

## International contracts and the choice of law in New Zealand

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### Introduction

An international contract is a contract that has contacts with more than one jurisdiction. Parties to such a contract may actually incorporate foreign law by writing terms of that foreign law into their contract, or they may also choose a particular jurisdiction in which to litigate, if the need arises, by putting a choice of forum clause into their contract. This can be a simple clause stating that the forum of a certain country or state is to apply if there is a dispute. Arbitration clauses may also be written into an international contract in the same way. In New Zealand the proper law of the contract determines which law is to apply if a dispute arises.<sup>1</sup>

### The Proper Law Defined

The term “proper law of a contract” means the system of law by which the parties intended the contract to be governed or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection.<sup>2</sup>

This definition, given by Dicey & Morris, includes the three rules on choice of law for contracts, because it is sufficiently widely drafted to incorporate:

- the parties’ actual express choice;

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<sup>1</sup> *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 (PC); *Club Mediterranee NZ v Wendell* [1989] 1 NZLR 216 (CA).

<sup>2</sup> L Collins, *Dicey & Morris The Conflict of Laws* (11th ed), London, Stevens & Sons Limited, 1987, Rule 180, 1161-1162 (hereinafter referred to as *Dicey & Morris*). This is the last edition where the law of New Zealand coincided with that of England. The EEC Convention on the Law Applicable to Contractual Obligations 1980 also called the Rome Convention is now in force in England by virtue of *The Contracts (Applicable Law) Act 1990*. See generally *Dicey & Morris*, 1161; D Goddard & H McQueen, *Private International Law in New Zealand*, Wellington, New Zealand Law Society, Repr. 2001, 131. See also *Mount Albert Borough Council v Australasian Temperance and General Mutual Life Assurance Society* (1938) AC 224, at 240 per Lord Wright (PC); *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, at 603 per Lord Reid (HL).

- the parties' choice which although not express can be inferred;
- the situation where the parties have not made a choice of law decision. Here the court applies the law most closely connected to the contract to govern.

## Express Choice

Parties to an international contract can expressly state that they wish the law of New Zealand, or wherever, to govern their contract and then the court will, subject to certain qualifications discussed below, honour such choice. This freedom to choose is called party autonomy. Cases applying party autonomy have existed since 1760<sup>3</sup>. Dicey & Morris state the rule in the following words:

When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention in general determines the proper law of the contract.<sup>4</sup>

All the parties need to do is declare their common intention by a simple statement that the contract shall be governed by the law of a particular jurisdiction. In an early New Zealand case it was specified that, "the contract evidenced by this bill of lading shall be governed by the law of England."<sup>5</sup> The case, which was a decision of the then New Zealand Supreme Court, concerned a contract involving shipment of goods from England to New Zealand. The court held that whilst English law governed the contract as the law of the place of contracting (*lex loci contractus*) the matter was completely settled by the incorporation of this clause and thus New Zealand legislation did not apply to the contract.<sup>6</sup>

The leading case is the Privy Council decision of *Vita Food Products Inc v Unus Shipping Co Ltd*.<sup>7</sup> where a cargo of herrings was shipped from Newfoundland for New York on board a Nova Scotian vessel. Owing to negligent navigation the ship came to grief off the coast of Nova Scotia and the herrings were damaged. The bill of lading stated that the contract was governed by English law and exempted the ship-owners from liability for negligence. A Newfoundland Statute provided that every outward bill of lading

<sup>3</sup> *Robinson v Bland* (1760) 2 Burr 1077. See also *Lloyd v Guibert* (1865) LR 1 QB 115; *Jacobs v Credit Lyonnais* (1884) 12 QBD 589.

<sup>4</sup> See Dicey & Morris, above n2, Rule 180, Sub Rule 1, 1168. See also *Gienar v Meyer* (1796) 2 Hy B1 603.

<sup>5</sup> *New Zealand Shipping Co Ltd v Tyree* (1912) 31 NZLR 825.

