds) *Encyclopedia of Private International Law* vol 3 (2017) 1879.

60 See Mills in Basedow *et al Encyclopedia of Private International Law* 1880: "[T]he relationship between the common law systems has become one of mutual influence rather than deference."

61 Mills in Basedow *et al Encyclopedia of Private International Law* 1882.

62 Tilbury, Davis and Opeskin *Conflict of Laws in Australia* (2002) 727.

63 Graveson *Conflicts of Law* 405-406; Morris *Dicey and Morris on the Conflict of Laws* 747–748; North *Cheshire and North Private International Law* 195. See *Mount Albert Borough Council v Australasian Temperance and General Life Assurance Society supra* 240: "The proper law of the contract means that law which the English court is to apply in determining the obligations under the contract." See also *Vita Food Products v Unus Shipping Co Ltd supra* 27: "It is now well settled that by English law the proper law of the contract is the law which the parties intended to apply."

64 See, for instance, *Dundee Ltd v Gilman & Co Pty Ltd* (1968) 70 SR (NSW) 219; *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd* (1989) 18 NSWLR 172; *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418; *Engel v Adelaide Hebrew Congregation Inc* (2007) 98 SASR 402.

65 *Supra*.

66 *Akai Pty Ltd v The People's Insurance Co Ltd supra* 440–442. See also Mortensen *Private International Law in Australia* (2006) 389.

67 Davies *et al Nygh's Conflict of Laws in Australia* 441–442; Marshall 2012 *Melbourne Journal of International Law* 505–506; Mortensen *Private International Law in Australia* 389; Mortensen, Garnett and Keyes *Private International Law in Australia* 3ed (2019) 443; Nygh *Conflicts of Laws in Australia* 272; Tilbury *et al Conflict of Laws in Australia* 714–715. See, for e.g., *US Surgical Corp v Hospital Products* (1983) 2 NSWLR 157 189–190; *Akai Pty Ltd v The People's Insurance Co Ltd supra* 440.

contract should be upheld.[68] However, the extent to which parties may exercise their choice of law is uncertain. On the one hand, there is authority in support of the view that a choice of law must have some connection to the parties or the contract.[69] On the other hand, it has been argued that a connection between the chosen law and the parties (or contract) is not essential.[70] The latter view is supported by the ALRC.[71] On the issue of *dépeçage*, the court in *Wanganui-Rangitikei Electric Board v Australian Mutual Provident Society*[72] held:

> "The whole theory which lies at the root of private international law, however difficult that theory may be in application, is that the law of one country, and one country alone, can be the proper or governing law of the contract."[73]

However, subsequent case law suggests that the courts are willing to accept the possibility of admitting *dépeçage*.[74] Concerning the choice of a non-national system of law, Sykes and Pryles state that "Anglo-Australian courts and writers have generally taken the view that a contract must be governed by an existing system of law of a nation state or part of a nation state".[75] There is no indication that an Australian court will be prepared to accept a direct choice of a non-state system of law in international commercial contracts.[76]

The manner in which the parties may express their choice is by stating explicitly that the law of a specific country shall be the proper law of the contract.[77] For instance, in *Akai*, the court gave effect to a choice of law clause in the contract that stipulated that the insurance policy should be governed by the law of England.[78] Where the parties to the contract express

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68 Australian Law Reform Commission *Choice of Law* (Commonwealth of Australia 1992) 84.

69 See *Re Helbert Wagg & Co* [1956] CH 323 341; *Kay's Leasing Corp v Fletcher* (1964) 64 SR (NSW) 195 205; *Queensland Estates Pty Ltd v Collas* [1971] QD R 75 80–81. See also Mortensen *et al Private International Law in Australia* 445; Nygh *Conflicts of Laws in Australia* 274.

70 See *Vita Food Products v Unus Shipping Co Ltd supra* 290; *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725 747; *Re Bulong Nickel Pty Ltd* (2002) 42 ACSR 52 66. See also Mortensen *et al Private International Law in Australia* 445–446; Nygh *Conflicts of Laws in Australia* 274; Sykes and Pryles *Australian Private International Law* 597–598.

71 Australian Law Reform Commission *Choice of Law* 85.

72 (1934) 50 CLR 581.

73 *Wanganui-Rangitikei Electric Board v Australian Mutual Provident Society supra* 604.

74 See *Tomkinson v First Pennsylvania Banking & Trust Co* [1961] VR 277 282–285; *Samarni v Williams* [1980] 2 NSWLR 389. See also Mortensen *et al Private International Law in Australia* 453–454; Sykes and Pryles *Australian Private International Law* 584–589.

75 Sykes and Pryles *Australian Private International Law* 594.

76 Sykes and Pryles *Australian Private International Law* 594–595.

77 Davies *et al Nygh's Conflict of Laws in Australia* 445–448; Mills in Basedow *et al Encyclopedia of Private International Law* 1882; Mortensen *Private International Law in Australia* 389; Nygh *Conflicts of Laws in Australia* 272; Tilbury *et al Conflict of Laws in Australia* 734.

78 *Akai Pty Ltd v The People's Insurance Co Ltd supra* 423. See also *Dundee Ltd v Gilman & Co Pty Ltd supra* 219.

such an intention, subject to certain limitations,[79] the courts will give effect to the chosen law as the proper law of the contract.[80] In *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd*,[81] the court held that "[t]here is no question but that when the parties make an express choice of law, then ordinarily that choice will be effective".[82] However, giving effect to a choice of law is considerably more difficult where the parties fail to expressly choose the governing law.[83]

It is often problematic to determine whether a contract is one in which the parties' choice of law can be inferred or one in which an intention is imputed by reference to the closest and most real connection to the contract.[84] There has been some uncertainty about the applicable test in the absence of an express choice of law. In some Australian cases, where there has been no express choice of law by the parties, the court did not embark upon a search for an implied intention and immediately proceeded to determine the objective proper law.[85] However, in *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd*,[86] Brownie J held:

> "The correct view is that the proper law of the contract is determined by the substantive view, or the inferred intention of the parties, where that inference can be drawn. Where that inference cannot be drawn, then and only then should the court go on to impute an intention to the parties, by reference to the system of law having the closest and most real connection with the transaction."[87]

In *Akai Pty Ltd v The People's Insurance Co Ltd*,[88] the majority of the High Court of Australia appeared to be of the same view, stating:

> "It is not a question of implying a term as to choice of law. Rather it is one of whether, upon the construction of the contract and by the permissible means of construction, the court properly may infer that the parties intended their contract to be governed by reference to a particular system of law."[89]

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79 See, for e.g., Mortensen *et al Private International Law in Australia* 446–447 for a discussion of overriding mandatory rules and public-policy considerations. See also Sykes and Pryles *Australian Private International Law* 596–600.

80 Mortensen *Private International Law in Australia* 390. See also ALRC 81; Davies *et al Nygh's Conflict of Laws in Australia* 445–447; Mortensen *et al Private International Law in Australia* 443; Nygh *Conflicts of Laws in Australia* 272; Sykes and Pryles *Australian Private International Law* 596; Tilbury *et al Conflict of Laws in Australia* 734.

81 *Supra*.

82 *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd supra* 185.

83 Marshall 2012 *Melbourne Journal of International Law* 511.

84 Mortensen *Private International Law in Australia* 394.

85 See, for e.g., *Boissevain v Weil* (1949) 1 KB 482 490–491*; Busst v Lotsirb Nominees Pty Ltd* (2003) 1 Qd R 477, (2002) QCA 296; *Attorney-General of Botswana v Aussie Diamond Products Pty Ltd* (No 3) (2010) WASC 141 207. See also Mortensen *et al Private International Law in Australia* 448–449; Sykes and Pryles *Australian Private International Law* 601–602.

86 *Supra*.

87 *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd supra* 185.

88 *Supra*.

89 *Akai Pty Ltd v The People's Insurance Co Ltd supra* 441.

Both cases exemplify that the court is required to look for an implied choice of law before moving onto an objective determination as to what the proper law should be.[90]

3 2 How strict are the criteria for inferring a tacit choice of law?

The ALRC notes that there exists considerable uncertainty over the extent to which a court may infer a choice of law by the parties.[91] At common law, the courts have shown a willingness to search for the inferred intention in the contract, even in circumstances where it was unlikely that the parties gave choice of law much thought.[92] This enthusiasm suggests a low level of strictness applied in inferring a choice of law. However, in *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd*,[93] the court stated that there is no reason why the actual choice of law of the parties should not be effective, provided that the choice is properly inferred.[94] Similarly, in *Akai Pty Ltd v The People's Insurance Co Ltd*,[95] the court held:

> "It is not a question of implying a term as to choice of law. Rather it is one of whether, upon the construction of the contract and by the permissible means of construction, the court properly may infer that the parties intended their contract to be governed by reference to a particular system of law."[96]

Both cases provided that the parties' choice of law must be "properly inferred", which seems to support the fact that the court must be certain that a choice of law exists. Furthermore, Australian authors Mortensen, Garnett and Keyes propose that where the parties have no common intention as to the proper law, or they have failed to leave conclusive evidence of that intention, a court must look to objective factors in order to determine the

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90 Davies *et al Nygh's Conflict of Laws in Australia* 451–452; Mortensen *Private International Law in Australia* 394; Sykes and Pryles *Australian Private International Law* 600–601. See Mortensen *et al Private International Law in Australia* 447: "If there is no effective express choice of law, the court is required to determine whether there is an actual but unexpressed choice of law." See also *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd supra* 186: "[T]he proposition that if the parties expressly agree that their contract will be governed by the law of a particular country, that choice is ordinarily effective, I see no reason in logic why the actual choice of the parties should not also be ordinarily effective, provided that that actual choice can properly be inferred. … [S]o long as the distinction is kept firmly in mind, it seems right that, in the absence of expressed actual intention, inferred actual intention should take precedence over imputed intention, that is, the assumption that the parties did not actually address their minds at all to the question of the proper law of the contract."

91 Australian Law Reform Commission *Choice of Law* 83.

92 Davies *et al Nygh's Conflict of Laws in Australia* 451; Marshall 2012 *Melbourne Journal of International Law* 516; Nygh *Autonomy in International Contracts* 111. See, for e.g., *Amin Rasheed Co v Kuwait Insurance Co supra* 60–65.

93 *Supra*.

94 *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd supra* 186.

95 *Supra*.

