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THE CONFLICT OF LAWS AND CONTRACT

by

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PREFACE

This paper is entitled "The Conflict of Laws and Contract". It was originally commissioned for the purposes of the Auckland District Law Society's Conference, which was held in Rarotonga at the end of April 1985. It was intended to form one constituent part of a larger number of papers devoted to the much wider topics of international trade contracts; aspects of local funding through overseas sources; aspects of domestic law in countries, such as Australia and Japan, which should be borne in mind when trading with them, and international protection of the rights of New Zealanders to intellectual property.

It has long been said that the study of the conflict of laws is like looking for a black cat that is not there in a dark room at night time. The world gets smaller by the year, CER comes closer and closer and New Zealand's outlook is becoming more and more internationalised. A sounder knowledge of the conflict of laws is becoming necessary to more and more people. This paper will, it is hoped, help those who wish to sharpen their private international legal wits.

P R H Webb

CONFLICT OF LAWS AND CONTRACT

By P R H Webb, M.A, LL.B (Cambridge), LL.D (Auckland), Professor of Law in the University of Auckland.

The aim of this Paper

A contract may be connected with several countries. Thus, one party to it may reside in New Zealand, the other in New South Wales. Or the contract may have been made in California but is to be performed in New Zealand, or vice versa. In order to cope with such situations, it is necessary to know the basic rules of New Zealand conflict of laws applicable to contracts[1]. It is the aim of this paper, therefore, briefly to state

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1. Bibliography:-

Dicey and Morris, The Conflict of Laws, (10th ed, 1980) and Third Supplement, Chapters 28 and 29.

Cheshire and North, Private International Law, (10th ed, 1979), Chapters 8 and 20.

Morris and North, Cases and Materials on Private International Law (1984), Chapter 14.

Nygh, Conflict of Laws in Australia (4th ed, 1984), Chapter 15.

Jaffey, (1974) 23 ICLQ 1; (1975) 24 ICLQ 603.

Webb, Heaven Help the Overseas Conflict Lawyers, [1979] NZLJ 442. (This raises the question of the conflict of laws aspects of the Illegal Contracts Act 1970, the Contractual Mistakes Act 1977 and the Contractual Remedies Act 1979).
(It is assumed throughout this article that the reader appreciates that it is necessary to bear in mind whether the New Zealand Court (or, indeed, an overseas Court) has jurisdiction to entertain an action arising out of the relevant contract. It is also assumed that the reader understands that, so far as the New Zealand Courts are
(Footnote Continued)

these basic rules and to illustrate their application by reference to decided cases. In particular, attention will be paid to the determination of the legal system which is to govern the contract, viz., its "proper law".

Quite a number of matters, in fact, call for attention, such as:-

A Where is a contract made?

B Was the contract validly concluded?

C Capacity to enter into a contract.

D The proper law of the contract and why we may need to know it.

E How do we ascertain the proper law of the contract and what are the tests to be applied?

F What law governs the essential validity of a contract, including the legality or otherwise of the contract?

G What law governs the essential validity of a contract, including the legality or otherwise of the contract?

H What law governs the rights and obligations under a contract of the parties to it?

I What law governs the discharge of a contract?

J What law governs the interpretation of a contract?

K "Splitting" the proper law.

L A short note has been added here on Remedies.

It is hoped that, by indicating the various rules that are applicable, the reader will be assisted not only when he or she is

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concerned, foreign law must be proved. If it is not, or is not satisfactorily proved, it will, as a general rule, be assumed to be the same as the domestic law of New Zealand.)

engaged upon the drafting of a contract containing one or more foreign elements but also when he or she is perusing such a contract drawn up by someone else.

A Where is a Contract Made?

Of course, no problem arises where two people strike a bargain face to face in Auckland. But problems may arise where a contract is made by correspondence between, say, England and Germany, when it is remembered that English domestic law states that the contract is made when and where the letter of acceptance is put in the post but that German law says it is made when and where the offeror receives the letter of acceptance. The only satisfactory way out of the dilemma is for the forum to decide it by its own domestic law. Thus in Benaim & Co v De Bono [1924] AC 514 (PC) an acceptance was sent by telegram from Malta to Gibraltar and it was held that the contract was made in Malta. In Entores Ltd v Miles Far East Corporation [1955] 2 QB 327; [1955] 2 All ER 493 (CA) a contract had been accepted by telex from Holland to England. It was held that telex was an instantaneous means of communication (and thus not like a telegram) and that the contract was made in England where the acceptance was received.

The telephone is also considered to be an instantaneous means of communic-

ation. In Avalon Hosiery v Down (1970) 1 WWR 239 a Manitoba purchaser telephoned his offer to purchase to a supplier in Quebec. The supplier agreed, on the telephone, to fill the order. The purchaser heard the acceptance in Manitoba. It was held that the contract had been made in Manitoba.

The place of conclusion of a contract made by telex has been recently considered by the House of Lords in Brinkibon Ltd v Stahag Stahl [1983] 2 AC 34; [1982] 1 All ER 293. An English company accepted, by telex sent from London to Vienna, the terms of sale offered by the sellers of a number of steel bars. The sellers were an Austrian company. Litigation ensued because of non-performance. In fact, communication had been instantaneous, and, following the Entores case above, it was held that the contract had been made in Austria where (and when) the offeror had received the acceptance. But what, it may be asked, if the communication be not instantaneous, as where only servants or agents with limited authority are involved? What if there is delay? What if the message is sent out of business hours or at night with intent that it be read later? What if error or fault is present at the receiving end? What if third parties send or receive the message? As this decision suggests, one can only resolve the difficulties by looking to the parties' intentions, sound business practice, and, sometimes by judgment where the risks should lie and not by applying some universal rule. Others, indeed, may ask why one should treat a telex message any differently from a telegram.

We shall see that the place of contracting is a factor of importance in the subject under review. It is, however, important in another context that requires only passing mention here. In certain circumstances, the English

High Court has a discretion to permit service outside the jurisdiction under RSC Order 11, rule 1(1). Under Order 11, rule 1(1)(e), such service may be permitted in respect of a contract made in England. Indeed, it was in this context that the English cases already discussed were decided.[2]

B Was the Contract ever validly concluded?

The question whether a contract has or has not been validly concluded is obviously an important one. It is now considered that this matter is governed by the law which would have been the proper law had the contract been validly concluded, that is to say by its "putative" or "potential" proper law.[3] Some examples may assist:-

1. Suppose that a letter was posted in England and was received in Switzerland, whereby A offered to appoint X as his agent in Switzerland. X posted, in Switzerland, a letter accepting A's offer but A never received it at all. According to Swiss law, there would

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2. See, generally, Dicey & Morris, Rule 24(6), pp 203-207. It is not the function of this paper to deal with service of process out of New Zealand or England. Rule 48(b)(i) of the present New Zealand Code of Civil Procedure is in similar vein.

3. See, generally, Dicey & Morris, Rule 146, pp 775-777; Cheshire and North, pp 212-218.

be a completed contract only when the letter of acceptance was received by the offeror, A. It was suggested in Albeko Shuhmaschinen A/G v Kamborian Shoe Machine Co Ltd (1961) 111 LJ 519 that, in such circumstances, an English Court would hold that there was no contract because, had a contract been concluded, Swiss law would have been the governing law and, by that law, as we have seen, that there was no contract. (It turned out in that case that there was no proof that X's letter of acceptance had been posted at all. Salmon J was thus able to hold that there was no contract for that reason.)

2. X, an Italian citizen, carried on business in England. He was made bankrupt and in due course obtained his discharge. At the time of his discharge, he owed A, also an Italian citizen, a sum of money. A was utterly ignorant of these bankruptcy proceedings and consequently never proved in the bankruptcy. After his discharge, X signed, in Italy, a document, not under seal, under which he promised to pay the debt to A. According to Italian law, the document constituted a valid promise to pay the sum. By English domestic law, it was, of course, a nudum pactum - a bare promise to pay, unsupported by valuable consideration - and void. X died, and the question arose whether A could prove for the debt against X's estate. It was held that he could, because Italian law was the proper law: Re Bonacina [1912] 2 Ch 394 (CA).

3. M, Lloyd's underwriters, insured F, diamond merchants in Belgium, against loss of stock. The contract contained a "foreign jurisdiction clause" stating that it was to be governed by Belgian law and subject to the exclusive jurisdiction of the Belgian Courts. In

the absence of this clause, English law would have been the governing law. M now alleged that the foreign jurisdiction clause was void because F failed to disclose that they had been smuggling diamonds into Italy, where the loss occurred. M's claim was not accepted because non-disclosure of material facts made the contract voidable only and not void: Mackender v Feldia [1967] 2 QB 590; [1966] 3 All ER 847 (CA). (It was indicated that, had the contract been void for mistake because of, eg., non est factum, a different result might have obtained: see per Lord Denning M R at p 598, and cf per Diplock L J at p 603, who suggests that English law as law of the forum should decide the matter.)

4. A firm of freight forwarders incorporated in Florida had been approached by a German company to try and find a vessel to take a cargo from Germany to Mexico for a Mexican company. Dutch brokers were asked by the Florida company to assist. Eventually, the plaintiff shipowner apparently thought a charterparty had been entered into, and that there would be London arbitration of disputes, while the Florida company thought that there was no contract at all, or, if there was, that it had been made without authority. The first instance Judge thought that there was no link with England and held that leave should never have been given to serve the Florida company out of the jurisdiction. The Court of Appeal, however, found that there had not been any discussion in the Court below of the putative proper law and held that, had that point been appreciated, the probabilities were that, if the case were heard, English law, as the putative proper law, would have been applied. Accordingly, the case would have been capable of coming within RSC Order 11, rule 1(1)(f).

(This empowers the Court, at its discretion, to permit service out of the jurisdiction where the contract is one which, by its terms or implication, is governed by English law. Rule 48(b)(iv) of the Code of Civil Procedure corresponds with it): The Parouth [1982] 2 Lloyd's Rep 351 (CA).