<sup>6</sup> Thus also illustrating the New Zealand development away from the mechanical rule of the law of the place of contracting (*lex loci contractus*).

<sup>7</sup> [1939] AC 277 (PC), referred to or applied in New Zealand in other contexts (mostly jurisdiction) but not discussed in any detail. See for example, *Cornwall Properties v King* [1966] NZLR 239; *Campbell Motors Ltd v Storey* [1966] NZLR 584 (CA); *Graham v Attorney-General* [1966] NZLR 937 (CA); *Carey v Hastie* [1968] NZLR 276 (CA); *Air New Zealand Ltd v The Ship "Contship America"* [1992] 1 NZLR 425 (HC); *Knyvett v Christchurch Casinos Ltd* [1999] 2 NZLR 559 (CA).

from Newfoundland must contain the Hague Rule. However, because out of date forms were used the bill of lading in question did not contain these relevant provisions. The buyers sued the ship-owners. Both parties assumed that Newfoundland law was the proper law of the contract.<sup>8</sup> The Privy Council, however, held that English law was the proper law and consequently, as the choice of it was valid, there was no liability by reason of the contract.

## Limits on Party Autonomy

### Bona Fide, Legal and not Contrary to Public Policy

In the *Vita Foods* decision Lord Wright also dealt with the question of the limits to be assigned to the doctrine of party autonomy. He said that, “it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal and there is no reason for avoiding the choice on the ground of public policy.”<sup>9</sup>

This statement is not free from ambiguity as it is difficult to know by which law Lord Wright intended the legality to be tested. The only safe conclusion would appear to be that a choice is not bona fide or legal if it can only be explained as having been made to escape some otherwise applicable law. Dicey & Morris<sup>10</sup> suggest that a foreign law would thus not be applied if it contravened the public policy of the forum or the mandatory provisions of a proper law. A choice of law unconnected with the contract could be seen as an evasive attempt and therefore not bona fide.

There would appear to be only two Commonwealth decisions, both Australian decisions, where the parties’ choice was set aside as being either unconnected with the realities of the contract or an attempt to evade a statute in force in the forum. The first case was *Golden Acre Ltd v Queensland Estates Ltd*.<sup>11</sup> Where a contract was made in Queensland between a Queensland undertaking and a Hong Kong company. The latter was doing business in Queensland as a real estate agent and the contract involved the sale of some Queensland land to, amongst others, persons from Hong Kong. Queensland statute law

<sup>8</sup> *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 (PC).

<sup>9</sup> See J H C Morris & G C Cheshire, “The Proper Law of a Contract” (1940) 56 LQR 320, 325.

<sup>10</sup> See Dicey & Morris, above n 2, at 1172.

<sup>11</sup> [1969] Qd R 378 (QSC), affirmed on other grounds by the High Court of Australia (1970) 123 CLR 418, Sub nom; *Freehold Land Investments Ltd v Queensland Estates Pty Ltd*.

required that real estate agents be licensed and provided for maximum rates of commission chargeable by real estate agents. The Hong Kong company had charged excessive commission and was unlicensed. It was considered that in order to circumvent the Queensland law the parties had made Hong Kong law the proper law of the contract. Hoare J held that their choice was not bona fide and that the law of Queensland was the proper law of the contract.

I am satisfied that the attempted selection of this [Hong Kong] law was for no other purpose than to avoid the operation of the Queensland law. Under all the circumstances, I conclude that the purported selection of the Hong Kong law was not a *bona fide* selection.<sup>12</sup>

In the second case<sup>13</sup> Campbell J said, obiter:<sup>14</sup>

The question is not one of jurisdiction which is not raised but what law should be applied. If the parties in this clause have indicated an intention that the law of Hong Kong is to govern the whole of their contractual relations they have expressed a choice unconnected with the realities of the contract ...