96 *Akai Pty Ltd v The People's Insurance Co Ltd supra* 441.

proper law.[97] The phrase "conclusive evidence" corresponds with the threshold outlined in *Akai* and *John Kaldor*, and, it may be argued, represents a high level of strictness to be applied when inferring a choice of law.[98]

It is not clear what test or level of strictness is supported by the ALRC. On the one hand, the Commission recommends that:

> "The parties' right to choose the law to govern their contract should be upheld provided that the choice is express or can be clearly inferred from the circumstances. If the indicators are not clear, the court should not be free to infer the choice but should apply an objective test of the proper law."[99]

The fact that a choice of law must be "clearly inferred" is consistent with a high level of strictness. On the other hand, the ALRC states that "[i]t seems desirable to limit the inquiry into intent to cases where it is reasonably clear that there was an original intention".[100] Nygh opines:

> "If the tacit choice need only to be established 'with reasonable certainty', the court need only be satisfied that it was more likely than not that the parties intended a particular legal system to apply."[101]

This approach reflects the traditional common-law position, and is, to some extent, less strict than the recommendation set out by the ALRC and the threshold in the *John Kaldor* and *Akai* cases.[102]

3 3 Indicators of a tacit choice of law

The traditional common-law approach allows a tacit choice of law to be inferred by the terms of the contract or the general circumstances of the case. For example, in *Amin Rasheed Shipping Corp v Kuwait Insurance Co*,[103] the majority of the judges held that the test for determining whether there exists a tacit choice of law involves an examination of the contract

> "in order to see whether the parties have, by express terms or necessary implication from the language used, evinced a common intention as to the system of law by reference to which their mutual rights and obligations under it are to be ascertained."[104]

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97 Mortensen *Private International Law in Australia* 394; Mortensen *et al Private International Law in Australia* 448: "Where the parties' intentions in this respect are not expressly or by implication to be found in the contract, a court must look to objective factors in order to determine the proper law of the agreement."

98 Marshall 2012 *Melbourne Journal of International Law* 516.

99 ALRC (fn 68) 84.

100 ALRC (fn 68) 83.

101 Nygh *Autonomy in International Contracts* 111: "In that case a single factor, such as a choice of jurisdiction clause, may suffice."

102 Nygh (*Autonomy in International Contracts* 111) states that the approach reflects the Anglo-Commonwealth law.

103 *Supra*.

104 *Amin Rasheed Shipping Corporation v Kuwait Insurance Co supra* 61.

The majority of the Australian High Court in *Akai Pty Ltd v The People's Insurance Co Ltd* cited this view with approval;[105] the court held that the determination of a tacit choice of law "requires consideration of the terms and nature of the contract and 'general circumstances of the case'".[106] Therefore, in deciding whether the parties have made a tacit choice of law, an Australian court must examine the terms of the contract and its surrounding circumstances.[107]

There are no conclusive presumptions in searching for an unexpressed choice of law.[108] Therefore, no one factor should be regarded as decisive of the parties' common intention.[109] Furthermore, there is no limit to the factors that a court may take into account in drawing inferences about the parties' intention.[110] Nevertheless, a factor that the courts have relied upon in determining whether a tacit choice of law exists is the use of a standard form that is known to be drafted with reference to a particular system of law.[111] Similarly, the use of technical terms or language in the contract may be a factor to be taken into account in searching for a tacit choice of law. Where the contract is drafted in a language that is understood by reference to the law of a particular country, it may be possible to infer that the parties intended the law of that country to govern the contract.[112] Other indications from which a choice of law may be inferred are instances of an express choice of law in a related transaction between the parties.[113] A choice may

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105 *Supra*.

106 High Court in *Akai Pty Ltd v The People's Insurance Co Ltd supra* 441, citing remarks of the Judge in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 347–353. See, also, *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565 574, where the court held it must consider the contract as a whole and the circumstances surrounding the contract.

107 Mortensen (*Private International Law in Australia* 394–5) states that it is incumbent on the court to consider the contract as a whole and the circumstances surrounding the contract; Mortensen *et al Private International Law in Australia* 448; Nygh *Conflicts of Laws in Australia* 277.

108 Nygh *Conflicts of Laws in Australia* 272.

109 Marshall 2012 *Melbourne Journal of International Law* 518; Mortensen *et al Private International Law in Australia* 448. See also Mortensen (*Private International Law in Australia* 394) who writes that where the parties' have not expressly stated the governing law, no one factor can be considered as conclusive of the parties' intentions; Nygh *Autonomy in International Contracts* 114: "If the search is for the real intention of the parties, or perhaps more correctly, the likely real intention of the parties, none of the above factors could be considered conclusive."

110 Mortensen *Private International Law in Australia* 394; Mortensen *et al Private International Law in Australia* 448.

111 Marshall 2012 *Melbourne Journal of International Law* 518: a Lloyd's Policy of Maritime Insurance or Lloyd's Standard Form of Salvage Agreement are common examples of the use of a standard form. See also Australian Law Reform Commission *Choice of Law* 83; Sykes and Pryles *Australian Private International Law* 605.

112 ALRC 83; Mortensen *Private International Law in Australia* 395; Mortensen *et al Private International Law in Australia* 448. See, for e.g., *Amin Rasheed Shipping Corporation v Kuwait Insurance supra* 64–67.

113 Marshall 2012 *Melbourne Journal of International Law* 518–523. Although an Australian court has not yet dealt with this proposition, Marshall believes that there is no reason why this should not be the case under Australian law. See also Australian Law Reform Commission *Choice of Law* 83; Sykes and Pryles *Australian Private International Law* 605; Nygh *Autonomy in International Contracts* 116: "In cases where the parties have specifically

also be inferred based on the validation principle.[114] With regard to the validation principle, it is suggested that courts are inclined to apply a system of law under which the contract will be valid, in preference to one that would render the transaction invalid.[115] However, as with the other indicators that may point to a tacit choice of law, the validation principle is only one factor that must be considered with all others.[116]

A notable indicator of a tacit choice of law is the inclusion of a choice-of-forum clause in the contract. The question is whether the inclusion of a clause selecting a court or arbitral tribunal should by itself be regarded as an expression of choice, or merely an indicator of the unexpressed choice of the parties.[117] As previously discussed, the courts at common law have attached significant weight to the presence of a choice-of-forum clause as indicating that the parties intended the law of that place to be the proper law of the contract.[118] Australian law seems to have adopted the same approach in this regard. In Australian case law, the courts have considered a clause selecting a particular court or arbitral tribunal as a strong indicator that the parties intended the law of that place to be the proper law of the contract.[119] In *Akai Pty Ltd v The People's Insurance Co Ltd*,[120] for example, the court held that "a submission, in the contract, to the exclusive jurisdiction of the tribunals of a particular country, may be taken as an indication of the

negotiated the choice of law clause in a related contract, it will be legitimate to infer that they intended the same law to apply to their other contracts."

114 Marshall "Australia" in Girsberger, Kadner Graziano and Neels (eds) *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague Principles* (2021) par 41 par 41.12; Nygh *Conflicts of Laws in Australia* 277. See also *Tipperary Developments Pty Ltd v Western Australia* [2009] WASCA 126, (2009) 38 WAR 488 [72].

115 Sykes and Pryles *Australian Private International Law* 603. See also Nygh *Autonomy in International Contracts* 119; Nygh *Conflicts of Laws in Australia* 277: "This principle of validation has been invoked to uphold a contract which was invalid according to one of two possible applicable laws." See, for e.g., *Monterosso Shipping Co Ltd v International Transport Workers' Federation* [1982] 3 All ER 841 (CA), where the court held that the contract was governed by Spanish law, under which the contract would be valid, rather than English law, under which it would be unenforceable.

116 Nygh *Conflicts of Laws in Australia* 277: "It can only be decisive in situations where there is established otherwise a substantial connection with the legal system upholding validity and where there are no preponderant factors pointing the other way." See also Nygh *Autonomy in International Contracts* 119; and Sykes and Pryles (*Australian Private International Law* 603) who state that there have been instances where the factor was considered relevant but not decisive.

117 Davies *et al Nygh's Conflict of Laws in Australia* 452; Nygh *Autonomy in International Contracts* 116.

118 See also Nygh *Autonomy in International Contracts* 116; Tilbury *et al Conflict of Laws in Australia* 738; Sykes and Pryles *Australian Private International Law* 602: "A clause providing for the submission of disputes to a court or to arbitration in a particular country was said to raise the inference that the law of that country was intended to be the proper law of the contract."

119 See for e.g., *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd supra* 185; *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197; *Akai Pty Ltd v The People's Insurance Co Ltd supra* 442 and 436–437. See also Davies *et al Nygh's Conflict of Laws in Australia* 452; Marshall 2012 *Melbourne Journal of International Law* 519; Mortensen *Private International Law in Australia* 394–395; Mortensen *et al Private International Law in Australia* 448; Nygh *Autonomy in International Contracts* 116.

120 *Supra*.

intention of the parties that the law of that country is to be the proper law of the contract".[121] Although courts in Australia have not gone as far as stating that a choice of forum or localised arbitral tribunal should by itself be regarded as an expression of a choice of law, they attach considerable weight to the existence of such a clause.[122]

4 CANADA

Private law in Canada falls within the legislative authority of the provinces.[123] The Canadian conflict of laws, with the exception of private international law in Quebec,[124] is inherited from English law.[125] Therefore, the majority of Canadian provinces[126] follow the English common-law rules and principles relating to the determination of the applicable law.[127] Furthermore, English precedents "in this area have historically had persuasive value in Canada".[128]

4 1 Party autonomy

Canadian courts refer to the "proper law of the contract" to describe the law applicable to an international commercial contract.[129] Under the proper law of the contract, the parties are entitled to select a law to govern their

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121 *Akai Pty Ltd v The People's Insurance Co Ltd supra* 441–442. See also *Lewis Construction Co Pty Ltd v Tichauer Société anonyme* [1966] VR 341 346.

122 Davies *et al Nygh's Conflict of Laws in Australia* 452; Marshall 2012 *Melbourne Journal of International Law* 519; Mortensen *Private International Law in Australia* 394–395; Mortensen *et al Private International Law in Australia* 448; Nygh *Autonomy in International Contracts* 116–117.

123 The discussion on Canada is based in part on Bouwers *Tacit Choice of Law in International Commercial Contracts: A Global Comparative Study*. Blom "Canada" in Basedow *et al Encyclopedia of Private International Law* 1950.

124 Quebec's private international law is codified in Book Ten of the 1991 Civil Code of Quebec.

125 Blom in Basedow *et al Encyclopedia of Private International Law* 1951.

126 British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, the Prince Edward Island, Nova Scotia, Newfoundland, Labrador and the three Northern territories (Yukon, the Northwest Territories and Nunavut) have inherited English private international law; see Blom in Basedow *et al Encyclopedia of Private International Law* 1950.

127 Blom in Basedow *et al Encyclopedia of Private International Law* 1950–1955; Pitel and Rafferty *Conflict of Laws* (2010) 270; Walker *Halsbury's Laws of Canada: Conflict of Laws* (2016) 636.