C Capacity to enter into a contract

(i) Of Individuals

It may be necessary to check whether an individual possesses capacity to enter into a contract. Unfortunately, the conflict of laws rule on this matter is not clear, and, as far as minors are concerned, the Minors Contracts Act 1969 is silent on the matter. An argument can be put forward for referring the matter to the individual's domiciliary law, seeing that it is that law which governs his or her status.[4] An argument could be also put forward in favour of the law of the place where the contract was made,[5] but this is liable to

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4. See, e.g., the marriage settlement cases: In re Cooke (1887) 65 LT 737; Cooper v Cooper (1888) 13 App Cas 99 (HL); Duncan v Dixon (1890) 44 Ch D 211; Baird v Fergusson (1911) 31 NZLR 33 (CA) and the discussion by JHC Morris in (1938) 54 LQR 78. And see Sottomayor v De Barros (No 1) (1877) 3 PD 1 (CA), at p 5; Sottomayor v De Barros (No 2) (1879) 5 PD 94, at pp 100-101; Baindail v Baindail [1946] P 122 (CA), at p 128, all cases concerning capacity to marry.

5. Because the lex loci contractus was applied to govern capacity in each of Kent v Salmon [1910] TPD 637; McFeetridge v Stewarts & Lloyds Ltd; 1913 SC 773 and Bondholders Securities Corporation v Manville [1933] 4 DLR 699. The somewhat unsatisfactory decision in Male v (Footnote Continued)

depend upon chance if it is made e.g. in an aeroplane as it flies across the United States, or by telephone, telex or letter. A third argument could be put forward in favour of the system of law with which the contract is most closely connected upon an objective determination. A fourth argument that can be presented is that if an individual has capacity by the law of his or her domicile and residence, the contract will be valid so far as capacity is concerned.[6] Some examples may assist:-

(a) A man domiciled in Quebec married in Ontario and lived in the latter Province with his wife for 12 years. They then entered into a separation and maintenance agreement (which, it must be confessed, is not a commercial contract) in Ontario. It was drawn up in Ontario by a local solicitor who used the usual Ontario form. The man went back to Quebec, his wife remaining in Ontario. The man subsequently died in Quebec. Under the law of Quebec the parties had no capacity to make the agreement, but, under Ontario law, they had capacity to do so, and the agreement was valid. The Ontario Court of Appeal held that a party's capacity to contract was governed by the law of the particular contract, that is, the law of the country with which the

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(Footnote Continued)
Roberts (1800) 3 Esp, 163 also goes in favour of the place of contracting. And see Baindail v Baindail, supra; Simonin v Mallac (1860) 2 Sw & Tr 67; Republica de Guatemala v Nunez [1927] 1 KB 669 (CA).

6. See Dicey & Morris, Rule 147, pp 778-783; Restatement on Conflict of Laws Second (1971) s 198; Cheshire & North, pp 221-223. As to capacity with regard to foreign immovables, eg., to enter into a contract to mortgage them, see Dicey & Morris, pp 550-551.

contract is most substantially connected. The validity of the contract was thus governed by Ontario law as the proper law of the contract. It may be noted that Ontario law was also the domestic law of the Court trying the case and also the lex loci contractus. It was void only according to the law of the parties' domicile (Quebec): Charron v Montreal Trust Co (1958) 15 DLR (2d) 240. (At p 244 it is suggested that, had the spouses been domiciled and resident in Quebec and had come to Ontario for a short-term stay during which they had made the agreement, then their capacity to make it would be governed by the law of Quebec.)

(b) P, aged 20, and therefore adult according to New Zealand law, is domiciled and resident in the Republic of Ireland, where minority lasts until 21. He comes to Auckland on a temporary visit and buys goods there from a shop on credit. Whether or not he has capacity to enter into the contract and thus to incur liability for the debt is, it may very well be, determined by New Zealand law and it ought not to make any difference that the New Zealand shopkeeper knows that P is domiciled and resident overseas and that, according to the law of his domicile and residence, he does not have contractual capacity.[7]

(c) Q, a man aged 20 years and six months, is domiciled and resident in New Zealand. He is, therefore, an adult according to New Zealand law. He pays a short visit to the Irish Republic and he buys goods on credit from a Dublin shop. According to Irish law, he is still a

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7. Cf Illustration 3 in Dicey & Morris, p 783.

minor. It would seem that the contract is valid and that Q will be liable to pay for the goods even though, by Irish law, he is a minor.[8]

(In circumstances such as the above, the parties obviously cannot be allowed to choose a law which gives capacity to one party or deprives the other of it: the proper law must be objectively determined: see Cooper v Cooper (1888) 13 App Cas 88 (HL), at p 108, per Lord Macnaghten.)

(ii) Of Corporations

A brief word must be added concerning the capacity of a corporation to enter into a contract. The position, basically, is that the question is governed both by the constitution of the corporation and by the law of the country which governs the relevant transaction. Thus, if a company incorporated in country X is not permitted by its constitution to acquire land, it cannot acquire land in country Y, even if the law of country Y permitted it to do so. Further, if a company incorporated in country A, and permitted by its constitution to acquire and hold land, were to attempt to buy land in country B in circumstances contravening the mortmain legislation of country B, the attempt would be futile.[9]

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8. Cf Illustration 4, ibid.

9. See Dicey & Morris, Rule 139(1), pp 730-732.

D The Proper Law of the Contract

Introduction

Many matters fall to be decided by the proper law, thus making it vital to know how to discover it.

In the first place, matters of essential validity are usually governed by the proper law, such as: is a medical practice vendible? Can workers be paid in kind, or must they be paid in cash? Is an exclusion clause valid? Is the contract champertous, a wagering contract or one to commit a criminal offence? Can foreign exchange be purchased or transferred without some kind of official permission? Is the contract in restraint of trade?

Secondly, the interpretation and effect of a contract normally falls to be determined by its proper law. To take a straightforward example, the words "to ship" mean "to place on board" to an English or New Zealand lawyer, whereas, to most American lawyers, the expression means "to load on a train". The proper law will also say what is the effect of a broken contract, e.g., what damage is not too remote and what is too remote. Thirdly, the proper law will say whether a contract has been discharged by, e.g., accord and satisfaction, performance, fundamental breach, frustration, novation.

1. Before going into further details, it is worth considering here, by way of initial illustration, the decision of the Court of Appeal in Jacobs v Credit Lyonnais (1884) 12 QBD 589. The defendant firm, a

French one doing business in London, contracted in London to sell to the plaintiff firm, also carrying on business in London, a large tonnage of esparto grass. It was to be delivered in instalments and was to be shipped from ports in Algeria. Payment was to be made in England. When nearly half the grass had been delivered, civil strife broke out in Algeria whereupon the defendant declined to deliver any more grass. There was no express choice of law to govern the contract. Were French law (which obtained in Algeria at the time) to be applicable to govern the parties' rights and obligations, then the defendant firm would have been excused from further performance by force majeure, viz. the outbreak of civil strife in Algeria. By way of contrast, were English law to apply, the defendant firm would be liable for breach of the contract. It had contracted in absolute terms and so could not claim that the contract was frustrated. The Court of Appeal held that the proper law was English law and that the defendant firm was liable for breach of the contract.

E Ascertaining the Proper Law[10]

(i) First Rule : Express Choice

For our purposes, the "proper law" of a contract is that system of law by which the parties intended to the contract to be governed, or, if their intention is not expressed and not to be inferred from the circumstances, the system of law with which the transaction has its

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10. See, generally, Dicey & Morris, Rule 145 and Sub-Rules 1, 2 and 3 thereto, pp 747-775; Cheshire and North, pp 195-212.

closest and most real connection. Thus there are nowadays no rigid or arbitrary criteria to be treated as conclusive of the matter, such as that the proper law must be the law of the place where the contract was made or where it was to be performed. After the generation of much heat and the spilling of much ink, it can now be said that, when the intention of the parties to a contract, as to the law governing that contract, is expressed in words, this expressed intention, as a rule, will determine the proper law of the contract. Put another way, the expressed intention, in general, settles the question. Prima facie, the Court will give effect to that intention. But the expressed choice of law must be "real, genuine, bona fide, legal and reasonable", since no Court can be expected to give effect to a capricious choice or to a mere absurdity.

There has been controversy as to whether a Court may disregard a choice of a governing law upon the ground that it has no apparent connection at all with the contract. The root of the problem lies in this: on the one hand, one ought to prevent parties from evading the law with which the contract is, viewed objectively, most closely connected; on the other hand, one ought to allow the parties to submit their contract to a law connected with it by virtue of commercial, financial or other links not really relevant to the Court's decision and thus, very possibly, never even disclosed to it. The solution would seem to lie in suggesting that no English or New Zealand Court would permit an evasive choice of law and, if faced with such a choice, would indicate that it was unreal, unreasonable and of no effect. Such approach would result in the upholding of the mandatory rules of the proper law, objectively determined. In any

event, many matters are of world-wide import and "located" in some particular place, such as the insurance and financing of various commercial transactions in London. Accordingly, it is not eccentric, it is not capricious, if a contract of this nature is subjected to English domestic law even though there is no palpable connection with England.

(ii) Second Rule : Inferred Choice

One can further say that, where the parties' intention is not expressed in words, their intention may be inferred from the terms and nature of the contract, and from the general circumstances of the case, and that such inferred intention determines the proper law. Thus one may be assisted by the presence of a clause giving the Courts of a particular country jurisdiction to settle disputes by the fact that arbitration is to take place in a given country, or by the use of legal terms known to one country better than to another.

(iii) Third Rule : Law of Closest Connection

Finally, it may be said that, when the parties' intention has not been expressed and cannot be inferred from the circumstances, the contract is governed by the legal system with which the transaction has its closest and most real connection.

(iv) Other Matters

(a) It is not possible to have a "floating" proper law. In Armar Shipping Co Ltd v Caisse Algerienne d'Assurance et de Reassurance; The Armar [1981] 1 WLR 207; [1981] 1 All ER 498 (CA) it was made clear that there must be a governing law at the

time of the conclusion of the contract, and the governing law cannot fail to be decided, retrospectively, by reference to an event which is an uncertain event when the contract is concluded.

(b) Further, the conduct of the parties after the making of the contract cannot be taken into account in ascertaining what is the proper law unless it constitutes an estoppel or amounts to the making of a fresh contract: see Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd [1970] AC 583 (HL), at pp 606, 611, 614-645.

(c) The House of Lords has now clearly stated that renvoi, whether by way of remission or transmission, has no place in contract cases: Amin Rasheed Shipping Corporation v Kuwait Insurance Co, The El Wahab [1984] AC 50; [1983] 2 All ER 884 (HL).