It has been pointed out<sup>15</sup> that whilst the decision reached in *Golden Acres* was not questionable the method of reaching it perhaps was. It could be argued that even if *Hoare J* had treated the parties' choice as effective the Queensland Act would not necessarily have been made inapplicable. The Queensland Act was obviously in force in Queensland and could have been applied notwithstanding the parties' choice of law.<sup>16</sup>

The use of the word "legal" by Lord Wright is ambiguous and a bona fide limitation has its difficulties. It may well have been a bona fide choice in a case such as *Golden Acre Ltd v Queensland Estates Ltd*.<sup>17</sup> If the result of the parties' actions is to avoid some consequence that would otherwise apply to their detriment it is easy to suggest that their actions are not bona fide. If the court considers that the parties' choice is not bona fide it may, in a *Golden Acres* situation, decide that the issue is adequately covered by the public policy limitation.

### Public Policy

Public policy, whether the forum's public policy or that of another jurisdiction, may overrule a choice of

<sup>12</sup> Ibid, at 385.

<sup>13</sup> *Queensland Estates Pty Ltd v Collas* [1971] Qd R 75 (QSC).

<sup>14</sup> Ibid, at 80.

<sup>15</sup> D St L Kelly, "International Contracts and Party Autonomy" (1970) 19 ICLQ 701, 702.

<sup>16</sup> See J L R Davis, "A Note" (1970) 44 ALJ 80.

<sup>17</sup> [1969] Qd R 378 (QSC).

law clause.<sup>18</sup> For example, in *Mitsubishi Corp v Alafouzos*<sup>19</sup> Steyn J stated that “contractual disputes must be resolved in accordance with settled principles and rules of contract law but that exceptionally, the dictates of a recognised head of public policy, grounded on incontestable and fundamental moral considerations, operate to render defensible what would otherwise be enforceable contractual rights.”

In *Knyvett v Christchurch Casinos Ltd*<sup>20</sup> the New Zealand Court of Appeal noted that public policy, understood in a wider sense, may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.

### **Choice of Law unconnected with the Contract, Capricious Choices**

Another possible limitation on party autonomy is the question of whether the parties may choose a governing law which is unconnected with their contract, in other words, may the parties make a capricious choice or alternatively, if not capricious, one totally unconnected with the contract? The matter was considered by Lord Wright<sup>21</sup> in the *Vita Foods* decision. His Lordship said “connection with English law is not, as a matter of principle, essential.” There can be sound financial or commercial reasons for choosing a governing law that appears otherwise unrelated to the contract.<sup>22</sup> A contrary view has been taken in other decisions.<sup>23</sup>

From a practical point of view it may be noted that there are no reported decisions where the parties have made a wholly capricious choice as defined by the judge deciding the case. Possibly the answer lies in the fact that persons involved in international contracts, simply do not make such choices.

### **Overriding or mandatory laws**

Mandatory rules, whether of the forum or the proper law, are rules that are considered sufficiently important to override choice of law clauses.<sup>24</sup> It has been suggested that Lord Wright in the *Vita Foods*<sup>25</sup>

<sup>18</sup> *Regazzoni v K C Sethia Ltd* [1958] AC 301 (HL).

<sup>19</sup> [1988] 1 Lloyd’s Rep 191, at 192.

<sup>20</sup> [1999] 2 NZLR 559, at 565 per Blanchard J (CA).

<sup>21</sup> *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, at 290 (PC).

<sup>22</sup> See for example *British South Africa Co v De Beers Consolidated Mines Co Ltd* [1910] 1 Ch 354, at 381 per Swinfen Eady J; *Rex v International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] AC 500, at 529 per Lord Atkin (HL); *British Controlled Oil Fields v Stagg* [1921] 127 LT 209; *Tzortzis v Monarch Line A/B* [1968] 1 All ER 949 (CA); *Akai Pty Ltd v The People’s Insurance Co Ltd* (1996) 141 ALR 374 (HCA); cf *Re Claim by Helbert Wagg* [1956] Ch 323.

<sup>23</sup> In *Re Claim by Helbert Wagg*, *ibid*, at 341, Upjohn J said that the court will not necessarily regard the intention expressed by the parties “as being the governing consideration where a system of law is chosen which has no real or substantial connection with the contract looked upon as a whole.”