128 Pitel and Rafferty *Conflict of Laws* 270.

129 See, for e.g., *Montreal Trust Co v Stanrock Uranium Mines Ltd* [1966] 1 OR 258, 53 DLR (2d) 594 (H.C.J.) 611; *Drew Brown Ltd v The 'Orient Trader'* [1974] SCR 1286 1288; *Eastern Power Limited v Azienda Communale Energia and Ambiente* [1999] CanLII 3785 par 30; *Richardson International Ltd v Mys Chikhacheva (The)* [2002] 4 FCR 80, 2002 FCA 97 CanLII par 28; *Hawkeye Tanks & Equipment Inc v Farr-Mor Fertilizer Services Ltd* 2000 SKQB 514 CanLII par 28; *JP Morgan Chase Bank v Lanner (The)* [2009] 4 FCR 109, 2008 FCA 399 CanLII par 25; *Snap-On-Tools Canada Ltd v Korosec* [2002] BCSC 1844 CanLII par 10; *Miller Farm Equipment (2005) Inc v Shewchuk* (2009) SKQB 170 CanLII par 60. See also Blom in Basedow *et al Encyclopedia of Private International Law* 1955; Pitel and Rafferty *Conflict of Laws* 270; Walker *Castel and Walker: Canadian Conflict of Laws* 2 6ed (2005 update issue 2015) section 31.5.

agreement.[130] Subject to certain limitations,[131] the principle of party autonomy is generally accepted in Canadian private international law.[132] Party autonomy is supported by the fact that *dépeçage* appears to be admitted in Canadian law.[133] However, it is uncertain whether the parties may select the law of a place that does not have any connection with the parties or the contract.[134] Whether the parties are able to choose a non-national system of law to govern their agreement is also unclear. However, Pitel and Rafferty state that

> "[t]he orthodoxy is that the choice must be that of a legal system – the law of a country. Other commercial principles can be made terms of the contract by reference, but not through a choice of law clause."[135]

Parties may go about selecting the proper law of the contract by inserting an express choice-of-law clause in their contract.[136] In the absence of an express choice of law, the court must consider whether a tacit (or implied) choice of law can be inferred. If not, the court will assign an objective proper

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130 Blom in Basedow *et al Encyclopedia of Private International Law* 1955; Pitel and Rafferty *Conflict of Laws* 271; Walker *Halsbury's Laws of Canada: Conflict of Laws* 637; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.5–31.6.

131 See, for e.g., Walker *Halsbury's Laws of Canada: Conflict of Laws* 637; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.8–31.9. See also Pitel and Rafferty *Conflict of Laws* 272–273 on the *bona fide* requirement: "This limitation is in part motivated by a concern that the parties not be allowed to choose a law with no connection to the transaction solely to avoid the application of the law that would otherwise apply." Secondly, a choice must be legal. It may be that under the law of the forum, certain choices are outlawed. With regard to public policy, this limitation overlaps with the *bona fide* requirement "in that it is also concerned with attempts to avoid the otherwise applicable law". A detailed discussion of the extent of the limitations is beyond the scope of this study.

132 Pitel and Rafferty *Conflict of Laws* 271; Walker *Halsbury's Laws of Canada: Conflict of Laws* 637; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.8.

133 Pitel and Rafferty *Conflict of Laws* 276–277; Walker *Halsbury's Laws of Canada: Conflict of Laws* 638.

134 Castel *Canadian Conflict of Laws* 3ed (1994) 555: "If … the parties expressly selected as the proper law a legal system with which the transaction had not connection at all, it is unclear whether effect would necessarily be given to their choice." See also Walker *Halsbury's Laws of Canada: Conflict of Laws* 637; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.8: "One possible example of *mala fides* is where the parties select the law of a country with which the contract has no connection whatever, although there are cases in which such choices of law have been treated without question as valid because they were made for good reason ... If the parties are from different jurisdictions the choice of a 'neutral' law is readily characterized as *bona fide*."

135 Pitel and Rafferty *Conflict of Laws* 274. Saumier ("Canada" in Girsberger *et al Choice of Law in International Commercial Contracts* par 67 par 67.17) states: "There is statutory support in Canada for the designation of non-State law in the arbitration context. However, there is no equivalent source for such an option before the courts."

136 *Drew Brown Ltd v The 'Orient Trader' supra* 1288; *O'Brien v Canadian Pacific Railway Company* (1972) CanLII 807 (SKCA) par 14; *Richardson International Ltd v Mys Chikhacheva (The) supra* par 28; *Snap-On-Tools Canada Ltd v Korosec supra* par 10; *Vasquez v Delcan Corp* [1998] 14741 (ON SC) par 31; *World Fuel Services Corporation v The Ship "Nordems"* 2011 FCA 73 CanLII par 86. See Walker *Halsbury's Laws of Canada: Conflict of Laws* 637; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.5–31.6. See also Pitel and Rafferty (*Conflict of Laws* 272) who say that the courts will give effect to the parties' choice-of-law clause contained in the contract.

law to the contract.[137] However, some commentators question whether the court should be allowed to infer a choice of law. Castel opines that "it would be better to consider two possibilities only: where there is an express selection and where there is no express selection".[138] He argues that a distinction between an express choice of law and an inferred choice of law is artificial; had parties intended to select the proper law, they would have included one in their contract.[139] There is also some confusion in Canadian case law. For instance, in *Richardson International Ltd v Mys Chikhacheva (The)*,[140] the court held that the process for determining the proper law of the contract, required a court to

> "[d]etermine whether there is an express choice of law by the parties. If there is none, then the Court must determine whether the proper law can be inferred from the terms of the contract and the surrounding circumstances, an exercise that requires the Court to determine the system of law that has the closest and most real connection to the contract."[141]

Although it was acknowledged that the proper law of the contract may be inferred in the absence of an express choice of law, the court blurred the line between the subjective determination of the proper law (which reflects the real intentions of the parties) and the objective determination of the proper law (where there is no real choice of law). Despite the apprehension and confusion surrounding the application of a tacit choice of law, Canadian law recognises the possibility of such a choice.[142] Before turning to the question of which system of law has the closest and most real connection to the contract, Canadian courts accept that it must first examine whether the parties have tacitly chosen a system of law.[143]

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137 Castel *Canadian Conflict of Laws* 553; Pitel and Rafferty *Conflict of Laws* 275; Walker *Halsbury's Laws of Canada: Conflict of Laws* 647; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.11–31.12.

138 Castel *Canadian Conflict of Laws* 553. See also Pitel and Rafferty *Conflict of Laws* 275; Walker *Halsbury's Laws of Canada: Conflict of Laws* 642.

139 Castel *Canadian Conflict of Laws* 553. See also Pitel and Rafferty *Conflict of Laws* 275; Walker (*Halsbury's Laws of Canada: Conflict of Laws* 642) writes: "The notion that there exists an intermediate category of cases – between those in which the governing law is expressly chosen, and one in which it is objectively determined – has been criticized because it would be artificial to impute a choice of law to parties who have not turned their minds to the issue." However, see Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.9.

140 *Supra*.

141 *Richardson International Ltd v Mys Chikhacheva (The) supra* par 28.

142 Castel *Canadian Conflict of Laws* 556; Pitel and Rafferty *Conflict of Laws* 274; Walker *Halsbury's Laws of Canada: Conflict of Laws* 643; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.9.

143 *Eastern Power Limited v Azienda Communale Energia and Ambiente* [1999] CanLII 3785 par 30; *Hawkeye Tanks & Equipment Inc v Farr-Mor Fertilizer Services Ltd supra* par 21–30; *Imperial Oil Ltd v Petromar Inc* [2002] 209 DLR (4th) 158 par 28; *JP Morgan Chase Bank v Lanner (The) supra* par 25; *Miller Farm Equipment (2005) Inc v Shewchuk supra* par 28; *Snap-On-Tools Canada Ltd v Korosec supra* par 10–11; *World Fuel Services Corporation v The Ship "Nordems"* 2011 FCA 73 CanLII par 86. The court in *Snap-On-Tools* held: "It has been suggested that there are three ways in which the proper law of the contract can be identified: (1) by express selection by the parties; (2) by selection inferred from the circumstances; or failing either of these, (3) by judicial determination of the system of law with which the transaction has the closest and most real connection. However, the

4 2 How strict are the criteria for inferring a tacit choice of law?

There is little guidance in Canadian private international law on how strict the criteria are for inferring a choice of law. Although Canadian courts acknowledge the possibility of a tacit choice of law, the courts have not yet expressed a definitive view on the extent to which a court may infer a choice of law.[144] In *O'Brien v Canadian Pacific Railway Company*,[145] Culliton C.J.S. held:

> "The general principles to be followed in determining the law governing a contract, or a particular issue within the contract, such as arbitration proceedings, may be stated as follows: (1) if the intention of the parties as to the law governing is expressly stated in the contract, then in general that law governs; (2) if the intention of the parties as to the law governing the contract, or a particular matter therein, is not expressly stated, but may properly be inferred … then the intention so inferred, in general, governs."[146]

The author is of the view that the phrase "properly be inferred" translates to a high threshold that must be met before a court can infer a choice of law.[147] The statement of the Chief Justice in *O'Brien* was subsequently referred to in another case, namely, *Snap-On-Tools Canada Ltd v Korosec*.[148] However, this deviates from the traditional common-law test, where courts have shown a willingness to search for the inferred intention in the contract, even in circumstances where it was unlikely that the parties gave choice of law much thought.[149] It is unclear whether in future Canadian cases involving tacit

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second category of cases – selection inferred from the circumstances – recreates the original dilemma. On the one hand, it seems artificial to impute a selection to parties who may not have turned their minds to the issue of choice of law; on the other hand, it seems unfair to impose an objectively identified choice of law on parties who appear to have implicitly chosen a different governing law without stating so expressly. Where the parties have not expressed a choice as to the proper law and no such choice can be inferred from the circumstances of the case, the proper law of their contract is the system of law with which the transaction has the closest and most real connection."

144 *Eastern Power Limited v Azienda Communale Energia and Ambiente* [1999] CanLII 3785 par 30; *Hawkeye Tanks & Equipment Inc v Farr-Mor Fertilizer Services Ltd supra* par 21-30; *JP Morgan Chase Bank v Lanner (The) supra* par 25; *Imperial Oil Ltd v Petromar Inc supra* par 28; *Miller Farm Equipment (2005) Inc v Shewchuk supra* par 28; *Snap-On-Tools Canada Ltd v Korosec supra* par 10–11; *World Fuel Services Corporation v The Ship "Nordems"* 2011 FCA 73 CanLII par 86.

145 *Supra*.