(d) It must be recollected that a contract may provide that disputes between the parties are to be referred to the exclusive jurisdiction of some foreign tribunal. In such cases, the New Zealand Courts will stay proceedings brought before them in breach of such agreement, though it is open to the plaintiff to prove, if he can, that it is just and proper to let them continue.[11]

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11. See Dicey & Morris, The Conflict of Laws, Rule 31, pp 255-257, for a discussion of this, for our purposes, subsidiary rule. For a recent case, see The El Amria [1981] 2 Lloyd's Rep 119 (CA). For a New Zealand case, (Footnote Continued)

(e) It is necessary to distinguish between making an express choice of law to govern a contract on the one hand and, on the other, merely incorporating in the contract the domestic law provisions of some foreign law so that they become terms in it. The draftsman can actually write down in full the terms of, say, the German Code concerning the parties' duties as vendor and purchaser respectively of goods. Alternatively, he could insert a general statement in the contract that the seller's and buyer's rights and duties under the contract are to be subject to German law. Reference may be made to Ocean Steamship Co v Queensland State Wheat Board [1941] 1 KB 402; [1941] 1 All ER 158 (CA); Stafford Allen & Sons Ltd v Pacific Steam Navigation Co [1956] 1 WLR 629; [1956] 2 All ER 716 (CA). The main point to remember, however, is this: If the proper law of a contract is changed before it is due to be performed and a question governed by the proper law is litigated, the changed law will have to be applied: see, for instance, Re Helbert Wagg & Co Ltd [1956] Ch 323; [1956] 1 All ER 129, (discussed in Part I, below). If, on the other hand, there is a change after the date of the making of the contract in the law which has been incorporated by specific or general reference, it is not material. The incorporated terms remain, as it were "constant": Vita Food Products Inc v Unus Shipping [1939] AC 277 (PC), at p 286. Reverting to the example above, if German law as to the obligations of a buyer of goods

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(Footnote Continued)
see Campbell Motors v Spedding (1969) 13 MCD 11, distinguishing The Fehmarn [1958] 1 WLR 159 (CA).

under a contract for the sale of goods were amended between the dates of making and of performance of the contract, the buyer would be bound by the law as it stood when incorporated and not by the amended law.

Express choice of law : some examples

1. The leading case concerned a shipment of herrings from a Newfoundland port to New York aboard a Canadian vessel. The bill of lading stated that the contract was governed by English law, that the herrings were to be delivered in good condition and that the shipowners were to be exempt from liability for negligence. The Carriage of Goods by Sea Act 1932 of Newfoundland embodied the Hague Rules (like the corresponding English Act of 1924). The 1932 Act provided that every outward bill of lading made in Newfoundland must contain these provisions and that they were to apply to every shipment from Newfoundland ports. The Rules were not incorporated into the bill of lading in this case. The ship ran aground in Nova Scotia through the master's negligence. The buyers sued the shipowners because the herrings were damaged. It was argued that, as the contract did not comply with the 1932 Act, it must be illegal and void, so that English law could not apply. Both parties in fact proceeded upon the basis that Newfoundland law was the proper law (see J H C Morris (1979) 95 LQR 59, at p 61, n 11). The Privy Council nevertheless held that English law (which neither party had pleaded) applied as the chosen law, that the choice of it was valid and, consequently, that there was no liability by reason of the contract. Lord Wright said that, where there is an express choice of the proper law, it was difficult to see what qualifications were possible, provided that the intention

expressed was "bona fide and legal", and provided there was no reason for avoiding the choice for public policy reasons. Lord Wright also said that connection with English law was not, as a matter of principle, essential. But he also mentioned that the underwriters concerned were probably English, and that the Merchant Shipping Act 1894 (UK) was applicable, as an Imperial Act, to the Canadian ship: Vita Food Products Inc v Unus Shipping Co [1939] AC 277; [1939] 1 All ER 513 (PC), dissenting from The Torni [1932] P 78 (CA), in which the Court was also not sitting in the country of the port of shipment. (See, for New Zealand, the Sea Carriage of Goods Act 1940, ss 7, 9 and 11A.)

2. A & Co, a Canadian company, and B, and Ecuadorian citizen carrying on business in Ecuador, entered in New York into a contract relating to the exploiting of mineral rights in Ecuador. One of the terms of the contract stated: "It is agreed that while for convenience this agreement is signed by the parties in the City of New York, USA, it shall be considered and held to be one duly signed and made in London, England." A & Co had a branch office in London. Beyond that, there was no connection with England or English law. It was held that English law was the proper law for the purposes of the contemporary English equivalent of Rule 48(b)(iv) of the present Code of Civil Procedure: British Controlled Oilfields v Stagg [1921] WN 319.

3. A bill of lading was made in England for the carriage of goods, in a ship belonging to the New Zealand Steamship Company, from England to New Zealand. A clause in the bill stated that: "The contract evidenced by this bill of lading shall be governed by the law of

England." The ship was an English vessel. Denniston J held that English law governed the contract as it was the lex loci contractus. Furthermore, the special stipulation for English law clinched the matter. Thus, since English law was the proper law, the provisions of the New Zealand Shipping and Seamen Act 1908 and its amendments could not apply to the contract: New Zealand Shipping Co Ltd v Tyree (1912) 31 NZLR 825.

4. A contract was made in Queensland between a Hong Kong company doing business in Queensland as a real estate agent and a Queensland undertaking concerning the sale by the former of certain land in Queensland. Some of the ultimate purchasers of the land were intended to be, and, indeed, were, persons from Hong Kong. Queensland statute law required real estate agents to be licensed as such and also laid down maximum rates of commission chargeable by real estate agents. It also made it a criminal offence to act as an unlicensed real estate agent and to charge excess commission, which the Hong Kong company had done. It was also unlicensed. However, in order to circumvent these provisions, the parties had made Hong Kong law the proper law of their contract. Hoare J held that their purported choice of Hong Kong law had not been a bona fide one and decided that Queensland law was the proper law: Golden Acres Ltd v Queensland Estates Ltd [1969] St R Qd 378, 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. See also Queensland Estates Ltd v Collas [1971] St R Qd 75 and Kelly (1970) 19 1 CLQ 701; Davis, 44 ALJ 80.

An express choice of law which is found to be meaningless will be ignored: see Compagnie d' Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1969] 1 WLR 1338; [1969] 3 All ER 589, where the Court of Appeal took the view that the choice of law clause referred to the laws of the flag of the vessel carrying the cargo but that no vessel was named in the contract and ignored the choice. As we shall see, the House of Lords took another view of the facts: see Case E 10, below.

5. A British Columbia company granted a franchise to an Alberta company to lease and service the former's audiovisual equipment in Alberta. There was an express choice of British Columbian law as the proper law. When litigation occurred, the Alberta company argued that the contract must be void or voidable because the British Columbia company had not complied with the Alberta legislation concerning registration and prospectuses. The agreement had been signed in Alberta, where, obviously, it was to be performed. The British Columbia Court held the Alberta legislation to have been excluded by the choice of British Columbia law. The contract had substantial connections with British Columbia. There was no evidence of any specific intent - as there was in case E4 above - to evade the Alberta statute law. The choice of British Columbia law is, it will be appreciated, not unconnected with the realities of this contract: Nike Information Systems Ltd v Avac Systems Ltd (1979) 105 DLR (3d) 455.

6. A Dutch shipowner contracted to carry a machine for X from Scotland to the Dutch West Indies. The bill of lading provided that Dutch law should be the proper law. Dutch law (ironically enough) incorporated

the old, unamended, Hague Rules. The bill also contained a clause giving the Court of Amsterdam exclusive jurisdiction. When the machine arrived at its destination, it was dropped on the quayside and badly damaged. Under the old Hague Rules, X could recover only fl 1250, ie. 250. Under the (new) Hague-Visby Rules, set out in the Carriage of Goods by Sea Act 1971 (UK), X would be able to recover the considerably larger sum of 11,500. The Hague-Visby Rules also provided (by Article III, rule 8) that any clause in a contract of carriage lessening the carrier's liability otherwise than as the Rules provided should be null and void. X brought an action in rem against a sister ship belonging to the Dutch shipowner, who asked the English Court for a stay, relying on the exclusive jurisdiction clause. X contended that the contract was governed by the Hague Visby Rules and not by Dutch law, and that those Rules allowed X to sue in England, where the bill was issued. X pleaded also that the carriage was from a port in the UK, which was a Contracting State, and relied on Article III, rule 8. The Court of Appeal held that the UK Courts must give the force of law to the Hague-Visby Rules, that those Rules applied to the present bill of lading inasmuch as it had been issued in the UK and that the limitation provision derogated from the Rules and so was null and void, as also was the exclusive jurisdiction clause. A stay should therefore be refused and X could sue in England (the country of the port of shipment, not the situation in case E 1 above). The decision was upheld by the House of Lords: The Hollandia [1983] 1 AC 565; [1982] 3 All ER 1141, affirming [1982] 1 All ER 1076 (CA). Compare, however, The Benarty [1984] 2 WLR 1082 (CA).

(Reference may also be made to the Unfair Contract Terms Act 1977 (UK) especially ss 12, 27(1) and (2), but see also s 26).

Inferred Choice of Law : some examples

(i) Is it true to say: "Qui elegit judicem elegit jus? The Arbitration Cases and Cases of Dispute Settlement.

7. Scottish merchants resident in Glasgow, but having a branch office in Bombay, entered into contracts with a Hong Kong firm whereby the former agreed to buy, through Java brokers, some sugar from the latter for shipment to Bombay. Payment was to be made in England. The contracts provided for the settlement of disputes by London brokers, their award to be enforceable in the High Court. The House of Lords unanimously held that the parties had impliedly chosen English law as the proper law: N V K Wik Hoo Tong Handel Maatschappij v James Finlay & Co Ltd [1927] AC 604 (HL).

8. A contract was signed in London between English and Scottish merchants, but it was to be performed in Scotland. One of the clauses, however, provided that, should any dispute arise, it should be settled by arbitration by two members of the London Corn Exchange in the usual manner. Such a clause was then considered invalid by Scots law because the reference was to unnamed arbitrators. It was valid in English law. The House of Lords, on appeal from the Court of Session, held English law to be the proper law. Thus the arbitration clause was to be regarded as valid in Scotland: Hamlyn v Talisker Distillery [1894] AC 202 (HL).

9. An insurance contract was made in Jersey between a Jersey resident and the agent of an English company in respect of the former's stamp collection. Disputes were to be settled by arbitration under the English arbitration legislation. The premiums were to be payable in

Jersey, as were the policy moneys. The arbitration clause was valid in English law but void in Jersey law. The Privy Council held that it might be inferred that both parties intended English law to be the proper law and, consequently, that the clause was valid in England and in Jersey: Spurrier v La Cloche [1902] AC 466 (PC).