<sup>24</sup> See *Boissevain v Weil* [1950] AC 327 (HL).

<sup>25</sup> [1939] AC 277 (PC); Davies, Bell and Brereton, Nygh’s Conflict of Laws in Australia (8th ed), LexisNexis 2010, at 402.

decision had this limitation in mind when he said that the choice must be legal.<sup>26</sup> In *Akai Pty Ltd v The People's Insurance Co Ltd*<sup>27</sup> a New South Wales corporation (Akai) entered into a contract of insurance with a Singapore Corporation (PIC) to protect Akai from bad debts. New South Wales had in force the Insurance Contracts Act 1984 (Cth), section 8 of which overrode any choice of law clause. Section 52 of the Act stated that where a provision was unhelpful to anyone (except the insurer) it was void. The contract stated that the policy was to be governed by the laws of England and any dispute arising from the policy was to be referred to the courts of England. A majority of the High Court of Australia held that section 8 required the court to ignore any of the evidence of the parties' choice of a governing law, including the reference to English Courts. The majority also held that section 52 precluded the evasion of the protection given by the Act through a choice of a foreign forum.<sup>28</sup> The forum is not concerned with the mandatory law of another jurisdiction unless its law is the proper law of the contract.<sup>29</sup>

### **Generally a choice of law clause only binds the parties to the contract and not third parties**

Following general principles of contract law in New Zealand a choice of law clause only binds the parties to the contract and not third parties.

### **Meaningless choice of law clauses will be disregarded or altered**

In *Compagnie D'Armement Maritime SA v Compagnie Tunisienne de Navigation SA*<sup>30</sup> the contract contained a clause holding that the governing law would be the law of the flag of the vessel carrying the goods. A number of boats were used, involving the flags of France, Italy, Liberia, Sweden, Bulgaria and Norway. Lord Reid said the clause had failed and therefore the third rule of the proper law had to be used.<sup>31</sup> The parties' intention was no longer relevant. It was decided that French law was the system of law with which the contract was most closely connected.

### **The law chosen must refer to a municipal system of law**

After a period of uncertainty it seems clear that the courts require the parties to choose a definite municipal system of law to govern their contract. Thus parties may not choose public international law to govern. In *Amin Rasheed Shipping Corp v Kuwait Insurance Co*,<sup>32</sup> Lord Diplock said that contracts were

<sup>26</sup> *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 141 ALR 374 (HCA).

<sup>27</sup> *Ibid.* See also F M B Reynolds, "Overriding Policy of the Forum: The other side of the Coin" [1997] LMCLQ 177; J Greene, "Party Autonomy in Choice of Law in Contract: Through the Lens of *Akai Pty Ltd v The People's Insurance Company*" (1997) 25 ABLR 330.

<sup>28</sup> *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 141 ALR 374, at 447-448 (HCA).

<sup>29</sup> *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 (PC); *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 141 ALR 374 (HCA).

<sup>30</sup> [1971] AC 572 (HL).

<sup>31</sup> As discussed below.

<sup>32</sup> [1984] AC 50, at 56 (HL).

incapable of existing in a legal vacuum:

They are mere pieces of paper devoid of all legal effect unless they are made by reference to some legal system of private law which defines the obligations...

The House of Lords explicitly rejected the notion of the internationalised contract governed by a set of general principles derived from public international law. It has also been suggested that parties are not at liberty to subject their contract to a legal system which is no longer in force, or to a draft of a foreign code or to a system which they have freely invented.

### **Parties are limited to the substantive law of the chosen law**

In other words there is no renvoi.<sup>33</sup> This means that the law refers to the domestic law of a jurisdiction and not its conflict of laws rules which might refer the matter back or onto another jurisdiction.

### **The choice of law limited to certain issues**

Party autonomy does not apply in the field of capacity to contract. Parties may not arrange their affairs in such a way as to confer capacity upon themselves by a choice of law clause. Dicey and Morris<sup>34</sup> state that an individual's capacity to contract is governed by the system of law with which the contract is most closely connected or by the law of his or her domicile or residence.