146 *O'Brien v Canadian Pacific Railway Company supra* par 14 and par 16–21.

147 Walker (*Castel and Walker: Canadian Conflict of Laws* 2 section 31.9) states: "An implied intention, strictly so called, can only be found if the terms of the contact, interpreted in the light of the surrounding circumstances, leave no room for doubt that the parties intended a particular system of law to govern their contract." See also Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.10 as referred to by Saumier (in Girsberger *et al Choice of Law in International Commercial Contracts* par 67.20) where he states: "[I]n the case of doubt about the parties' intention, the court's inquiry should shift to identifying the proper law in the absence of choice as opposed to any attempt to impute a choice."

148 *Supra* par 10.

149 Marshall 2012 *Melbourne Journal of International Law* 516; Nygh *Autonomy in International Contracts* 111. See, for example, *Amin Rasheed Co v Kuwait Insurance Co supra* 60–65.

choice of law a court will follow the traditional common-law test, or whether a higher threshold will be sought.

4 3 Indicators of a tacit choice of law

Castel states that in the absence of an express choice of law by the parties the proper law may be "inferred from the circumstances".[150] It appears from the indicators highlighted by Castel[151] that the word "circumstances" refers to an examination of the terms of the contract and its surrounding circumstances in determining whether a choice of law may be inferred. This is reiterated by the courts. In *O'Brien v Canadian Pacific Railway Company*,[152] the court held:

> "If the intention of the parties as to the law governing the contract, or a particular matter therein, is not expressly stated, but may properly be inferred from the terms and nature of the contract and the surrounding circumstances, then the intention so inferred, in general, governs."[153]

A similar view was expressed by the court in *Richardson International Ltd v Mys Chikhacheva (The)*.[154] Therefore, a Canadian court must examine the terms of the contract and the factors surrounding the contract in order to determine whether a tacit choice of law may be inferred.

Numerous factors have been taken into account in assessing whether parties have tacitly chosen the proper law.[155] For instance, the use of a standard form that is known to be drafted with reference to a particular system of law has been considered as a factor that may assist the court in inferring a tacit choice of the proper law.[156] This factor was highlighted by the court in *Richardson International Ltd v Mys Chikhacheva (The)*.[157] Similarly, the court in *Richardson International Ltd* also refers to the use of legal terminology.[158] Furthermore, where a contract is drafted in the language of,

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150 Castel *Canadian Conflict of Laws* 553. See also Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.9.

151 See Castel *Canadian Conflict of Laws* 556–558. For e.g., references to a jurisdiction clause, the terminology in which the contract is drafted, and the form of the documents involved, refer to the terms of the contract. On the other hand, references to preceding transactions refer to the circumstances surrounding the contract.

152 *Supra*.

153 *O'Brien v Canadian Pacific Railway Company supra* par 14. See also *Snap-On-Tools Canada Ltd v Korosec supra* par 10.

154 *Supra* par 28: "First, the Court must determine whether there is an express choice of law by the parties. If there is none, then the Court must determine whether the proper law can be inferred from the terms of the contract and the surrounding circumstances."

155 Castel *Canadian Conflict of Laws* 556–558; Pitel and Rafferty *Conflict of Laws* 274–275; Walker *Halsbury's Laws of Canada: Conflict of Laws* 643; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.10–31.11.

156 Castel 3ed *Canadian Conflict of Laws* 557; Walker *Halsbury's Laws of Canada: Conflict of Laws* 643; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.10.

157 *Supra* par 36, where the court held: "the legal terminology and form of the document appears to favour American law, as the agreements in their original form were drafted by American lawyers."

158 *Ibid*.

or uses terminology that is understood by reference to the law of, a particular country, it may be possible to infer that the parties intended the law of that country to govern the contract.[159] Other factors from which the courts are prepared to infer a tacit choice of law include a connection with preceding transactions[160] and the validation principle.[161] Pitel and Rafferty describe the concept of preceding (or related) transactions:

> "If the contract in question is one of a series of related contracts, and those other contracts have the same applicable law, the court can infer that the parties intended the contract to use that same law. Similarly, if there have been previous similar contracts between the parties, it can be inferred that the parties meant the law previously applied to apply again."[162]

With regard to the validation principle, there is support for the proposition that if the contract or some of its terms are void or invalid under one system of law but not under another system of law, the parties must be taken to have intended to contract with reference to the law by which the contract would be valid.[163] However, the validity of the contract should only be an indication of the parties' intentions and not a general presumption. This is outlined in *Etler v Kertesz*,[164] where the court held: "Under certain circumstances such a consideration might have some weight viewed together with all other evidence from which [such] intention might be inferred."[165]

As with other choice-of-law aspects, Canadian courts are guided by the English law in addressing the role of forum clauses. For instance, in evaluating the presence of an arbitration clause in the contract, the court in *Richardson International Ltd v Mys Chikhacheva (The)*[166] held:

> "As Castel, supra, writes … 'If the parties agree that arbitration shall take place in a particular legal unit, the court will usually, although not always, conclude that the parties have impliedly chosen the law of the legal unit of arbitration as the proper law. Similarly, if the parties agree that the courts of a particular legal unit shall have jurisdiction over the contract, there is a strong inference that the law of that legal unit is the proper law.' In this case, the arbitration clause reads as follows: Any dispute which might arise from or in relation to this contract, if not settled by negotiations, shall be settled by arbitration in accordance with UNCITRAL arbitration rules presently in force. Place of arbitration shall be Seattle, Washington USA, the appointing authority

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159 Castel *Canadian Conflict of Laws* 557; Walker *Halsbury's Laws of Canada: Conflict of Laws* 643; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.10.

160 Castel *Canadian Conflict of Laws* 557; Walker *Halsbury's Laws of Canada: Conflict of Laws* 643; Pitel and Rafferty *Conflict of Laws* 275.

161 Castel *Canadian Conflict of Laws* 558; Walker *Halsbury's Laws of Canada: Conflict of Laws* 643.

162 Pitel and Rafferty *Conflict of Laws* 275.

163 Castel *Canadian Conflict of Laws* 558; Walker *Halsbury's Laws of Canada: Conflict of Laws* 643. See, for e.g., *Imperial Life Assurance Co of Canada v Segundo Casteleiro Y Colmenares* 1967 SCR 443 448; *Morguard Trust Company v Affkor Group Ltd* 1984 CanLII 781 (BC CA) par 30–31; *Nike Infomatic Systems Ltd v Avac Systems Ltd* 1979 CanLII 667 (BC SC) par 22–24.

164 1960 OR 672 CanLII 128.

165 *Etler v Kertesz supra* par 142.

166 *Supra*.

> shall be the President of the Chamber of Commerce in Seattle. The number of arbitrators shall be three (3) and the language used for all documents and proceedings shall be English. Parties desire to execute the award of arbitration voluntarily. Court of arbitration shall base its award on the respective contract. In my view, this clause is indicative of the parties' implied intention to have American law apply. Though not determinative, the arbitration clause is highly persuasive."[167]

In reaching this view, the court referred to the English case of *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA*,[168] where an arbitration clause was seen as a "weighty indication" that the parties intended the law of the place of arbitration to govern the contract.[169] The views expressed in *Richardson International Ltd* and *Compagnie d'Armement Maritime SA* were again echoed in *JP Morgan Chase Bank v Lanner (The)*,[170] where the court held:

> "In the CP3500 contract, there is no explicit choice of law clause; however, there is an arbitration clause stating that any arbitration between the parties is to be decided in accordance with the law of the State of Washington. Even where an arbitration clause only selects the forum of the arbitration, British and Canadian courts normally take this clause as indicative of the proper law of the contract."[171]

Canadian law places considerable emphasis on a choice-of-forum or localised-arbitration clause. Although the Canadian courts refer specifically to arbitration clauses as "highly persuasive" and normally indicative of the parties' intentions, Canadian authors, guided by English law,[172] view a clause selecting a particular court as having jurisdiction over the contract as a strong pointer that the parties intended the law of that place to be the proper law of the contract.[173]

5 INDIA

Indian private international law is inherited from the English common law. According to Biswas:

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167 *Richardson International Ltd v Mys Chikhacheva (The) supra* par 33–34.

168 *Supra*.

169 *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA supra* 596. See *Richardson International Ltd v Mys Chikhacheva (The) supra* par 34–35, where, in referring to the *Compagnie d'Armement* case, the court remarked that "both Lords Diplock and Wilberforce commented on the persuasive value of the arbitration clause in the absence of a contrary intention in the contract. Lord Diplock [at page 609] was of the view that: 'an arbitration clause is generally intended by the parties to operate as a choice of the proper law of the contract as well as the curial law and should be so construed unless there are compelling indications to the contrary in the other terms of the contract.' No contrary intention appears on the face of the marketing contract."

170 *Supra*.

171 *JP Morgan Chase Bank v Lanner (The) supra* par 31.

172 Graveson *Conflicts of Law* 417; Morris *Dicey and Morris on the Conflict of Laws* 761; North *Cheshire and North Private International Law* 203.

173 Castel *Canadian Conflict of Laws* 556; Pitel and Rafferty *Conflict of Laws* 274; Walker *Halsbury's Laws of Canada: Conflict of Laws* 643; Walker *Castel and Walker: Canadian Conflict of Laws* 2 section 31.11.

> "The Regulating Act 1773 … was the first parliamentary Act of the British Government to apply in India. This Act applied in India from 1773 until the entering into force of the Independence Act 1974 … during which period India successfully adopted the common law system. Thus the development of the Indian legal system has mostly followed the same trajectory as that of England."[174]

Therefore, there is no statute on the choice of law in international commercial contracts.[175] Instead, Indian courts tend to follow and apply the traditional English common-law rules relating to the proper law of the contract.[176] Although the Indian judiciary is not bound to English precedent, the courts are likely to follow English decisions in this regard.[177]

5 1 Party autonomy

The term "proper law" is defined in *Indian General Investment Trust v Raja of Khalikote*,[178] as "the law which the Court is to apply in determining the obligations under the contract".[179] It is well established in English private international law that if the parties have chosen a law to govern their contract, then that would be the proper law of the contract.[180] Indian law also takes this view. In the leading case of *National Thermal Power Corporation v Singer Company*,[181] the court stated that the proper law of the contract refers

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174 The discussion on India is based in part on Bouwers *Tacit Choice of Law in International Commercial Contracts: A Global Comparative Study*; and see Biswas "India" in Basedow et al *Encyclopedia of Private International Law* 3 2155 2157. See also Agrawal and Singh *Private International Law in India* (2010) 49–51; Diwan and Diwan *Private International Law: Indian and English* 4ed (1998) 61–62; Khanderia "Indian Private International Law vis-à-vis Party Autonomy in the Choice of Law" 2018 *Oxford University Commonwealth Law Journal* 1 6; Neels "The Role of the Hague Principles on Choice of Law in International Commercial Contracts in Indian and South African Private International Law" 2017 22 *Uniform Law Review/Revue de Droit Uniforme* 443 444; Setalvad *Conflict of Laws* 2ed (2009) 674 and 679.