10. French shipowners agreed, in France, to carry oil for a Tunisian company from one Tunisian port to another, the contract being made on an English printed document. The freight was payable in France in French francs. French law obtained in Tunisia. A clause in the contract provided for arbitration in London. It was held by the House of Lords that, while the arbitration clause was a strong indication in favour of English law, it was, in the last analysis, just a factor to be taken into account. The proper law was held to be French law: Compagnie Tunisienne de Navigation SA v Compagnie d' Armement Maritime SA [1971] AC 572; [1970] 3 All ER 71 (HL), a more satisfactory decision than Tzortzis v Monark Line A/B [1968] 1 WLR 406; [1968] 1 All ER 949 (CA).

11. A Panamanian shipowning company and its sister companies entered into insurance contracts to cover their ships. The insurances were effected through US brokers. Some of the risk was placed on the London market, part of it through Lloyd's; somewhat more was placed on the US market and the remainder in Belgium, Greece and Japan. The policies issued through one of the US insurers were negotiated in the US and provided for payment of premiums and claims there. All the policies, however, contained a clause known as a "Follow London" clause. The aim of such a clause is that negotiations on claims

should be undertaken at first instance by Lloyd's underwriters or a British insurance company. It was held that the policies issued by the American insurer were governed by English law because the policies placed in the English market were governed by English law, and the inference to be drawn from the "Follow London" clause was that the US policies would be governed by English law as well. In other words, the legal or commercial connection between one contract and another may allow the Court to say the parties implicitly submitted both to the same law: Armadora Occidental SA v Horace Mann Insurance Co [1977] 1 WLR 1098; [1978] 1 All ER 407 (CA).

12. In a time charter and the relevant bill of lading, it was provided that any claim and/or dispute arising under the bill of lading should be referred to arbitration in London "pursuant to English arbitration law" but if, for any reason, it were ruled by a competent authority that the arbitration provision was unenforceable, then any claim and/or dispute should be governed by Greek law and solely decided by the competent Greek Courts at Piraeus, where the carrier had his principal place of business and to which both parties submitted themselves to the exclusion of any other competent Court. At first instance, the Judge ordered the arbitration to proceed, observing that the above terms contained a suggestion that English law applied. He was upheld by the Court of Appeal, where it was stated that the reference to London arbitration was to be pursuant to English arbitration law, and this was arguably an indication in itself that English law was to be the substantive law rather than the procedural law. It was considered unusual for a clause to provide expressly or by implication for two proper laws, one to be applied in one event

and another if that event were negatived, but that there was no reason why there could not be good commercial sense in having a fall-back provision of the kind which this clause represented: The Mariannina [1983] Lloyd's Rep 13.

13. An English company conducted a railway undertaking in Cuba. It raised a loan in the United States under a plan whereby it sold the rolling stock of the undertaking to the Philadelphia banking company which made the loan and the latter company leased it back to the English company. The English company paid a rental, payable partly in Pennsylvania and partly in New York. The relevant transactions were entered into in the United States. Nevertheless, the parties agreed to submit to the jurisdiction of the tribunals of the city of Havana "for all notifications, summonses and other judicial or extrajudicial formalities to which this lease shall give rise". One might be tempted to infer from this that the domestic law of the chosen forum, i.e. Cuban law, was to be the proper law. It will be seen that it is only a set of special, somewhat ancillary, aspects of the contract that are referred to. The clause is, moreover, non-exclusive, for the parties have merely chosen the Havana tribunals rather than those of some other Cuban city. This does not prevent the Court from holding Pennsylvanian law to be the proper law: Re United Railways of Havana etc. Warehouses Ltd [1960] Ch 52 (CA); [1961] AC 1007 (HL). The case is discussed further below: see Case E 19.

(ii) Language and form

14. The question arose as to what was the proper law of an agreement

between the M Co, a Maltese company, and the International Transport Workers' Federation, the effect of which was that the latter would not black the former's ships for proceeding with crews of Spaniards instead of Swedes. The agreement was in English; the Federation (one of world-wide unions) had its headquarters in London; the signing of the agreement took place in Spain; it was a standard form contract, moreover, in world-wide use. Spain was the country in which M Co recruited their crews and the agreement had been negotiated. Were English law to be the proper law, the agreement would have been unenforceable by reason of s 18 of the Trade Union and Labour Relations Act 1974 (UK), since it did not contain a provision stating that the parties' intention was that the agreement should be a legally enforceable one. The Court of Appeal held that Spanish law was the proper law, the English language being of little weight as it was the language of shipping; the form of the contract similarly did not point to English law as it was in world-wide use.

As a matter of interest, the provisions of s 18 were regarded as having the substantive effect that the parties would be deemed not to have intended to create legal relations between themselves. Thus, a collective agreement to which s 18 applied would not be a contract in law at all. It would be merely an "arrangement" between the parties, enforceable (if at all) by other means. The section must therefore not be seen as a provision resembling those of the Statute of Frauds or a limitation statute making certain contracts unenforceable.

It is, further, noteworthy that May L J seems to give the quietus to the application of a doctrine of in favorem negotii, for he took the

line that if there was no express or implicit statement by the parties of their intention which particular law was applicable to their agreement, the enforceability or unenforceability of it was irrelevant in deciding objectively with which system of law the transaction had its closest and most real connection: Monterosso Shipping Co v International Transport Workers' Federation [1982] 3 All ER 841 (CA). See also, on the matter of the language of the contract, Armar Shipping Co v Caisse Algérienne d' Assurance et de Réassurance [1981] 1 WLR 207; [1981] 1 All ER 498 (CA), where the points were made that the English language was the lingua franca of commerce and the language of the USA.

15. A Liberian company residing in Dubai owned a ship and insured it with the K Insurance Co, which did business in Kuwait. The policy was based on the Lloyd's SG form as set out in Schedule 1 to the Marine Insurance Act 1906 (UK). Cover was for one year from April 1977. Cover was renewed for 1978-1979 and 1979-1980. The policy was issued in Kuwait and any claim was to be paid there in sterling. In 1980 the ship was seized by the Saudi Arabian authorities and a claim was made for constructive total loss of the ship. At the time the insurance contract was made, Kuwait had no commercial code dealing with marine insurance contracts, but the local Courts would have had no difficulty in applying foreign law, such as that of England, to marine insurance contracts concluded in Kuwait. Furthermore, without recourse to the 1906 Act, which was a codifying statute, and to judicial interpretation thereof, it was not possible to interpret the policy. It became necessary to ascertain the proper law since, if it were English, it was open to the Court to allow service out of the

jurisdiction. It was held that English law governed as being the system of law with which the transaction was most closely and really connected, but the following points were made: the fact that the standard form of marine policy was widely used in insurance markets throughout the world did not make it an international floating contract unattached to any system of law, and, by the same token, the fact that many foreign litigants choose to resort to the Commercial Court in London to have their disputes settled does not make that Court an international one. It is a national or domestic Court. It was too simplistic to suggest the problem was solved by saying the English language and form of the contract employing, as it did, many technical expressions which could only be explained by resort to English law, pointed to English law as the proper law; the payment of premiums in London in sterling and the use of London brokers was irrelevant; more significant were the use of this form of policy in the English language and requiring interpretation according to English rules and the nationality of the parties (the insurers being incorporated and carrying on business in Kuwait and the insured being Liberian but resident, not in England and not in Kuwait, but in Dubai); the issue of the policy in Kuwait was of little weight; the provision for paying claims there was of little consequence in view of the established practice, when the contract was made, of settling claims in London.

It was not without importance that there was no express choice of law clause, and, with a policy so essentially English, the absence of such a factor left the form and language, as a pointer towards English law, without what one would consider its natural counterweight. The

incorporation of the so-called "Institute Clauses", with express reference to English law provisions was important also.

In the event, service out of the jurisdiction was not allowed; Amin Rasheed Shipping Corporation v Kuwait Insurance Co, The El Wahab [1984] AC 50; [1983] 2 All ER 884 (HL).

The system of law with which the contract has its closest and most real connection : some examples

This third test is applied when the first and second tests have failed. The Court has to consider "how a just and reasonable person would have regarded the problem"[12] of what was the proper law. This means that a variety of matters have to be considered, such as the place of performance, the places of residence, the places of business of the parties and the nature and subject matter of the contract.[13] Again, the problem is best illustrated by examples, though with the caveat that it is now out of fashion to put reliance on presumptions in favour of the law of the place where the contract was made or the law of the place where it is to be performed.[14]

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12. The Assunzione [1954] P 150 (CA) at p 176.

13. Re United Railways of Havana etc Warehouses Ltd [1960] Ch 52 (CA), at p 91.

14. See Coast Lines Ltd v Hudig and Veder Chartering NV [1972] 2 QB 34; [1972] 1 All ER 451 (CA) (Case E 29 below).
It has been held that a letter of credit has a proper law. It is the law with which the letter of credit has the closest
(Footnote Continued)

16. In 1895 the Queensland Government issued certain debentures to secure a loan of two million pounds. Much of it was raised in England; the rest was raised in Australia. Holders were entitled to repayment in sterling in 1945 in either Brisbane, Melbourne, Sydney or London, at their option. In 1931 Australia devalued her pound relative to English pound (ie. £1A now equalled 16 English shillings; £1E now equalled 25 Australian shillings). A debenture holder chose to be paid in London and claimed to be paid the face value of his stock in English pounds (ie. if he had £1000 stock, he would expect £1000E; had be elected payment in Australia, he would have expected £1250A). It was held the substance of the obligation must be determined by the proper law, and Queensland law was the system of law with which this contract had its closest and most real connection. The debentures had been issued under a Queensland statute and were secured on Queensland public revenues. It was true that part of the loan was raised in England, but it had to be presumed that the Queensland government was referring to the terms of its own monetary system as the money of account throughout and not to that of England. Accordingly, a holder of 1000 stock desirous of payment in London would receive £1000A (or £800E, if he wanted English money): Bonython v Commonwealth of Australia [1951] AC 201 (PC). (The "closest and most real connection" test is often referred to as the "Bonython" test

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(Footnote Continued)
and most real connection. In Power Curber International Ltd v National Bank of Kuwait SAK [1981] 1 WLR 1233; [1981] 3 All ER 607 (CA), the proper law was held to be North Carolina as it was there that the Kuwaiti Bank was required by the letter of credit to perform its obligation to pay. See, too, Offshore International SA v Banco Central SA [1977] 1 WLR 399; [1976] 3 All ER 749.

as a result of this decision.)