### **Parties may not choose a law to govern procedure**

Parties are not allowed to choose a governing law to govern procedure. These questions are governed by the law of the forum (the *lex fori*). It would be quite impractical to allow otherwise.

### **Both parties must agree on the choice of law clause**

If one party is in a weaker position there may be no true agreement on the choice of law.<sup>35</sup> This is a problem with standard form contracts, where the weaker party has no real choice in negotiating the contract.

### **Limitations concerning time of choice**

Courts will not enforce a governing law clause whereby the law chosen is made to depend upon some future event.<sup>36</sup> In *The Iran Vojdan*<sup>37</sup> the choice of law clause stated that, at the option of the carrier, either

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<sup>33</sup> This was affirmed in the *Amin Rasheed* decision, *ibid*.

<sup>34</sup> See Dicey & Morris, above n 2

<sup>35</sup> *Fricke v Isbrandtsen* 151 F Supp 465 (1957).

Iranian law or German law or English law could govern the contract. Bingham J held that as a matter of English law it was “clear and not disputed that this clause in the bill of lading is bad insofar as it envisages what may be called a ‘floating proper law’.” There must be a choice of law clause at the time of contracting if it is to be a valid clause that the courts will uphold. If a so-called floating proper law clause is made the courts will ignore it and apply the system of law which is most closely connected to the contract.

The parties may, however, provide for two proper laws, one to be applied in one event and the other if that event was negated. This has been considered to be good commercial sense. In *The Mariannina*,<sup>38</sup> for example, the parties had chosen arbitration in England pursuant to English arbitration law but if this was unenforceable then Greek law was to apply. The Court held that English law would apply. If for any reason it could not have applied then the Greek choice would have prevailed.

Finally, it is acceptable to choose one law to govern one part of the contract and another law to govern another aspect of it. This is called depeçage.

### **Inferred Choice**

The intention of the parties may be inferred from the terms of the contract and the surrounding circumstances.<sup>39</sup>

This second limb or rule applies again where the parties have actually made a choice. The difference between the first and second rule is that in the first situation the parties have expressly stipulated a choice of law to govern their contract and have inserted such a clause in their written agreement. In this second situation the parties, while having made a choice, have failed to articulate it. In the words of Dicey & Morris:<sup>40</sup>

When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and the nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.<sup>41</sup>

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<sup>36</sup> *The Iran Vojdan* [1984] 2 Lloyd’s Rep 380.

<sup>37</sup> Ibid.

<sup>38</sup> *Astro Venturoso Compania Naviera v Hellenic Shipyard SA (“The Mariannina”)* [1983] 1 Lloyd’s Rep 12.

<sup>39</sup> *R v International Trustee for the Protection of Bondholders Akt* [1937] AC 500, at 529 per Lord Atkin (HL).

<sup>40</sup> See Dicey & Morris, above n 2, Rule 180, Sub-Rule 2, 1182.

<sup>41</sup> Ibid. See also *Re a Mortgage* [1933] NZLR 1512.

At one time it was thought that the problem of inferred choice could be solved by means of an implied term in the contract. However, it has been pointed out<sup>42</sup> that this creates difficulties and Lord Reid held in *James Miller & Partners v Whitworth Street Estates (Manchester) Ltd*<sup>43</sup> that “the better view is now to apply a more objective test.” Similarly, Lord Wilberforce<sup>44</sup> in the same decision said:

In my opinion, once it was seen that the parties had made no express choice of law, the correct course was to ascertain from all relevant contemporary circumstances<sup>45</sup> including, but not limited to, what the parties said or did at the time, what intention ought to be imputed to them on the formation of the contract.<sup>46</sup>

Thus, the rule here is that the parties’ choice still prevails if it can be discovered. The choice may be said to be implicit. The difficulty is to work out what law the parties had in fact had in mind when they entered their contract. As the litigants have not articulated their choice the court is in a difficult position. Traditionally, a number of presumptions existed which, if applicable to the contract under consideration, were used to assist the court in inferring a choice. Today, presumptions in general are now out of favour and indeed the development of some of them in recent years, as will be shown, has reduced their usefulness in the search for the parties’ choice.