175 Agrawal and Singh *Private International Law in India* 93; Biswas in Basedow *et al Encyclopedia of Private International Law* 3 2159; Setalvad *Conflict of Laws* 674 and 679.

176 Agrawal and Singh *Private International Law in India* 93; Biswas in Basedow *et al Encyclopedia of Private International Law* 3 2159; Setalvad *Conflict of Laws* 674. See also Neels 2017 *Uniform Law Review/Revue de Droit Uniforme* 444: "The Indian courts often follow developments in the English conflict of laws, although, of course, the Indian courts are not bound to English precedent."

177 See Agrawal and Singh *Private International Law in India* 93; Khanderia 2018 *Oxford University Commonwealth Law Journal* 6; Neels 2017 *Uniform Law Review/Revue de Droit Uniforme* 444; Setalvad *Conflict of Laws* 679.

178 AIR 1952 Cal 508. See Agrawal and Singh *Private International Law in India* 94.

179 *Indian General Investment Trust v Raja of Khalikote supra* par 38.

180 Diwan and Diwan *Private International Law: Indian and English* 509. See, for e.g., Graveson *Conflicts of Law* 405–406; Morris *Dicey and Morris on the Conflict of Laws* 747–748; North *Cheshire and North Private International Law* 195. See also *Mount Albert Borough Council v Australasian Temperance and General Life Assurance Society supra* 240: "The proper law of the contract means that law which the English court is to apply in determining the obligations under the contract"; and *Vita Food Products v Unus Shipping Co Ltd supra* 27: "It is now well settled that by English law the proper law of the contract is the law which the parties intended to apply."

181 (1992) SCR (3) 106. See Agrawal and Singh *Private International Law in India* 93: "The Supreme Court in *National Thermal Power Corporation v Singer Company*, has traced the

to the legal system by which the parties intended their contract to be governed.[182] In the absence of any express or tacit intention of the parties, the court will apply the law with which the contract has its closest and most real connection.[183]

In an earlier decision, the Supreme Court in *British Indian Steam Navigation Co Ltd v Shanmughamavilas Cashew Industries*[184] held: "It may not be permissible to choose a wholly unconnected law", which meant that the law chosen by the parties must have had some connection to the contract.[185] This appeared to limit the scope of party autonomy in Indian law. However, this view was not upheld in *National Thermal Power Corporation v Singer Company*.[186] The court stated that the only limitation on the proper law of the contract is "that the intention of the parties must be expressed bona fide and it should not be opposed to public policy".[187] Although it appears from this *dictum* that the parties are permitted to choose a neutral, unconnected system of law to govern their rights and obligations under the contract, the matter remains unsettled.[188] It is also unclear whether a splitting-up (*dépeçage*) of the applicable law, or choice of a non-national system of law (such as the *lex mercatoria* or the general principles of

current legal position with regard to the proper law of the contract in all its perspectives generally as well as the Indian contract." See also Govindaraj *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict* (2011) 57.

182 *National Thermal Power Corporation v Singer Company supra* 117. See also Agrawal and Singh *Private International Law in India* 93; Khanderia 2018 *Oxford University Commonwealth Law Journal* 6; Neels "Choice of Forum and Tacit Choice of Law: The Supreme Court of India and the Hague Principles on Choice of Law in International Commercial Contracts (an Appeal for an Inclusive Comparative Approach to Private International Law)" in UNIDROIT (ed) *Eppur Si Muove: The Age of Uniform Law. Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday* (2016) 358 365; Setalvad *Conflict of Laws* 305; Wadhwa (ed) *Mulla on the Indian Contract Act* 13ed (2011) 4.

183 Biswas in Basedow *et al Encyclopedia of Private International Law* 3 2159; Diwan and Diwan *Private International Law: Indian and English* 520; Govindaraj *The Conflict of Laws in India. Inter-Territorial and Inter-Personal Conflict* 58; Setalvad *Conflict of Laws* 676. See, for e.g., *Delhi Cloth & General Mills Co Ltd v Harnam Singh* AIR 1955 SC 590, [1955] 2 SCR 402; *Rabindra v Life Insurance Corporation of India* AIR 1964 Cal 141.

184 (1990) 3 SCC 481.

185 See also Agrawal and Singh *Private International Law in India* 93; Khanderia 2018 *Oxford University Commonwealth Law Journal* 7–8; Setalvad *Conflict of Laws* 675.

186 *Supra*.

187 *National Thermal Power Corporation v Singer Company supra* 108.

188 Contrast *Rabindra v Life Insurance Corporation of India supra* par 25; *British Indian Steam Navigation Co Ltd v Shanmughamavilas Cashew Industries supra* par 31 with *Swedish East Asia Co Ltd v BP Herman & Mohatta (India) Pvt Ltd* AIR 1962 Cal 601 par 14; *Max India Ltd v General Binding Corporation* 2009 (112) DRJ 611 (DB) par 31. See Agrawal and Singh *Private International Law in India* 94; Biswas in Basedow *et al Encyclopedia of Private International Law* 3 2159; Govindaraj *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict* 56; Khanderia 2018 *Oxford University Commonwealth Law Journal* 8–9 and 13. Setalvad (*Conflict of Laws* 675) states that a choice of law that has no connection to the contract should be upheld as being a valid choice of law. See also Neels 2017 *Uniform Law Review/Revue de Droit Uniforme* 445: "In the private international law of contract of India, there seems to be no clarity on whether a connection between, on the one hand, the contract and the parties and, on the other, the chosen law is required."

international commercial law), will be allowed in Indian private international law.[189]

The principle of party autonomy is echoed in the provisions of section 28(1)(b)(1) of the Arbitration and Coalition Act, 1996 (applying to international commercial arbitrations), which provides: "The arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substances of the dispute."[190] Setalvad states that this represents "legislative approval to the principle of complete party autonomy in the choice of the proper law, and the principle can be applied in all cases where the proper law of a contract has to be determined".[191]

According to the English common law, the parties to a contract may exercise their choice by explicitly or impliedly choosing a system of law with which to govern their contract.[192] In the absence of an express or tacit choice of law, the court must determine the system of law with which the transaction has the most real connection.[193] This view is supported in Indian law. In *National Thermal Power Corporation v Singer Company*,[194] the Supreme Court acknowledged that the determination of the proper law involves the need to examine the possibility of these three situations.[195] In the first instance, parties may expressly select a law with which to govern their agreement by means of an express clause in the contract.[196] For example, in *National Thermal Power Corporation v Singer Company*,[197] the parties inserted a clause stating "the laws applicable to this Contract shall be the laws in force in India".[198] In the absence of an express choice of law, the court must determine whether a tacit choice of law may be inferred. If not, a court must assign a proper law to the contract.[199]

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189 See Khanderia 2018 *Oxford University Commonwealth Law Journal* 13–14.

190 See the Arbitration and Coalition Act, 1996 http://www.wipo.int/edocs/lexdocs/laws/en/in/in063en.pdf.

191 Setalvad *Conflict of Laws* 675.

192 See discussion under heading 2 1 above.

193 Govindaraj *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict* 56.

194 (1992) 3 SCC 511.

195 *National Thermal Power Corporation v Singer Company* (1992) SCR (3) 106.

196 *Delhi Cloth & General Mills Co Ltd v Harnam Sing*h *supra*; *Dhanrajamal Gobindram v Shamji Kalidas & Co* AIR 1961 SC 1285, [1961] 3 SCR 1020 par 35; *State Aided Bank of Travancore Ltd v Dhrit Ram* LR 69 IA 1, AIR 1942 PC 6 par 4; *Swedish East Asia Co Ltd v BP Herman & Mohatta (India) Pvt Ltd* AIR 1962 Cal 601 par 14. See also Agrawal and Singh *Private International Law in India* 93; Diwan and Diwan *Private International Law: Indian and English* 520; Setalvad *Conflict of Laws* 674; Wadhwa *Mulla on the Indian Contract Act* 4.

197 *Supra*.

198 *National Thermal Power v Singer Company supra* 114.

199 *National Thermal Power v Singer Company supra* 108; *State Aided Bank of Travancore Ltd v Dhrit Ram supra* par 4; *Delhi Cloth & General Mills Co Ltd v Harnam Singh supra*; *Dhanrajamal Gobindram v Shamji Kalidas & Co supra* par 35; *Swedish East Asia Co Ltd v BP Herman & Mohatta (India) Pvt Ltd* AIR 1962 Cal 601 par 15. See also Agrawal and Singh *Private International Law in India* 93; Biswas in Basedow *et al Encyclopedia of Private International Law* 3 2159; Diwan and Diwan *Private International Law: Indian and English* 512; Govindaraj *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict* 57; Neels in UNIDROIT (ed) *Eppur Si Muove* 365; Setalvad *Conflict of Laws* 674; Wadhwa *Mulla on the Indian Contract Act* 4.

5 2 How strict are the criteria for inferring a tacit choice of law?

There was previously little guidance in Indian private international law on the appropriate level of strictness in the criterion for inferring a tacit choice of law. However, it would seem that the court in *National Thermal Power Corporation v Singer Company*[200] has definitively answered this question. Although the decision dealt primarily with issues relating to arbitration,[201] and remarks concerning tacit choice of law were obiter, Neels states that "they are nevertheless formulated in such a way as to provide an authoritative rendition of Indian private international law in this regard".[202] Agrawal and Singh affirm that the court in the *National Thermal Power Corporation* case

> "has traced the current legal position with regard to the proper law of contract in all perspectives generally as well as the Indian contract. It has laid down in clear terms Indian law in the area of international contracts where parties have expressly chosen the applicable law, where the law is inferred, and where there is no expressly chosen … applicable law."[203]

According to the court in the present case, in the absence of an expressly stated proper law, a court should only give effect to a choice of law if it can be "clearly inferred".[204] The court also provides that in the absence of an express provision, the "true intention" of the parties must be discovered.[205] From the particular wording used in the case, it seems that the court endorses a high level of strictness in the criteria for a tacit choice of law.[206]

5 3 Indicators of a tacit choice of law

According to the court in *Dhanrajamal Gobindram v Shamji Kalidas & Co*,[207] where the parties to a contract fail to express their intention as to the proper law, then "the rule to apply is to infer the intention from the terms and nature of the contract and from the general circumstances of the case".[208] This view is supported by the Supreme Court in *National Thermal Power Corporation v*

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200 *Supra*.