17. R, an Egyption national resident in Egypt, applied for three endowment policies with the defendant insurance company, which had offices in Egypt and various other parts of the world. Its head office was in Toronto. Policies were issued in R's favour in the form used by the insurance company for foreign business. The policies were executed in Toronto, though R's original application was lodged at the Cairo office. R paid the premiums in advance. It was agreed that, two policies being for a sum in sterling, the moneys should be payable in bankers' demand drafts on London for sterling and that the third, which was for a sum in US dollars, should be paid in a bankers' demand draft in New York. R paid the premiums on the sterling policies to the Egyptian office and those on the dollar policy to the head office. Supervening Egyptian legislation made payment of the policy moneys to R without the consent of the Egyptian exchange control authorities illegal. The policies having matured, the question now is whether the insurance company can insist on paying R in Egypt or whether R can require payment outside Egypt because the Egyptian legislation is inapplicable. Applying the Bonython test it was held that the law of Ontario was the proper law. It was noted that the form of policy was based on the law of Ontario, where the defendant company had its head office; that although the policies had been negotiated in Egypt and the policies had been delivered to R there, R would never have got any of them had not head office approved his application; that where a resident in a State seeks an insurance contract with a foreign company, it must be clear that he chooses that company because he has faith both in it and the system of law under which it operates. As

Ontario law governed the discharge of these contracts, and contained no embargo on paying R, the company could not insist on paying him in Egypt. Thus Egyptian law, including its exchange control legislation, did not, as lex loci solutionis, have any application: Rossano v Manufacturers' Life Insurance Co [1963] 2 QB 352; [1962] 2 All ER 214.

18. C, domiciled in Scotland and also resident there, saw an advertisement in an English newspaper for a job in Libya. Being interested, he applied; negotiations took place in England, where, eventually, a contract of employment was made. His interview was conducted in English and the contract was in English. C's salary was paid in sterling, the employing company was resident in England and its official agent in England had arranged the job. The witness to the contract was English. All payments while C was off sick were completed in England. C was more in England during the period of the contract than in Libya (he having been seriously injured in the course of his employment). C was a UK taxpayer. The insurers of the employing company were London-based. C was treated as an expatriate throughout the contract. On the other hand, the employing company employed nationals of various countries on what were, effectively, the same contractual terms. The Court considered the prevailing connection was with Libya, where, in effect, the contract was to be performed. Libyan law was, therefore, the proper law: Coupland v Arabian Gulf Petroleum Co [1983] 2 All ER 434; [1983] 3 All ER 226 (CA). See further on employment contracts, Sayers v International Drilling Co [1971] 1 WLR 1176; [1971] 3 All ER 163 (CA); Brodin v A/R Seljan 1973 SC 213.

19. We may revert to the Cuban railway case already discussed in part: see Case E 13, above. In determining what was the proper law of the transaction, the view might have been taken that English law should be the proper law because the head office of the railway company was situated in England. Further, Cuban law might have been seen as the governing law because the railway run by the company was situated in Cuba, and so was the rolling stock. On the other hand, the money had been raised by a distinctly American fashion - it was, indeed, called, "the Philadelphia Plan" - on the New York money market; the rentals were to be paid in New York and Pennsylvania; the company protecting the interests of the lenders, some of whom were American, was a Pennsylvanian company. The capital would be paid back in Pennsylvania. Further, when the agreement was originally entered into, the trusts it created were, virtually, unrecognised by Cuban law. They were valid by Pennsylvanian law. In a nutshell, really only the security was situated in Cuba and the law of one of the United States of America is the obvious candidate to be the proper law. It was held that Pennsylvanian law was the proper law: Re United Railways of Havana etc Warehouses Ltd [1960] Ch 52 (CA); [1961] AC 1007 (HL).

20. A Swiss company had an account with a London branch of a New York Bank. Instructions in relation thereto were received and acted on in London and the banker-customer relationship was centred there. The Swiss company contemplated that its transactions with the Bank would be governed by English law. London was where their contract was made and where the relationship had begun. It was held that English law governed the contract between the company and the Bank. The argument

that New York law was the proper law as being the law with which the contract had its most real and closest connection was firmly rejected: XAG v A Bank [1983] 2 All ER 464.

21. X & Co, a Scottish company, agreed to convert a Scottish factory belonging to A & Co, an English Company, into a warehouse. The contract was made in Scotland in the standard form of the Royal Institute of British Architects, whose membership consists of Scots and English architects. It was "redolent" of English law in that it referred to the common law of England, to liens and receiverships and to other concepts known to English lawyers but unfamiliar to their colleagues north of the border. X & Co appeared to have appreciated the form of the contract and it was content to accept it. A London architect was appointed to superintend the performance of the contract. It was apparently he who suggested the use of the standard form contract of the Royal Institute. It will be seen that the case is one of a contract made in Scotland concerning land in Scotland to be performed in Scotland. It thus might be expected that Scots law was therefore the law with which the contract had its most real and substantial connection. A 3-2 majority of the House of Lords, however, held that English law was the proper law because the parties' intention that it should govern was shown by their agreement to use the Royal Institute form: Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd [1970] AC 353; [1970] 1 All ER 796 (HL).

(The case also shows that if a clause provides for arbitration in a country other than that whose law is the proper law - as was the case here, since there was a clause providing for arbitration in Scotland

and the proper law was English law - the curial law of the arbitration proceedings will be that of the arbitration forum, ie. Scots law. Thus the English High Court had no power to order the Scottish arbitrator, (who had been appointed as arbitrator by the President of the RIBA), to state his award in the form of a special case).

22. The Chief Justice of Mauritius contracted with A & Co, an English company, to carry his baggage in English registered ships from England to Mauritius via Suez. He took his ticket at Southampton. It contained a condition limiting A & Co's liability for loss etc. The luggage was lost in Egypt. By English law, A & Co would be exempted from liability for the loss. By the law of Mauritius, it would not be so exempted. It was held that English law was the proper law and that the exemption clause was valid: P & O v Shand (1865) 3 Moo PCC (NS) 272 (PC).

23. An English company agreed in Boston, Massachusetts, with A to carry in an English registered ship a number of A's cattle from Boston to England and to deliver them there. The charter party exempted the company from liability for the negligence of master and crew. The exemption clause was valid by English law but invalid by the law of Massachusetts inasmuch as it contravened that State's public policy. Through the negligence of the master or crew, some cattle were injured off the Welsh coast. English law is the proper law of the contract, the exemption clause is valid and the English company is not liable:

Re Missouri Steamship Co (1889) 42 Ch D 321 (CA).[15]

24. A Brazilian citizen residing in Brazil executed in Brazil, in the Portuguese language, a power of attorney in A's favour in the form required by the law of Brazil. A was a London stockbroker. The power authorised A to sell and buy securities on the donor's behalf. The question arose as to the extent of A's authority to act in England so far as third parties were concerned. It was held that this was a matter for English law as the lex loci solutionis: Chatenay v Brazilian Submarine Telegraph Co [1891] 1 QB 79 (CA).

25. A Gibraltar firm agreed to sell a Maltese firm a quantity of anchovies f.o.b. Gibraltar, which meant that Gibraltar was the place of performance so far as the Gibraltar firm was concerned. On reaching Malta the fish were found to be in poor condition. The contract had been made in Malta. Can the Maltese firm rescind, or claim an allowance off the price, by virtue of the fish not being of merchantable quality? The Privy Council held that, as the lex loci solutionis, Gibraltar law governed such matters: Benaim v De Bono [1924] AC 514 (PC).

26. The charterers of an Italian vessel were a French government agency,

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15. It would seem fair to say that this case decides that a contract which is valid by its proper law will not be affected in New Zealand by the mere fact that it happens to be illegal by the law of the place where it was entered into, ie. illegal by the lex loci contractus. See Dicey and Morris, pp 790-791; Cheshire & North, pp 226-227.

which was an undisclosed principal in the matter. The shipowners were an Italian partnership. The charterparty was eventually signed in Paris after protracted negotiations between Parisian and Genoese brokers. It was in the English language and in English form, and provided for the carriage of a cargo of grain from France to Italy. A supplement was made in France, in the French language. The bills of lading were in standard French form and in the French language and were issued in France. It was probable - indeed it so turned out - that these documents would be presented in Italy by Italian holders. Freight and demurrage (if due) and damages for detention at the port of loading and of discharge were to be payable in Italian money in Italy. Upon a claim for short delivery and damage, it was held that, as payment had to be in lire in Italy, and as the ship was an Italian ship (commanded by an Italian master) which was going to an Italian port, the scales dropped in favour of Italian law as the proper law: The Assunzione [1954] P 150; [1954] 1 All ER 278 (CA).

27. An English corporation having borrowing powers borrowed money on debentures from a company incorporated in what is now the Republic of South Africa, though it had a London Office. The agreement was made in London in English form and the principal was repayable in London. The loan was secured by a floating charge on land in England and South Africa. The loan having been paid off, a question arose whether there was a clog on the equity of redemption, which would be void in English law. It was held that the proper law of the debentures was English law: British South Africa Co v De Beers Consolidated Mines Ltd [1910] 2 Ch 502 (CA); (the case was reversed in the House of Lords: [1912] AC 52, but in a manner not relevant to the conflict of

laws.) The case was followed in In re A Mortgage, J to A [1933] NZLR 1512 (Case E 28, below).

28. Mrs J borrowed a sum of money from mortgagees on the security of a freehold house in Wanganui. The mortgage was collaterally secured by an equitable mortgage by her husband of his interest in certain land in England. All parties were domiciled and resident in New Zealand, and it was New Zealand funds that had been advanced and it was in New Zealand that repayment was to be made. The question arose whether the Mortgagor's Relief Act 1931 of New Zealand and its amendments applied so as to allow a reduction of the interest payable. If English law as the lex situs of the English land comprised in the collateral mortgage applied, then the 1931 Act could not be relied on, since it was not part of the lex situs. It could have been resorted to only so far as a mortgage of property in New Zealand was concerned. It was held that the parties might fairly be presumed to have intended the contract to be governed by New Zealand law; that it was inconceivable that the intention should have been that New Zealand law should apply to the Wanganui property and English law to the collateral security; that the principal thing was the debt and the securities were adjuncts, and, consequently, the contractual element overrode all else. The 1931 Act applied both to the mortgage and the collateral security: In re a Mortgage, J to A [1933] NZLR 1512.