## **Aids in Establishing Party Choice**

### **Arbitration Clauses**

Until the end of the nineteen sixties<sup>47</sup> the English courts had generally held that if the parties had agreed that arbitration should take place in a given country then the law of that country was intended to be the proper law of the contract.<sup>48</sup> Today an arbitration clause is just one factor to take into account when considering the issue.<sup>49</sup>

### **Particular language as an aid to inferred choice**

It has been suggested<sup>50</sup> that the use of terms such as “Act of God” or “Queen’s Enemies” in a contract may suggest that English law was intended to govern. These two phrases are, for example, meaningless in

<sup>42</sup> *James Miller & Partners v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, at 603 per Lord Reid (HL).

<sup>43</sup> Ibid.

<sup>44</sup> Ibid, at 614.

<sup>45</sup> This test was applied in *JMJ Contractors v Marples Ridgway* (1985) 31 BLR 100 by Davies J.

<sup>46</sup> See also [1970] AC 583, at 611 per Viscount Dilhorne (HL).

<sup>47</sup> Until *Compagnie d’Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572 (HL).

<sup>48</sup> See eg *Hamlyn v Talisker Distillery* [1894] AC 202 (HL); *Spurrier v la Cloche* [1902] AC 466 (PC); *N.V. Kwik Hoo Tong Handel Maats-Chappij v James Findlay & Co* [1927] AC 604 (HL); *Tzortzis v Monarch Line A/B* [1968] 1 WLR 406 (CA); *Compagnie d’Armement Maritime SA*, *ibid*.

<sup>49</sup> *Astro Venturoso Compania Naviera v Hellenic Shipyard SA (“The Mariannina”)* [1983] 1 Lloyd’s Rep 12.

<sup>50</sup> See Dicey & Morris, above n 2, at 1184.

German law.

The use of an English standard form is another factor that may be taken into account. For example, in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* Bingham J, at first instance, said:

The use of an English standard form may be a powerful, even conclusive, indication that the parties intended to contract with reference to English law [...] But there is, in my judgment a factor here which cannot be ignored in assessing whether, and if so, how strongly, that inference should be drawn. The evidence in this case plainly establishes that this form of ruling policy, produced and developed on the London Insurance market, has achieved worldwide currency. Partly this is due to the long history, the great experience, the professional expertise and the high standing of that market, combined with a traditional dominance of London as a Commercial centre. Partly it is due to the process of imperial fertilization which has led to the reproduction of the *Marine Insurance Act 1906* in far corners of the globe [...] the more international and generally used the reference (i.e. the standard form) is the less specifically English it becomes.<sup>51</sup>

In *NZI Insurance New Zealand Ltd v Hinton Hill & Coles Ltd*<sup>52</sup> Smellie J, referring to *Amin*, said that “it was not unusual for a ‘foreign’ Court to apply English law when interpreting particular kinds of insurance contracts which are couched in arcane language, derived from long usage in the London market, and for the interpretation of which reference must be made to established lines of English authority.” Dicey & Morris suggest that a contract making reference to, for example, a Scottish Statute, would presumably be taken to intend that it be governed by Scottish law even if its subject matter was situated in England and the person executing it be domiciled there.<sup>53</sup>

Other matters have included the place where the contract is made<sup>54</sup> or the choice by the parties of a method of negotiating and financing a loan.<sup>55</sup> The fact that a 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 to the proper law.<sup>56</sup> The residence of the parties, occasionally the nationality of the parties, the nature and location of the subject matter of the contract and the currency of payment have likewise been considered. In *Club Mediterranee v Wendell*,<sup>57</sup> Cooke P said that, “Reading through the terms and conditions, one cannot avoid the conclusion that, taken

<sup>51</sup> [1982] 1 WLR 961, at 968. See also *Armar Shipping Co v Caisse Algerienne d’Assurance et de Reassurance* [1981] 1 All ER 498 (CA); *Monterosso Shipping Co v International Transport Workers Federation* [1982] 3 All ER 841 (CA).