201 Neels in UNIDROIT (ed) *Eppur Si Muove* 365.

202 *Ibid*.

203 Agrawal and Singh *Private International Law in India* 93; Govindaraj *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict* 57. See also Neels in UNIDROIT (ed) *Eppur Si Muove* 365: "Prominent authors accept the exposition in this case as reflecting positive law in India."

204 In *National Thermal Power Corporation v Singer Company supra* 118, the court held: "The expression 'proper law of a contract' refers to the legal system by which the parties to the contract intended their contract to be governed. If their intention is expressly stated or if it can be clearly inferred from the contract itself or its surrounding circumstances, such intention determines the proper law of the contract."

205 *National Thermal Power Corporation v Singer Company supra* 119.

206 Neels in UNIDROIT (ed) *Eppur Si Muove* 366.

207 *Supra*.

208 *Dhanrajamal Gobindram v Shamji Kalidas & Co supra* par 37. See also *General Indian Investment Trust v Raja of Khalikote* AIR 1952 Cal 508.

Singer Company.[209] The court stated that "[i]f their intention is expressly stated or if it can be clearly inferred from the contract itself or its surrounding circumstances, such intention determines the proper law of the contract".[210] It is clear from these *dicta* that a court is not only bound to the terms of the contract but must examine the surrounding circumstances when searching for a tacit choice of law.

There is little guidance in Indian private international law on which indicators may be taken into account in determining whether the parties have tacitly chosen a system of law to govern their contract. That being said, one factor that may assist the court in searching for a tacit choice of law is the validation principle. Under the principle, if there are two competing systems of law that may be applicable to the contract, and the contract happens to be valid under one and invalid under the other, the inference is that the parties intended to contract with reference to the system of law by which their agreement would be valid.[211] Nygh states that "[t]here may … be room for the application of the principle of validation as a guide to the tacit choice of the parties" in certain instances.[212] He believes that applying it more generally, however, creates a peremptory rule, which may not have anything to do with the real intention of the parties.[213] An Indian court has yet to express any opinion on the validation principle or the weight that should be attached to this indicator.

One factor that has consistently been the subject of discussion is the inclusion of a forum clause in the contract. However, the weight that has been attached to this factor has varied from case to case.[214] For instance, in *Dhanrajamal Gobindram v Shamji Kalidas & Co*,[215] the Supreme Court of India stated:

> "Where there is no expressed intention … then the rule to apply is to infer the intention ... In the present case, two such circumstances are decisive. The first is that the parties have agreed that in case of dispute the Bombay High Court would have jurisdiction, and an old legal proverb says, "*Qui eligit judicem eligit jus*." If Courts of a particular country are chosen, it is expected, unless there be either expressed intention or evidence that they would apply their own law to the case. The second circumstance is that the arbitration clause indicated an arbitration in India. Of such arbitration clauses in agreements, it has been

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209 *Supra*.

210 *National Thermal Power Corporation v Singer Company supra* 108. See also Agrawal and Singh *Private International Law in India* 94; Diwan and Diwan *Private International Law: Indian and English* 512; Neels in UNIDROIT (ed) *Eppur Si Muove* 366; Wadhwa *Mulla on the Indian Contract Act* 4.

211 Govindaraj *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict* 57.

212 Nygh *Autonomy in International Contracts* 119.

213 Nygh *Autonomy in International Contracts* 119. See Govindaraj *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict* 57.

214 See Neels in UNIDROIT (ed) *Eppur Si Muove* 369: "The decisions of the Supreme Court reflect two opposing interpretations of Indian private international law in respect of the relationship between choice of forum and tacit choice of law." See also Neels 2017 *Uniform Law Review/Revue de Droit Uniforme* 446.

215 *Supra*.

> said on more than one occasion that they lead to an inference that the parties have adopted the law of the country in which arbitration is to be made."[216]

The court was clearly of the view that the inclusion of a clause selecting a court or arbitral tribunal may by itself be presumed to be the unexpressed choice of law of that particular forum. This view was to be reinforced in *British Indian Steam Navigation Co Ltd v Shanmughamavilas Cashew Industries*,[217] where the court held: "If there is no express choice of the proper law of the contract, the law of the country of the chosen court will usually, but not invariably, be the proper law."[218] However, these observations are not supported in the more recent decision of the Supreme Court in *National Thermal Power Corporation v Singer Company*.[219] In dealing with the relationship between choice of forum and tacit choice of law, the court held:

> "In such a case, selection of courts of a particular country as having jurisdiction in matters arising under the contract is usually, but not invariably, an indication of the intention of the parties that the system of law followed by those courts is the proper law by which they intend their contract to be governed. However, the mere selection of a particular place for submission to the jurisdiction of the courts or for the conduct of arbitration will not, in the absence of any other relevant connecting factor with that place, be sufficient to draw an inference as to the intention of the parties to be governed by the system of law prevalent in that place. This is specially so in the case of arbitration, for the selection of the place of arbitration may have little significance where it is chosen, as is often the case, without regard to any relevant or significant link with the place. This is particularly true when the place of arbitration is not chosen by the parties themselves, but by the arbitrators or by an outside body, and that too for reasons unconnected with the contract. Choice of place for submission to jurisdiction of courts or for arbitration may thus prove to have little relevance for drawing an inference as to the governing law of the contract, unless supported in that respect by the rest of the contract and the surrounding circumstances. Any such clause must necessarily give way to stronger indications in regard to the intention of the parties."[220]

The court was quite clear in its assessment of choice-of-forum clauses. Although a choice-of-forum clause may "be an indication of the intentions of

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216 *Dhanrajamal Gobindram v Shamji Kalidas & Co supra* par 37.

217 *Supra*.

218 *British Indian Steam Navigation Co Ltd v Shanmughamavilas Cashew Industries supra* par 23. See also *Modi Entertainment Network v W S G Cricket Pte Ltd* (2003) 4 SCC 341 par 16, where the court referred to the *dictum* in *British Indian Steam Navigation Co Ltd v Shanmughamavilas Cashew Industries*. However, Neels in UNIDROIT (ed) *Eppur Si Muove* at 367 remarks in respect of the statement in the *British Indian Steam Navigation* case: "The statement is isolated (the remainder of the paragraph deals with jurisdictional issues) and also goes unmotivated; it is furthermore unclear whether it refers to the determination of a tacit choice of law, the objective proper law, or both. In any event, the statement does not form part of the *ratio decidendi* as the contract contained an express choice of English law."

219 *Supra*.

220 *National Thermal Power Corporation v Singer Company supra* 119. See *Shreejee Traco (I) Pvt Ltd v Paperline International Inc* (2003) 9 SCC 79, where the court referred to *National Thermal Power Corporation v Singer Company*, and reaffirmed the principles set out in relation to choice of forum and tacit choice of law. See, generally, Neels in UNIDROIT (ed) *Eppur Si Muove* 365-366.

the parties", there must be "other relevant connecting factor(s) with that place".[221] According to the court, the mere presence of a forum clause is not "sufficient to draw an inference as to the intention of the parties" and may, in certain instances, "have little relevance for drawing an inference as to the governing law of the contract".[222] Neels correctly interprets the *dictum* in *National Thermal Power*, stating "[a] choice of forum provision may nevertheless be seen as an indication of a tacit choice of law, on condition of corroboration by other pointers to such an intention".[223] Nevertheless, the uncertainty in respect of the relationship between choice of forum and tacit choice of law persists.[224]

6 ISRAEL

The Israeli legal system is an uncodified one, which has been influenced by civil and common-law systems to form a "mixed or hybrid" system of law.[225] Prior to the establishment of the State of Israel in 1948, the land was under the control of the British, by way of the British Mandate for Palestine.[226] During the British Mandate, certain parts of English law were transplanted to the territory.[227] After 1948, the Knesset[228] "enacted statutes modelled on

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221 *National Thermal Power Corporation v Singer Company supra* 119. See also Neels in UNIDROIT (ed) *Eppur Si Muove* 366.

222 *National Thermal Power Corporation v Singer Company supra* 119.

223 Neels in UNIDROIT (ed) *Eppur Si Muove* 366.

224 Neels in UNIDROIT (ed) *Eppur Si Muove* 369: "[I]t is respectfully submitted that the Supreme Court of India, when the opportunity presents itself in the future, considers reconfirming the interpretation of the private international law of India in respect of the relationship between choice of forum and tacit choice of law in conformity with the approach as convincingly formulated by Thommen and Agrawal JJ. in *National Thermal Power Corporation*." See also Neels 2017 *Uniform Law Review/Revue de Droit Uniforme* 446: "Nevertheless, in two twenty-first-century decisions by the … [Supreme Court], the previously accepted view is encountered yet again." See, for e.g., *Modi Entertainment Network v WSG Cricket PTE Ltd* (2003) 4 SCC 341 par 16; *Shreejee Traco (I) Pvt Ltd v Paperline International Inc supra* par 7.

225 The discussion on Israel is based in part on Bouwers *Tacit Choice of Law in International Commercial Contracts: A Global Comparative Study*. Einhorn ("Israel" in Basedow *et al Encyclopedia of Private International Law* 3 2193 2195) states: "Important parts of Israeli law can only be understood in light of the historical developments that had taken place especially since the 19th century, during the occupation of the Land of Israel by the Ottoman Empire (1517–1917) and during the British Mandate (1917–1948)."

226 See Einhorn in Basedow *et al Encyclopedia of Private International Law* 3 2195. See also Omer-Man "This Week in History: The British Mandate for Palestine" (29 July 2011) www.jpost.com/Features/In-Thespotlight/This-Week-in-History-The-British-Mandate-for-Pale-stine, (accessed 2018-12-20): "On July 24, 1922, the Council of the League of Nations – the predecessor of the United Nations Security Council – gave its blessing to The British Mandate for Palestine ... The British Mandate put Palestine and Transjordan under British control with a mandate to oversee the creation of a Jewish homeland ... It was not until the 1947 United Nations Partition Plan (UN General Assembly Resolution 181) that the idea of a Jewish State was ever formalized by either the League of Nations or its successor, the United Nations. By that time, the British had long realized the difficulty of ruling over Jewish and Arab populations with conflicting claims to the land. The British eventually sought to end the Mandate, the result of which was UN Resolution 181. The British Mandate for Palestine, after 26 years, came to an end in mid-May 1948. Hours later, the Jewish State of Israel was born."