29. A Dutch company chartered a British ship registered in England from an English company on a voyage charter. The ship was to go to Rotterdam and there load a cargo and carry it to a port in the Irish Republic.

The charterparty was negotiated by the English company's Cardiff brokers and the Dutch company. It was signed in Rotterdam. In it was an exemption clause exonerating the English company for everything save personal acts and defaults. There was no objection to such a clause in English law, but Dutch law would then have regarded it as void. The English company became liable to the cargo owners for damage caused to the cargo by reason of the vessel's unseaworthiness. The English company thereupon sought to be indemnified by the Dutch company. It was held that the proper law of the charterparty was English law as the law of the ship's flag: Coast Lines Ltd v Hudig & Veder Chartering NV [1972] 2 QB 34; [1972] 1 All ER 451 (CA). (The ship's flag, it need hardly be said, was not a flag of convenience.) For other cases where the law of the flag was applied, see, eg. Lloyd v Guibert (1865) LR 1 QB 115 (Exch Ch); The Gaetano (1882) 7 PD 137 (CA); The August [1891] P 328; for cases where it was not applied, see The Industrie [1894] P 58 (CA) and the The Njegos [1936] P 90. It will be recalled from The Assunzione [1954] P 150; [1954] 1 All ER 278 (CA) (Case E 26, above), that the proper law was found to be Italian law and the relevant ship was flying the Italian flag, not as a flag of convenience.)

30. A charterparty in English form was entered into by the Dutch Ministry of Economic Affairs, whereby it chartered a Greek vessel to carry a cargo from Sweden to Holland. The charterparty was in the English language and was signed in London by English agents for the shipowners. It contained no choice of law clause and no provision for the arbitration or other settlement of disputes. Freight was payable in sterling in London. Bills of lading, also in the English

language, were issued in Greece to the Swedish shippers. The latter endorsed them over to the Dutch consignees. The bills incorporated the terms of the charterparty. The Dutch consignees were not the same persons as the charterers. It became necessary to know whether English law was the proper law of the contract of affreightment because the ship, and cargo, were lost off the Dutch coast and the consignees wished to sue the shipowner for non-delivery in England. It was held that the contract was not by its terms or implication governed by English law and hence that leave to serve out of the jurisdiction under RSC Order 11, rule 1(1)(e)(iii) could not be given: The Metamorphosis [1953] 1 WLR 543; [1953] 1 All ER 723.

(There might be a temptation to say that Dutch law must be the proper law in this case because the charterers were a Dutch Ministry and thus an arm of the Dutch State. The fact that a State is party to a contract is, of course, a matter of great weight when there is no express choice of law, but it does not conclusively point to the law of that State as being the proper law: see R v International Trustee for Protection of Bondholders Act [1937] AC 500; [1937] 2 All ER 164 (HL) (where the British Government had raised a loan in the First World War in the United States and it was held that it was New York law, and not English law, that was the law governing the transaction.)

The lex loci contractus has a strong claim to be the proper law of a contract concluded at an international fair, market or exhibition. The same is true of a "cash and carry" transaction. In such cases, the place of making is not fortuitous, since the contract will not have been made in, eg, an aeroplane flying over many different countries. Nor will it be likely to have been made by correspondence and thus will not be dependent on rules about offer and acceptance.

Deals between parties who are residents of the same country, where each does business, obviously have a strong claim to be governed by the lex loci contractus: see, for instance, Jacobs v Credit Lyonnais (1884) 12 QBD 589 (CA) referred to above (see Case D 1, above).

On the other hand, the fact that a contract was not made in a particular country may assist in determining that the law of that country is not the proper law. In Keiner v Keiner [1952] 1 All ER 643, a former husband, ordinarily resident in England, had executed in New Jersey, where his former wife resided, a deed making financial provision for her after dissolution proceedings. The former wife later sued to recover arrears that had accrued. The ex-spouses settled the action and the question subsequently arose whether the former husband could deduct tax from the payment he was to make under the settlement. He would be entitled to do this only if the proper law were English law. In other words, he could, if that law applied, say: "By paying part of the debt I owe to my former wife to the UK Revenue authorities, I have, pro tanto, discharged my liability to her". It was held that the proper law was not English law, the contract not having been made in England, and no countervailing considerations pointed to English law as the law to govern the contract. It will be appreciated that this case is not one between the former husband on the one hand and the United Kingdom Revenue authorities on the other, but that it is simply a case concerning the ex-spouses' rights inter se. The Court thus considered that the former wife's rights were not be affected by the mere fact that the former husband had happened to come to live in England and had all his assets there. The parties' rights, it was held, were governed by the law of New Jersey which, indeed, they had, in the Court's view, agreed to abide by.

F The formal validity of a contract: must there be a document under seal, or written evidence etc?[16]

Putting the matter briefly and simply, the generally accepted rule is that the formal validity of a contract is governed by the lex loci contractus or by its proper law. Hence a contract will be formally valid if made in accordance with any form recognised by the lex loci contractus, whether or not it is made in accordance with the form prescribed by the proper law of the contract. Conversely, any contract is formally valid which is made in accordance with any form required, or permitted, by the proper law of the contract, even though not made in accordance with the lex loci contractus. In Guepratte v Young (1851) 4 De G & Sm 217 a married woman domiciled in France made a contract in England with respect to her interest in an English trust fund. The contract was essentially valid by French law but not by English law. It was formally valid by English law, (the lex loci contractus) but not by French law (the proper law) because there were not as many copies of the contract as there were parties to it. It was held that the contract was valid because English law was complied with. The place of contracting was not fortuitous here, and the result is sensible: the woman must be able to get advice from a local lawyer, who would

16. See Dicey & Morris, Rule 148, pp 784-789; Cheshire & North, pp 219-221.

naturally utilise the formalities of his own law. By way of contrast, in Van Grutten v Digby (1862) 31 Beav 561, a French citizen domiciled in France married, in France, an English woman resident in France but domiciled in England. Before the marriage, the woman made, in France (where they intended to remain), a settlement of her English movables. She used the appropriate English form, but it did not satisfy the French legal requirements, e.g., she did not make the settlement before a notary. It had been agreed that the trustees should keep the capital in England. It was held that the proper law of the settlement was English and, since it complied with English legal formalities, it was formally valid - an equally sensible decision.

Where, however, one is likely to be unexpectedly caught is in the context of the Statute of Frauds and similar statutes. This is shown by Leroux v Brown (1852) 12 CB 801. B orally engaged L at Calais as his agent to collect eggs, poultry etc. there and to forward them to England. The employment was to commence at some future date for a year certain at 100 per annum. The Statute of Frauds in its then form (the contract was one not to be performed within a year of its being made) required that such a contract should be evidenced by writing if it were to be enforceable by action. French law, the proper law, did not lay down any such requirement. L sued B in England for breach of the agreement. It was held that judgment must be given for B because the Statute of Frauds laid down a procedural rule which prevented enforcement of the contract in England. (It is axiomatic that procedural matters are governed by the law of the Court hearing a conflict of laws case, but nice questions can arise as to what is, or is not, a procedural matter.) The nuisance value of the decision is obviously great. (Similar trouble has occurred in the context

of stamp laws: if a foreign stamp law makes an unstamped document inadmissible in the foreign court as evidence, it can nevertheless be produced in evidence in an English court despite the lack of the stamp, as was the case in the English decision in Bristow v Sequeville (1850) 5 Exch 275. But if the document is null and void in the foreign law for lack of the stamp, it will be inadmissible, as in Alvez v Hodgson (1797) 7 TR 241. (Such matters are sometimes dealt with by statute: see eg., Bills of Exchange Act 1908, s 72(a)(i).)

Various reasons exist for requiring the adoption of some particular form. The first is that there shall be evidence that the transaction was concluded. The second is the laudable aim of ensuring that the parties to a contract enter into it after due consideration and with full knowledge. The third is that the public interest is served by promoting confidence in validly concluded transactions and providing a simple and external test of enforceability.[17]

G Essential Validity of the Contract, and questions of illegality

The essential validity of a contract is, as a general rule, governed by the proper law of the contract.[18] We have, indeed, already observed this

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17. See Baty, Polarised Law (1914), p 44; Tottermann (1953), 2 ICLQ 27, at p 33.

18. See Dicey & Morris, Rule 149, pp 789-808; Cheshire & North, pp 230-235.

principle at work in some of the cases already discussed.[19] It may be added here that an expressly chosen proper law has been held in England to govern the consequences of the fundamental breach of the contract: The Orient Trader [1973] 2 Lloyd's Rep 174.

We may now turn to the House of Lords decision in Zivnostenska Banka v Frankman [1950] AC 57; [1949] 2 All ER 671 (HL). In that case, stocks belonging to a woman who was a Czechoslovakian citizen, resident in Prague, were deposited on her behalf by her bank in Czechoslovakia at its branch in London. The woman subsequently emigrated to England. After her death, her personal representatives sought to recover these securities and were met with refusal - the ground for refusal being that the law of Czechoslovakia was the proper law of the contract and that the Czechoslovakian exchange control laws did not permit her bank to hand over the stocks without the permission of the Czechoslovakian National Bank, which, when approached, had refused it. It was held that the woman's bank was accordingly entitled to refuse to hand over the securities since to hand them over would constitute an act illegal by Czechoslovakian law, which was the proper law of the contract. Reference may be made, in connection with illegality under the proper law, to Kahler v Midland Bank Ltd [1950] AC 24; [1949] 2 All ER 621 (HL), and to Heriz v Riera (1840) 11 Sim 318.

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19. See the decisions in Hamlyn v Talisker Distillery [1894] AC 202 (HL) (Case E8, above); Spurrier v La Cloche [1902] AC 446 (PC) (Case E9, above); P and O v Shand (1865) 3 Moo PCC (NS) 272 (Case E22, above) and Re Missouri Steamship Co (1889) 42 Ch D 321 (CA) (Case E23, above). And see Cheshire & North, pp 227-229.

However, it must now be observed that a contract, whether lawful by its proper law or not, is, in general, invalid in so far as the performance of it is unlawful by the law of the country where it is to be performed.[20] In Klatzer v Caselberg & Co (1909) 28 NZLR 994, the defendant New Zealand merchants purchased for sale in New Zealand 300 cases of "Meadow Brand" milk from the plaintiff Amsterdam merchant. The latter knew that the defendants desired to re-sell the milk in New Zealand. The content and description of the milk was such that the contemporary Adulteration Prevention legislation of New Zealand was contravened. (Indeed, the defendants were prosecuted under it.) The contract was considered by Sim J to be illegal. Even assuming that it had been made in Holland and was lawful by Dutch law as lex loci contractus, he still thought that the plaintiff could not recover the price because the contract had been made in contemplation of a violation of New Zealand law, viz, the resale of the goods there.