<sup>52</sup> [1996] 1 NZLR 203, at 208 (HC). This was said in the context of staying proceedings.

<sup>53</sup> See Dicey & Morris, above n 2, at 1184, footnote 45 and cases cited eg *Re Pilkington’s Will Trusts* [1937] Ch 574; cf *Lindsay v Miller* [1949] VLR 13 (VSC).

<sup>54</sup> *Club Mediterranee v Wendell* [1989] 1 NZLR 216, at 218-219 (CA).

<sup>55</sup> *Re United Railways of Havana etc Warehouses Ltd* [1960] Ch 52 (CA) affirmed sub nom *Tomkinson v first Pennsylvania Banking & Trust Co* [1961] AC 1007 (HL).

<sup>56</sup> *Anspach & Co Ltd v CNR* [1950] 3 DLR 26, and other cases cited by Dicey & Morris, above n 2, at 1184, footnote 48.

<sup>57</sup> [1989] 1 NZLR 216, at 218-219 (CA).

as a whole this was a contract made by parties in New Zealand, to be paid for in New Zealand in New Zealand currency, and that the primary obligations under it must have been intended by the parties to have been governed by New Zealand law.”

Finally, the parties’ choice could be inferred from the theory that parties intend their contract to be valid. If there are two possible laws to choose from, then if a particular choice would render the contract void this choice is to be avoided. However, as with arbitration clauses all these considerations are merely indicators and must be considered in the light of all relevant circumstances. At the end of the day the assistance offered a judge is of little help. It has been said that “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 intention of the parties.”<sup>58</sup>

The difficulties in establishing the parties’ choice when they have failed to articulate their wishes are obviously considerable. The lack of presumptions leaves the court without any really useful aids. However, the present English law is that the parties’ choice will be upheld even though it is not explicitly expressed. The court will consider all relevant circumstances but will not rely on any predetermined presumptions.

## Law of Closest Connection

### Definition

When the intention of the parties to a contract with regard to the law governing it is not expressed and cannot be inferred by the circumstances, the contract is governed by the system of law with which the transaction has its closest and most real connection.<sup>59</sup>

This is sometimes referred to as the *Bonython* test after the case of that name. The judge puts him or herself in the place of the reasonable person and determines the proper law for the parties. (S)he does not attempt to attain the actual intention of the contracting parties because that is non-existent but “how a just and reasonable person would have regarded the problem.”<sup>60</sup>

<sup>58</sup> *Jacobs v Credit Lyonnais* (1884) 12 QBD 589, at 601 per Bowen LJ (CA).

<sup>59</sup> See Dicey & Morris, above n 2, Rule 180, Sub Rule 3, 1190-1191. *Compagnie d’Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572, at 603 (HL); *Connell Dowell Constructors Ltd v Lloyd’s Syndicate 396* [1988] 2 NZLR 256 (CA); *Club Mediterranee NZ v Wendell* [1989] 1 NZLR 216 (CA).

<sup>60</sup> *The Assunzione* [1954] P 150, at 176 per Singleton LJ.

### Application of the Test

When applying this third test the judge may consider all the relevant circumstances. Two text book examples illustrate this rule. In *Rossano v Manufacturers' Life Insurance Co*<sup>61</sup> the court held that Ontario law applied as the proper law to the transaction which involved three endowment policies, all of which were associated with Ontario. It was noted that the defendant company had its head office in Ontario, that the form of policy was based on the law of Ontario, that despite *Rossano*, an Egyptian national resident in Egypt, negotiating the contracts initially in Cairo, he would never have got the policies if the Ontario head office had not approved. Finally, the Court considered that generally a person contracting with a foreign insurance company does so because he has faith in it and the system of law under which it operates.