227 See Einhorn in Basedow *et al Encyclopedia of Private International Law* 2195.

continental law, especially German and Swiss law".[229] However, the Knesset did not adopt any legislation regulating private international law.[230] Therefore, reliance was placed on article 46 of the Palestine Order in Council (1922).[231] According to article 46, Israeli courts could turn to the "common law, and the doctrines of equity in force in England" to fill gaps in Israeli law.[232] However, article 46 was repealed in 1980, when the Knesset enacted the Foundations of Law.[233] This Law provides: "Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage."[234] Despite the severing of English common-law ties, "choice of law rules for contracts witnessed no drastic changes since its importation from English common law".[235]

6 1 Party autonomy

Following the traditional English-law rule, reference is made to the "proper law of the contract" to describe the law that creates and governs an international commercial contract.[236] Therefore, the principle of party

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228 The Knesset is the legislative authority and the sole authority with the power of legislation in Israel. See www.knesset.gov.il.

229 Einhorn in Basedow *et al Encyclopedia of Private International Law* 2195.

230 *Ibid*.

231 Text available at www.un.org/unispal/document/mandate-for-palestine-the-palestine-order-in-lon-council-mandatory-order/.

232 See article 46 of the Palestine Order in Council 1922: "The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on November 1st, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions. Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary." See also Einhorn in Basedow *et al Encyclopedia of Private International Law* 2195; Einhorn "Israel" in Girsberger *et al Choice of Law in International Commercial Contracts* (2021) par 27 par 27.04; Vitta "Codification of Private International Law in Israel?" 1977 12 *Israel Law Review* 129.

233 5740–1980. See Einhorn in Basedow *et al Encyclopedia of Private International Law* 2195; Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par 27.04.

234 See the Foundations of Law 5740–1980. See also Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par 27.04.

235 Karayanni *Conflicts in a Conflict: A Conflict of Laws Case Study on Israel and the Palestinian Territories* (2014) 193. See also Einhorn in Basedow *et al Encyclopedia of Private International Law* 2195.

236 Karayanni *Conflicts in a Conflict* 193. See Einhorn *Private International Law in Israel* 2ed (2012) 78; Einhorn in Basedow *et al Encyclopedia of Private International Law* 2195. See also Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par

autonomy is generally accepted in Israeli private international law.[237] The parties are afforded a significant amount of autonomy in selecting the applicable law. It appears that it is permitted for parties to make a choice of law that bears no connection to the contract or the parties.[238] Furthermore, the parties are able to choose different laws for different parts of the contract.[239] Lastly, a choice of law, or any modification to a choice of law, may be made at any time.[240] However, it is uncertain whether the parties will be allowed to choose a non-state law.[241]

In respect of the parties' choice of law, Karayanni states: "If the parties were considered to have evinced an explicit or implicit intention that a certain law will govern their relationship, then this law was deemed to be the proper law of the contract."[242] It appears that Israeli private international law allows for an express choice, as well as a tacit choice of law.[243]

6 2 Tacit choice of law

Unlike in many other jurisdictions, Israeli private international law provides no further guidance on the determination of a tacit choice of law. In the absence of an express or tacit choice of law, "the law of the state with which the contract is most closely connected" shall apply.[244]

27.33: "Although there is no statutory provision concerning party autonomy regarding international commercial contracts, nevertheless, under general principles of law, Israeli PIL recognizes the right of parties to a contract to design their private affairs as they wish. Party autonomy includes the parties' right to agree upon the law that will apply to their contract. Showing respect for their choice also achieves another very important principle of private law – protecting the reliance interest of the parties, that is, their expectation that the agreement that they made will be upheld."

237 Einhorn *Private International Law in Israel* 78. See also Einhorn in Basedow *et al Encyclopedia of Private International Law* 2195; Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par 27.33; Karayanni *Conflicts in a Conflict* 193.

238 Einhorn in Basedow *et al Encyclopedia of Private International Law* 2199. See also Einhorn *Private International Law in Israel* 78: "For example, parties may wish to choose a law that they regard as neutral, that is, the law of neither party." See also Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par 27.35.

239 Einhorn *Private International Law in Israel* 78; Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par 27.34.

240 See Einhorn *Private International Law in Israel* 78: "If a choice of law is made after the contract has already been concluded, such choice has retrospective effect as of the time of its conclusion, to the extent that the rights of third parties are unaffected."

241 Einhorn *Private International Law in Israel* 78–79. See also Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par 27.38: "It is submitted that, in principle, the answer should be positive, at least for clear sets of rules. Thus, parties should be allowed to have their contract governed by Jewish law (halakha), or by sets of rules such as the UNIDROIT principles or PECL. The choice of lex mercatoria may be too vague."

242 Karayanni *Conflicts in a Conflict* 193. See also Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par 27.41.

243 Einhorn *Private International Law in Israel* 78; Einhorn in Basedow *et al Encyclopedia of Private International Law* 2195; Einhorn in Girsberger et al *Choice of Law in International Commercial Contracts* par 27.41.

244 Einhorn in Basedow *et al Encyclopedia of Private International Law* 2199. See also Einhorn (n 234) 80; Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* par 27.76; Karayanni *Conflicts in a Conflict* 193. See also Einhorn in Girsberger *et al Choice of Law in International Commercial Contracts* note 46: "Cf *Efrima v HP Capital Ltd.*, CA (Tel-

7 NEW ZEALAND

Great Britain's colonisation of New Zealand in 1841 led to the transplantation of English law and English legal tradition in the newly formed colony.[245] The influence of English law is still visible today, especially in the field of private international law.[246] There are two significant reasons for the country's reliance on traditional English common-law rules in this branch of law. First, "[s]ince there are not many reported (and unreported) private international law cases in New Zealand, case-law from comparable Anglo-common law jurisdictions, such as the United Kingdom … have significant persuasive value".[247] Secondly, New Zealand does not have an abundance of academic literature on private international law.[248] Therefore, "reference is traditionally made to the leading English law texts" on the subject.[249]

7 1 Party autonomy

In respect of its choice-of-law rules in international contracts, New Zealand is guided by the English common law.[250] Therefore, reference is made to the proper law of the contract to describe the law applicable to an international commercial contract.[251] The proper law of the contract refers to the legal system by which the parties intended the contract to be governed.[252] Subject

Aviv) 2385/00, tak-District 2002(2) 6350 (27 June 2002); cf also *Beit Amzaleg Ltd. v Africa Israel Investments Ltd* CC (District Court, Central) 10007-02-09, Nevo electronic database (7 September 2011), concerning contracts made with a real estate agent concerning his services with respect to the acquisition of real estate in the Czech Republic and in Romania. Based upon the identity of the parties in each case, the places where the negotiations took place and where contract was concluded, the currency, etc. the Court held that in the first case Czech law applied and in the second – Israeli law; *Steinhauer v Aharon*, Civil Case (Magistrate Court, Haifa) 33760-12-09, Nevo electronic database (23 September 2013)."

245 The discussion on New Zealand is based in part on Bouwers *Tacit Choice of Law in International Commercial Contracts: A Global Comparative Study*. See Schoeman "New Zealand" in Basedow *et al Encyclopedia of Private International Law* 3 (2017) 2369 2370.

246 Angelo *Private International Law in New Zealand* (2012) 34; Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2370. See, also, Hook "New Zealand" in Girsberger *et al Choice of Law in International Commercial Contracts* (2021) par 42, par 42.01.

247 Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2369. See, also, Angelo *Private International Law in New Zealand* 34: "Much of the private international law on obligations is covered in New Zealand by the common law and essentially by that of England." See, also, Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2370.

248 Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2370.

249 See Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2370.

250 See also Angelo *Private International Law in New Zealand* 34; Hook in Girsberger *et al Choice of Law in International Commercial* par 42.01; Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2370 and 2373.

251 See Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2373. See also Angelo *Private International Law in New Zealand* 35: "The proper law will govern matters of legality of performance, discharge and interpretation of the contract."

252 Angelo *Private International Law in New Zealand* 35; Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2373. See *Mount Albert Borough v Australasian Temperance and General Mutual Life Assurance Society, Limited* [1937] NZLR 1124 (PC) 1131.

to certain limitations,[253] the principle of party autonomy is generally accepted in New Zealand private international law. It appears that the parties are able to choose different laws for different parts of the contract, thereby permitting *dépeçage*.[254] However, there is no judicial authority or academic opinion on whether parties may choose a particular legal system that bears no connection to the parties or the contract.[255] Finally, the possibility of a non-state law has not been settled by a New Zealand court.[256]

Parties may choose the proper law of the contract by inserting an express choice-of-law clause in their contract.[257] In the absence of an express choice of law, the court must consider whether a tacit choice of law can be inferred. If not, the court will assign an objective proper law to the contract.[258] However, it appears as though New Zealand law does not clearly distinguish the determination of a real (albeit tacit) choice of law from the objective determination of the applicable law.[259] Hook, in reference to *McConnell Dowell Constructions Ltd v Lloyd's Syndicate 369*,[260] states that the court uses "the concepts of 'inferred choice' and 'closest and most real connection' interchangeably".[261] Furthermore, in *Chevalier Wholesale Produce Ltd v Joes Farm Produce Ltd*,[262] the court held: "In the absence of

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253 See Angelo *Private International Law in New Zealand* 35: "If the parties have expressed their intention that the contract be governed by the law of a particular country, then the courts will honour that intention 'provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy'. The choice will be *bona fide* if there was not clear intention on the part of the parties by their choice to evade fraudulently the application of the law of a country which would otherwise be applicable." See also Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2373.

254 *Club Mediterranée v Wendell* [1989] 1 NZLR 216 (CA) 218–219. See also Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.07.

255 However, see Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.10: "The chosen law need not be connected to the parties or their transaction ... There are no cases in New Zealand in which a choice of law agreement was not respected because it was not sufficiently closely connected to the parties or the contract."

256 See, generally, Howarth "*Lex Mercatoria*: Can General Principles of Law Govern International Commercial Contracts?" 2004 10 *Canterbury Law Review*. See also Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.12: "New Zealand law probably does not allow for the possibility of a choice of non-State law. Although there is no New Zealand authority on the matter, it is likely that a New Zealand court would be guided by English precedent to conclude that parties must choose the law of a country."

257 Angelo *Private International Law in New Zealand* 35; Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2373.

258 Angelo *Private International Law in New Zealand* 35; Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.13; Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2373. See *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93 (CA) [30]; *McConnell Dowell Constructors Ltd v Lloyd's Syndicate 396* [1988] 2 NZLR 257 (CA) 272–273.

259 See Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.15 and 42.16.

260 [1988] 2 NZLR 257 (CA) 272–273: "The Question is one of inferred intention of the parties in the circumstances, or what is the system with which the transaction has the closest and most real connection."

261 Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.16.

262 HC Auckland CIV 2010-404-4227, 17 November 2011.

an express choice of law in a contract, the proper law of the contract is that system of law with which the contract is most closely connected. This is an objective test, not a search for the parties' subjective implicit intentions."[263] Hook is of the view that "New Zealand courts have largely failed to distinguish the concept of a tacit choice from the position where there is no choice of law".[264]

7 2 How strict are the criteria for inferring a tacit choice of law?