In Steinman v De Courte (1899) 17 NZLR 805, the plaintiff claimed damages for wrongful dismissal from the defendant's service as femme de chambre, and the balance of wages due. It appeared that the contract had been made in France and that the balance had been deducted, or kept back, by the defendant in accordance with the employment contract. It is not readily apparent what was thought to be the proper law of the contract or what was the purpose of the deductions. The plaintiff contended that, insofar as her contract of service was to be performed in New Zealand, the Truck Acts

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20. Dicey & Morris, Exception 1 to Rule 149, pp 794-801; Cheshire & North,, pp 227-229.

applied, so that the deductions should not have been made. This argument commended itself to Prendergast C J, who found in her favour.

The leading example of the rule under discussion is provided by the more recent decision in Ralli Bros v Compania Naviera Sota y Aznar [1920] 2 KB 287 (CA). The English Court was there concerned, putting the matter in simplified form, with a contract, governed by English law, for the carriage by sea of certain jute from Calcutta to Barcelona. The contract was made in London and provided, perfectly lawfully by English domestic law, for freight to be paid by the charterer to the shipowner at the rate of 50 per ton on delivery of the jute at Barcelona. Upon a date lying between the making of the contract and the ship's arrival in Spain, the Spanish Government decreed a maximum freight rate for jute that was less than 50 per ton, and made it illegal to pay in excess of the decreed rate. When the shipowner sued to recover the difference between the agreed rate and the decreed rate before the English Courts, his claim was dismissed. (Quaere what would have been decided by the Court of Appeal had the proper law been French instead of English?)

On the other hand, the infringement of a foreign law that has no relevance at all to the case will not adversely affect the contract, as is evident from Kleinwort Sons & Co v Ungarische Baumwolle Industrie A/G [1939] 2 KB 678; [1939] 3 All ER 38 (CA), where an English bank opened an acceptance credit to a Hungarian firm. When the credit expired, the Hungarian firm declined to pay in London, saying that Hungarian legislation made it illegal for it to send money abroad or to obtain English currency or to dispose of assets outside Hungary. As English law was the proper law of the contract and the money was to be paid in London, it will be seen that

the law of Hungary was rightly held to be irrelevant. It was not the proper law, nor was it the lex loci solutionis. It does not matter, either, that the firm was of Hungarian nationality, resident and carrying on business in Hungary.

It is accepted also that the validity or otherwise of a contract must be determined in accordance with New Zealand law, independently of the law of any foreign country whatever, if an insofar as the application of foreign law would be contrary to the public policy of New Zealand law.[21] Two examples must suffice here. In Regazzoni v K C Sethia Ltd [1958] AC 301; [1957] 3 All ER 286 (HL), a contract, governed by English law, was entered into in Germany between A, carrying on business in England, and B, carrying on business in Switzerland, whereby A agreed to sell B a number of jute bags c.i.f. Genoa. On the face of it, this is a perfectly innocent contract, but the whole complexion changes when it is understood that the only source of supply of jute bags that is possible is India; that A means to sell the bags in South Africa; that Indian law has made it unlawful to ship jute bags from India in the event of their final destination being South Africa; and that the persons from whom A will have to acquire the jute bags to fulfil the contract will have to pull the wool over the eyes of the authorities in India. The contract clearly cannot be performed without A's and B's procuring the doing in India, a country friendly to England, of an illegal act. It is obvious that A and B contemplated and

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21. Dicey & Morris, Exception 2 to Rule 149, pp 801-808; Cheshire & North, pp 223-230, and see also pp 145-148, and R Y Jennings [1956] CLJ 41. Reference should be made to Boissevain v Weil [1950] AC 327; [1950] 1 All ER 728 (HL).

intended such act. The English Court will therefore not enforce this contract, which contravenes English public policy. On the other hand, let it be supposed that, by an agreement governed by Californian law, a husband were to agree to pay his wife a weekly sum for her maintenance and that of the children of the marriage and that, in consideration thereof, the wife gave an undertaking not to proceed in any Californian Court to enforce her rights to maintenance. Such an agreement was held not to contravene English public policy: Addison v Brown [1954] 1 WLR 779; [1954] 2 All ER 213, a decision evidently preserved by s 11(1)(b) of the Illegal Contracts Act 1970.

H The rights and obligations under the contract of the parties to it

These are governed by the proper law.[22] We have in fact seen from Jacobs v Credit Lyonnais (1884) 12 QBD 589 (CA) that English law was the proper law of the contract and accordingly that the contract was not frustrated and performance was not excused (Case D 1, above). We also saw in the Bonython case [1951] AC 201 (PC) that, if London were chosen as the place to receive payment, the measure of the obligation was not governed by English law as lex loci solutionis (Case E 16, above).

We may take one further example, viz. J D Almeida Araujo Lda v Sir Frederick Becker & Co Ltd [1953] 2 QB 329; [1953] 2 All ER 288. A firm

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22. Dicey & Morris, Rule 151(1), pp 812-818; Cheshire & North, pp 230-232.

carrying on business in Portugal agreed by contract, governed by Portuguese law, to sell to an English company an amount of palm oil f.o.b. Angola. The Portuguese firm had agreed to buy the oil to fulfil the contract from a second Portuguese firm. The English firm did not open a credit in payment of the price as it had agreed that it would. Because of this breach of contract the (first) Portuguese firm was unable to accept delivery of the oil from the second Portuguese firm and had to pay it the equivalent of 3,500 by way of damages. It was held that Portuguese law, as proper law of the contract, must say whether, as between the English firm and the (first) Portuguese firm, the 3,500 loss incurred by the latter was too remote or not. The same law must say whether and how far the latter firm was under a duty to mitigate the loss, as by failure to resell the palm-oil on the market with despatch. On the other hand, English law, as the lex fori, will quantify the damages.

There is, however, a somewhat nice distinction which has to be drawn, which is this: the mode of performing a contract, as contrasted with the substance of the obligation, will be governed, in the absence of a contrary intention, by the law of the place where the obligation is to be performed.[23] This may be illustrated by a New Zealand case that went on appeal to the Privy Council, thereby becoming accepted throughout the

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23. Dicey & Morris, Rule 151(2), p 812; Cheshire and North, pp 235-239. A simple example, given at p 813 of Dicey & Morris in the course of the Comment to Rule 151 is: "If, under an English contract, a party undertakes to deliver goods in Paris "during the usual business hours" it will presumably be for French law to say what business hours are "usual", but English law will determine whether eg. performance is excused owing to frustration or to what extent the seller is liable for defects in the goods delivered."

Commonwealth: Mount Albert Borough Council v Australasian etc., Assurance Society Ltd [1938] AC 224; [1937] 4 All ER 266 (PC). The Mount Albert Borough Council raised a loan from the respondent insurance company, incorporated in Victoria and doing business both in Australia and New Zealand, under a contract wherein it was stated that the Borough Council was entitled to raise quite a considerable loan. Authority to raise the loan had been given by New Zealand statute law. The loan was secured on a special rate of threepence in the pound on land in the borough. The loan bore interest at 5.13s.9d. per annum, payable half-yearly. The interest and the capital were repayable in Victoria. The loan had been agreed in New Zealand, however, and the Borough Council had received the borrowed moneys in New Zealand. At a later stage, a statute was passed in Victoria reducing the rate of interest due on certain mortgages for three years. This statutory rate was lower than the rate contracted for. The Borough Council paid only the reduced rate of interest and it was consequently sued for the balance. It was argued on its behalf that its obligation to pay interest was governed by Victorian law as lex loci solutionis, so that only the Victorian maximum rate was payable. It was held that this was an unacceptable argument and that the rate of interest was a matter of the substance of the obligation, governed by the proper law of the contract, which was New Zealand law. It was not a matter of the mode of performance governed by the lex loci solutionis. Accordingly the Victorian legislation had no application here. (On the other hand, had it been a matter of whether the Borough Council had to pay in cash, or whether a cheque would have sufficed, it would have raised a question of the mode of performance to be governed by Victorian law.)

I Discharge of Contracts

As a rule, the discharge of a contract will depend upon its proper law, so that, if it is discharged in accordance with that law, it will be a valid and effective discharge in New Zealand. If it is not discharged in accordance with the proper law, therefore, it will not be a valid and effective discharge in New Zealand.[24] These principles have been seen at work in some of the cases already set out and need not be illustrated further.[25] A few words may be added, however, in the context of moratorium laws. In Re Helbert Wagg & Co Ltd [1956] Ch 323; [1956] 1 All ER 129, under a contract the proper law of which was German, a German company in business in Germany owed an English company a sum of money payable in sterling in England. Subsequently, in order to protect the German currency, German law was altered so as to cause the German company to pay the amount due to the English company to a German governmental office called the Konversionskasse. By so paying the money, the German company would discharge its indebtedness. It was held that the German company's liability would be validly discharged by paying the

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24. Dicey & Morris, Rule 152, pp 818-827; Cheshire and North, pp 241-248.

25. See, eg., Keiner v Keiner [1952] 1 All ER 643 (mentioned at the end of Part E, above); Rossano v Manufacturers' Life Assurance Co [1963] 2 QB 352; [1962] 2 All ER 214 (Case E 17, above); In re a Mortgage, J to A [1933] NZLR 1512 (Case E 28, above); Mount Albert Borough Council v Australasian etc Assurance Association Ltd [1938] AC 244; [1937] 4 All ER 266 (PC) (mentioned in Part H, above). In Jacobs v Credit Lyonnais (1884) 12 QBD 589 (CA) (Case D 1, above) it was seen that the contract was not discharged by impossibility of performance, although it would have been so by the lex loci solutionis.

Konversionskasse, as German law was the proper law.[26]

J Construction and Interpretation

It simply remains to note that the construction and interpretation of a contract is determined in accordance with the proper law of the contract.[27] It will, for instance, be recalled from the Bonython case [1951] AC 201 (PC) (case E 16, above) that the law of Queensland was found to be the proper law and that that law determined the meaning of the word "pound". Further, in Spurrier v La Cloche [1902] AC 446 (PC) (case E 10, above), Lord Lindley said (at p 450) that, once it was established that English law was the proper law of the contract, it followed that, wherever sued upon, its interpretation and effect ought, as a matter of law, to be governed by English law.