The *Assunzione*<sup>62</sup> is the perfect example of a court adding up all relevant factors to determine the applicable law. A contract was made for the carriage of wheat from Dunkirk to Venice on board an Italian ship. The charterers were an organization of French grain merchants. The wheat was shipped under an exchange agreement between the French and Italian Governments (but the Italian ship owners did not know this). The contract was negotiated by correspondence between brokers in France and brokers in Italy. It was formally concluded in Paris in the English language and on an English standard form. Freight and demurrage was payable in Italian currency in Italy. The points in favour of applying French law were:

- The contract was made in France. It was headed "Paris, 1949";
- It was written in English but had a French supplement;
- The Bills of Lading were in French Standard form;
- The Charterers were a French firm acting for the French Government (although the Italians did not know this).

Matters favouring the application of Italian law were:

- The ship was Italian, flying an Italian flag;
- Italy was the place of performance where delivery was to be made;
- The Bills of Lading were assigned to Italian Consignees;
- The freight expenses were payable in Naples in Italian currency.

The English Court of Appeal had to use "a very delicate pair of scales"<sup>63</sup> in order to determine the proper law. It was unanimously held that Italian law was the proper law of the contract. The decisive factor was

<sup>61</sup> [1963] 2 QB 352. Another example is *Offshore International SA v Banco Central SA* [1977] 1 WLR 399.

<sup>62</sup> [1954] P 150.

<sup>63</sup> J H C Morris & D McClean, *The Conflict of Laws* (5th ed), London, Sweet & Maxwell, 2000, 324.

that both parties had to perform in Italy.<sup>64</sup>

Dicey & Morris<sup>65</sup> use the term “system of law”. Generally the country with the closest connection will be the same as the system of law with the closest and most real connection but cases do exist where the difference could be important.<sup>66</sup> Country is also inappropriate, obviously, where there may be a number of different states with different laws.

It must be noted that the test can be difficult to apply.<sup>67</sup> This, in part, can be attributed to the fact that an international contract can be so international as to not have a close connection with any particular system of law.

### Scope of the Proper Law

Capacity to contract is governed by the system of law with which the contract is most closely connected or by the law of the person’s domicile and residence.<sup>68</sup> The proper law governs issues of offer, acceptance, consideration<sup>69</sup> and consent.<sup>70</sup> Formal validity of an international contract is governed by the law of the jurisdiction where the contract is made or by the proper law of the contract. If it complies with either of those systems of laws it will be formally valid.<sup>71</sup> Material or essential validity is also determined by the proper law.<sup>72</sup>

### Conclusion

The difficulties with the New Zealand approach would suggest that this is a suitable area of law for legislative reform which if it did eventuate would hopefully follow European law to make for uniform rules for conflict of laws issues.

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<sup>64</sup> See also *Sayers v International Drilling Co* [1971] 3 All ER 163 (CA); *Brodin v A/R Seljar* [1973] SC 213 and *Coupland v Arabian Gulf Petroleum Co* [1983] 3 All ER 226 (CA).

<sup>65</sup> See Dicey & Morris, above n 2, Rule 180, Sub Rule 3, 1190, 1191.

<sup>66</sup> *James Miller & Partners v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 (HL).

<sup>67</sup> In *Sayers v International Drilling Co.* [1971] All ER 163, at 168 (CA), for example, Salmon LJ said “Sometimes it is said that the test – and it is a very useful test – is: what system of law has the closest and most real connection with the contract? My difficulty is that I can find very little clue in the contract as to what the parties intended, and very little indication that the contract has a very real or close connection with any particular system of law.”

<sup>68</sup> See Dicey and Morris, above n 2, at 1203; See also Nygh and Davies, above n 25 at 372-375.

<sup>69</sup> *Re Bonacina* [1912] 2 Ch 394 (CA).

<sup>70</sup> See Dicey and Morris, above n 2, at 1199.

<sup>71</sup> *Ibid.*, Rule 183, 1207.

<sup>72</sup> *Ibid.*, Rule 184, 1213.