There is little guidance in New Zealand private international law on the level of strictness in the criteria for inferring a choice of law. Although academics acknowledge the possibility of a tacit choice of law,[265] there is no definitive view in this regard.

7 3 Indicators of a tacit choice of law

In the absence of an express choice of law, Angelo states, "the proper law will be determined in accordance with the intention of the parties as may be gleaned from the contract and its circumstances".[266] This means that a court, in deciding whether the parties have made a tacit choice of law, is not confined to the written agreement, but may take account of considerations surrounding the contract.

Owing to the confusion between a tacit choice of law and the determination of the objective proper law, New Zealand private international law does not contain clear examples from which a tacit choice of law may be inferred. In the context of the objective proper law, reference is made, *inter alia*, to the legal provisions of a particular legal system,[267] the place of performance of the contract,[268] and jurisdiction clauses.[269] The weight that a

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263 *Chevalier Wholesale Produce Ltd v Joes Farm Produce Ltd supra* par 19.

264 Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.18.

265 Angelo *Private International Law in New Zealand* 35: "Where the parties have not expressly identified the governing law for their contract, the proper law will be determined in accordance with the intention of the parties." See also Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2373.

266 Angelo *Private International Law in New Zealand* 35. See also Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.18; Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2373. See *Chevalier Wholesale Produce Ltd v Joes Farm Produce Ltd supra* par 19. See, for e.g., *Amin Rasheed Shipping Corp v Kuwait Insurance Co supra* 61. The majority of the English court held that the test for determining whether there exists a tacit choice of law involves an examination of the contract "in order to see whether the parties have, by express terms or necessary implication from the language used, evinced a common intention as to the system of law by reference to which their mutual rights and obligations under it are to be ascertained".

267 *Bexhill Funding Group Ltd v MBA Ltd* HC Wellington CIV 2003-485-205, 19 February 2008 par 33 as referred to by Hook in Girsberger *et al Choice of Law in International Commercial Contracts* note 42; *Chevalier Wholesale Produce Ltd v Joes Farm Produce Ltd supra* par 22.

268 *Bexhill Funding Group Ltd v MBA Ltd supra* par 33 as referred to by Hook in Girsberger *et al Choice of Law in International Commercial Contracts* note 43.

court will attach to these factors in the determination of a tacit choice of law is unclear. This uncertainty extends to the relationship between choice of forum and a tacit choice of law.[270]

8 COMPARISON AND CONCLUDING REMARKS

The principle of party autonomy in respect of international commercial contracts is commonly accepted in private international law systems. The legal systems of Australia, Canada, India, Israel and New Zealand generally recognise the principle, albeit to varying degrees. It is also uncontroversial that parties may exercise their autonomy by expressly selecting a law to govern their agreement. At English common law, there has been some uncertainty about the applicable test in the absence of an express selection, and the line between finding a tacit choice of law and the system of law with which the contract has its closest connection is blurred.[271] This uncertainty persists in the jurisdictions under discussion insofar as a tacit choice of law is concerned. Although all countries recognise the possibility of a tacit choice of law, there is confusion and apprehension regarding its application. For instance, in Australian case law, there are times when the courts have immediately proceeded to determine the objective proper law in the absence of an express choice of law.[272] In Canadian law, the courts have blurred the lines between the subjective proper law (which reflects the parties' true intentions) and the objective determination of the proper law.[273] There is also a debate in Canadian academic circles whether tacit choices of law should be permitted.[274] Similarly, it appears that New Zealand law does not clearly distinguish a tacit choice of law from the objective determination of the applicable law.[275] Finally, it seems that Israeli law provides no guidance other than that its private international law allows both express and tacit choices of law. It is submitted that legal systems must be mindful of distinguishing a tacit choice of law from an objective determination of the applicable law – and a strict threshold for the determination of a tacit choice of law may assist the courts in avoiding this confusion.

Although all legal systems examined in this article recognise the possibility of a tacit choice of law, the criteria for detecting such choices are far from certain. As mentioned, the Israeli system does not provide any guidance in this regard. Likewise, the New Zealand legal position does not offer any clarity regarding the level of strictness in the criteria for determining

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269 See *Chevalier Wholesale Produce Ltd v Joes Farm Produce Ltd supra* par 19.

270 Schoeman in Basedow *et al Encyclopedia of Private International Law* 3 2373: "An arbitration clause does not necessarily indicate an implied choice of law – it is one of the factors to be taken into account when inferring a choice." See also Hook in Girsberger *et al Choice of Law in International Commercial Contracts* par 42.18: "Jurisdiction clauses or arbitration agreements, too, may be a relevant factor, but they would not automatically indicate a tacit choice of law."

271 See discussion under heading 2 1 above.

272 See discussion under heading 3 1 above.

273 See *Richardson International Ltd v Mys Chikhacheva (The) supra* par 28.

274 See under heading 4 1 above.

275 See under heading 7 1 above.

a tacit choice of law. Nevertheless, it remains to be seen whether the traditional English common-law rules will guide these systems in this regard. At common law, it appears that there is a low threshold for the determination of a tacit choice of law.[276] However, this article supports a strict test for the determination of a tacit choice of law. A high threshold will have the effect of limiting "the court's discretion in determining the existence of a tacit choice of law, thereby promoting legal certainty and predictability of decision. It will also dissuade courts from readily deducing a tacit agreement, particularly where the parties did not have a true common intention in respect of choice of law".[277] The private international law systems of Australia,[278] Canada[279] and India[280] all contain a threshold that appears to satisfy a strict test for the determination for a tacit choice of law. This seems to deviate from the traditional common-law position. Although a case is made that the courts in these jurisdictions endorse a strict test for the determination of a tacit choice of law, perhaps further clarity is needed.

It seems that Australian, Canadian, Indian and New Zealand law permits the courts to infer an intention in light of the terms of the contract and the circumstances of the case. However, there is uncertainty concerning the indicators of a tacit choice of law. Owing to confusion between a tacit choice of law and determination of the objective proper law, New Zealand does not contain clear examples of factors from which a tacit choice of law may be inferred. Judicial and academic support for comparable factors can be found in Australian, Canadian and Indian law. These include: the use of a standard form that is known to be drafted with reference to a particular system of law; an express choice of law made in related transactions between the parties; the use of technical terms or language characteristic of a legal system; reference to provisions or the legislation of a legal system in the contract; and the validation principle. It is submitted that these factors are only indicators "that [point] to a common intention of the parties; the inference that a court draws from their existence should depend on all the circumstances of the case".[281] Fixed criteria or a single factor cannot automatically indicate a real (albeit tacit) choice of law.[282] This is especially

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276 See under heading 3 2 above.

277 See Bouwers "Tacit Choice of Law in International Commercial Contracts: An Analysis of Asian Jurisdictions and the Asian Principles of Private International Law" 2021 26(1) *Uniform Law Review/Revue de Droit Uniforme* 14 41. See also Bouwers *Tacit Choice of Law in International Commercial Contracts: A Global Comparative Study* 228–229: "In this way, a search for a hypothetical intention, as opposed to the real (or actual) intention of the parties will be avoided. The sum effect of a strict criterion for the determination of a tacit choice of law is that the legitimate expectations of the parties are protected."

278 See heading 3 2 above. The courts have used phrases such as "properly inferred", while Australian authors propose that there should be "conclusive evidence" of a tacit choice of law.

279 See heading 4 2 above. Canadian courts have made use of the phrase "properly be inferred" when referring to a tacit choice of law.

280 See heading 5 2 above. An Indian court uses the phrase "clearly inferred" when referring to a tacit choice of law. It also stated that the "true intention" of the parties must be discovered.

281 Bouwers *Tacit Choice of Law in International Commercial Contracts: A Global Comparative Study* 247.

282 *Ibid*.

relevant regarding choice-of-forum clauses. However, the role of forum clauses has not been adequately addressed. Notwithstanding the fact that courts in Australia and Canada apparently endorse a strict test for the determination of a tacit choice of law, these jurisdictions still attach significant weight to the presence of a forum clause in the contract as indicating a choice of law.[283] This corresponds with the traditional common-law approach, where courts have attached considerable weight to the presence of a choice-of-forum clause.[284] In Indian law, the position remains unclear. On the one hand, there is support for the view that the inclusion of a forum clause should only be a factor in the determination of a tacit choice of law. In the Indian case of *National Thermal Power*, the Supreme Court was quite clear in its assessment of choice-of-forum clauses. Although the court accepts that a choice-of-forum clause may "be an indication of the intentions of the parties", there must be "other relevant connecting factor(s) with that place".[285] According to the court, the mere presence of a forum clause is not "sufficient to draw an inference as to the intention of the parties" and may, in certain instances, "have little relevance for drawing an inference as to the governing law of the contract."[286] It is submitted that this is the correct view.[287] Unfortunately, support for the traditional common-law approach regarding choice-of-forum clauses can be found in more recent Indian court decisions.[288]

The English common law remains highly influential. The jurisdictions under discussion still appear to be guided by English case-law jurisprudence and traditional common-law rules regarding choice of law. As previously mentioned, this is problematic since the common-law rules may be outdated. From the examination of selected common-law jurisdictions, it is apparent that many issues regarding the determination of a tacit choice of law remain stagnated and need judicial clarity or legislative reform. This would enhance legal certainty and predictability of decisions when courts in these jurisdictions are tasked with determining the existence of a tacit choice of law.

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283 See under headings 3 3 and 4 3 above.

284 See under heading 2 3 above.

285 *National Thermal Power Corporation v Singer Company supra* 119. See, also, Neels in UNIDROIT (ed) *Eppur Si Muove* 366.

286 *National Thermal Power Corporation v Singer Company supra* 119.

287 See Bouwers *Tacit Choice of Law in International Commercial Contracts: A Global Comparative Study* 245: "A choice of forum or arbitral tribunal for dispute resolution and the choice of law applicable to the contract should be distinguished. This is justified on the ground that the parties may have chosen a particular forum because of its neutrality, experience, convenience, or expertise and not necessarily for the application of its domestic law. In any event, the forum will determine the law of the contract in terms of the applicable rules of private international law. Parties who submit to a court or tribunal's jurisdiction do not intend thereby that the forum should abandon its choice of law process and mechanically apply the *lex fori*. Although it is a relevant factor in the determination of a tacit choice of law, the inference that a court draws in a particular case should depend on all the circumstances surrounding the agreement. A choice of court or localised arbitral tribunal should therefore not on its own be taken to indicate a choice of law by the parties."

288 See heading 5 3 note 224.