We may, with advantage, return to the Amin Rasheed case [1984] AC 50; [1983] 2 All ER 884 (HL) (case E 15, above). Lord Wilberforce made the point that, whether English or Kuwaiti law were the proper law, the terms of the contract would be given the meaning ascribed to them by English statute, custom and decisions. There was nothing unusual in a situation where, under the proper law of a contract, resort was had to some other

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26. For a case where the moratorium law was not the proper law, see National Bank of Greece and Athens SA v Metliss [1958] AC 509; [1957] 3 All ER 608 (HL).

27. Dicey & Morris, Rule 150, pp 808-812; Cheshire and North, pp 239-241.

system of law for purposes of interpretation, in which case that other system became a source of law on which the proper law may draw. In such a case, the proper law was merely importing a foreign product for domestic use. There was evidence before their Lordships' House that in relation to insurance, and in particular to cases where Lloyd's SG policies were used, Courts in Europe did this, and that the Kuwaiti Courts would act similarly, resorting, as to a source of their own domestic law, to English law directly or indirectly, via Turkish law. He emphasised that it was wrong to say that, because a form of contract had to be interpreted in accordance with English rules, or even English decisions, the proper law was English.

K "Splitting" the Proper Law

We have seen from the foregoing that, as a rule, the same law applies to all aspects of the contract, e.g. its formation, validity, its interpretation and discharge. It is, in fact, open to the parties to agree that one aspect of the contract is to be governed by the law of one country, let us say the lex loci contractus, and another or other aspect or aspects shall be governed by the law of a different country, such as the lex loci solutionis. Thus, in a contract for the sale of goods, it would be possible to provide that the passing of risk and property in the goods should be subject to the law of the country where the seller does business and that the duties of the purchaser should be subject to the law of the different country in which he does business. It would, however, only be in unusual and compelling circumstances that a Court would be ready to split a contract in this way: see Kahler v Midland Bank Ltd [1950] AC 24 (HL), at p 42, per Lord MacDermott. No Court seems yet to have applied this "scission" principle in New Zealand.

L A note on the matter of remedies

What remedy (or remedies) will be available to a plaintiff is a matter for the lex fori, that is to say the domestic law of the Court trying the case. Thus, in Baschet v London Illustrated Standard [1900] 1 Ch 73, the plaintiff French copyright owner sued the defendant in England seeking various remedies for infringement of his copyright. Had he sued in France, the plaintiff could not have got an injunction against the defendant. It was held that he was nevertheless entitled to such relief before an English Court. On the other hand, a plaintiff cannot bring an action in New Zealand for specific performance of a contract governed by a foreign law which would allow the grant of a decree of specific performance if New Zealand law would not permit it, e.g. in a case of a contract for personal services: cf Warner Bros v Nelson [1937] 1 KB 209; [1936] 3 All ER 160. It is also the case that no New Zealand Court can act if it possesses no remedy in its armoury that is appropriate to the plaintiff's case. This is aptly illustrated by the decision in Phrantzes v Argenti [1960] 2 QB 19; [1960] 1 All ER 778. A daughter, domiciled in Greece, brought an action in England against her father, also domiciled in Greece. Having just married, the daughter claimed that her father was duty-bound in Greek law to provide her with a dowry - a claim quite unknown to English domestic law. Her claim was dismissed, not because of the novelty of its nature, but because English law really had no machinery for effectuating the claim. By Greek law the amount of the dowry would be at the Court's discretion and would depend on various matters such as the plaintiff's conduct, the defendant's wealth, his social position and the number of children he had. Obviously such matters would be better threshed in a Greek Court than in an English one. On the other hand, in Shahnaz v

Rizwan [1965] 1 QB 390; [1964] 2 All ER 993, H and W were Muslims domiciled in India who had married there in polygamous form. Under their marriage contract, W was entitled to "deferred dower" in the event of H's dying or their marriage being dissolved. H subsequently divorced W in Muslim form. At that time, English Courts refused matrimonial relief in respect of polygamous marriages. When W sought to claim the promised deferred dower before the English Court, it was held that she should succeed. She was not seen as seeking matrimonial relief, but as seeking to enforce a contract, albeit of a sort not known to English law. The fact that their marriage had been potentially polygamous raised no public policy bar to W's claim.

On the other hand again, an English Court has seen no objection to granting a decree of specific performance of a contract for the sale of land situated in Scotland: Richard West and Partners v Dick [1969] 2 Ch 424; [1969] 1 All ER 943 (CA).

M. Some Talking Points

1. A firm of New Zealand underwriters executes in Auckland a policy of insurance one of the express terms of which states that the policy shall be construed and applied in accordance with French law. You are unable to discover any intention on the parties' part to evade any imperative provision of New Zealand law. What law governs the policy?

2. A charterparty is entered into in London between a German shipowner domiciled in Germany and a company of London merchants, L & Co, for the carriage, on board the German shipowner's vessel, of a cargo of rice from India to England. The contract is on an ordinary English printed form and the terms are those of the usual English charter-party. It does, however, contain special stipulations as to payment of freight on right delivery. En route to England, the ship is driven into a port of refuge, where some of the cargo is sold. If German law as the law of the flag applied, the German shipowner would be entitled to be paid the full freight. If English law applied, he would not be entitled to the freight on that part of the cargo which was sold. Is the law of the flag excluded so that L & Co do not have to pay the full freight, or is German law the proper law of the contract?

3. A man resident in New Zealand agreed with an English life assurance company to take out a life policy with it. He always dealt with an agent in New Zealand of the English company and paid the premiums due to him as they fell due. The policy was, however, prepared in England and not in New Zealand. It was sent to the assured direct from the company's head office in London. What law governs the policy?

4. Francois, a French citizen resident in Paris, promises, by notarial contract made in London when there on a business visit, to give a large sum to a French charity. What is the proper law of the promise?

5. X, who carries on business in England, ships a cargo at New York on board an Italian vessel for carriage to London. The ship arrives in Portuguese territory in distress. The master there borrows a sum of money on bottomry of ship, cargo and freight, to enable her to continue with the voyage to London. The master could have communicated with X, as he had the means of doing so. Nevertheless, he did not communicate with X. In these circumstances, Italian law, as the law of the flag, would say that the bond was valid. English law would say th bond was not valid in the circumstances. It has to be determined what law governs the authority of the master to do what he did vis-a-vis X and whether the bond is valid as against X. Does the law of the flag apply? Or English law?

6. A contract was entered into in Austria whereby A lent B $5,000 US, the sum to be repaid later in Switzerland. A and B are Hungarians resident in Austria, but not permanently so. The agreement is in breach of the current Austrian exchange control legislation. It is, indeed, void and illegal under Austrian law. Could A recover the loan from B before a New Zealand Court, assuming there to be no jurisdictional problems?

7. C entered into an agreement in Auckland with D to smuggle goods into Fiji. You have satisfied yourself that both of them did become actively engaged in smuggling goods into Fiji. C now sues D for breach of the agreement before a New Zealand Court. Will he succeed?

8. A carries on business in England. He agrees to sell some copper to B, a French company doing business in France. Without any good reason, B declines to accept or to pay for the copper when tendered by A at the proper time and place. The proper law of the contract is English law. B is subsequently placed under judicial liquidation in France. The result of this is that B's liability is deemed to be discharged by French law. Would B still be liable in damages to A for breach of the contract, were the matter to come before the English/New Zealand Courts?

9. Goods were shipped from Santos, Brazil, for carriage to Haifa, in transit to Beirut. The shippers were Brazilian. The ship, the "Stensby", was a Danish one, but was managed by Norwegian managers for Swedish time charterers. The bill of lading was headed "Scandinavia - South America - Mediterranean Line". It was in English, but there were two endorsements in Portuguese. Weights were expressed in Kg, measurements in metres, the freight in US dollars translated into Brazilian currency. A clause in the bill of lading provided that "Landing at Oslo to be effected by the ship on account of goods and in accordance with the rules and tariffs of [a Danish company]". Another clause provided that "In case of average same to be adjusted in Oslo or another port in owner's option according to York-Antwerp Rules." A third clause stated that all the terms and conditions of a Norwegian statute relating to the enforcement of the International Convention concerning Bills of Lading were to apply to the contract contained in the bill of lading and that the carriers were to be entitled to the benefit of all privileges, rights and immunities contained in the statute as if they were specifically set out in the bill of lading.

   An action is started in England for breach of the bill of lading, but the English Court will only permit service out of the jurisdiction on the defendants if the plaintiffs can persuade the Court that the proper law of the bill of lading is English. The plaintiffs argue that the bill of lading was in English, that many of the clauses in it had been the subject of decisions by English Courts and that English law was the proper law.

   The time charterers were resident in England.

The freight was to be paid into a bank account in New York.

There is no question of the "Stensby" flying a flag of convenience.

Comment on the plaintiffs' hopes of persuading the English Court that English law is the proper law.

N. Some Ideas for Answers

1. French: see Greer v Poole (1880) 5 QBD 272, at p 274. French law is expressly chosen.

2. There is no express choice here; the parties' intention must be inferred from the nature of the contract and the general circumstances. The Industrie [1894] P 58 (CA) points to English law.

3. It looks as if the Bonython test would lead us to conclude that English law governed.

4. It would appear to be French law. The contract thus is formally valid because the proper law is complied with. If French law, as proper law, does not require consideration, the contract is valid essentially as well.

5. The proper law of the bond would be Italian law and its validity would be determined thereby: see The Gaetano (1882) 7 PD 137 (CA).

6. On similar facts in Etler v Kertesz (1960) 26 DLR (2d) 209, A failed in Ontario when he sought repayment of the loan there. The contract is essentially invalid by its proper law, Austrian law.

7. Performance of the contract in Fiji would be performance illegal by the lex loci solutionis. Applying the Regazzoni case, the Court would say the contract was invalid and no action could be maintained.

8. The discharge would be insufficient by the proper law. Thus B would still be liable to pay damages to A in New Zealand or England as the case might be: see Gibbs v Societe Industrielle (1890) 25 QBD 399 (CA).

9. Very, very slim: see Kadel Chajkin Ltd v Mitchell Cotts & Co (1948) 64 TLR 89; [1947] 2 All ER 786 where the facts were similar and leave was refused to serve out of the jurisdiction under that heading. The Court having said English law was not the governing law did not indicate what was. Any offers?