# RATIONALISING CONTRACT CHOICE OF LAW RULES

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Contract choice of law rules tell a court in what circumstances a law other than its own should govern the rights and duties of the parties to a contract.

For example, litigation in New Zealand might concern a contract between a New Zealander and a French citizen for the sale and delivery of goods from France to Indonesia. The existence of choice of law rules means that a New Zealand court is prepared in the right circumstances to apply a foreign law to resolution of the dispute. Why should it be willing to do this when every instinct impels it to apply the familiar (and by its standards just) rules of its own law?

It might consider that it was bound by the law of nations to apply, say, Indonesian law to contracts having a certain connection with Indonesia. New Zealand courts will apply the customary rules of public international law if they are not inconsistent with the rules of New Zealand municipal law.[1] But courts in different countries give different answers to the question when a foreign law and if so which one should be applied. This shows that there is no uniform rule of international law imposing reciprocal duties on nations. The idea of choice of law rules as part of an international community of law has vanished with the proliferation of municipal laws.[2] Conflicts rules are now seen as part of municipal law.[3]

As part of the municipal law of New Zealand, it follows that conflicts choice of law rules exist, like other rules of municipal law, to further some policy of the forum. The rules of private laws, like tort and contract, including contract choice of law rules, are concerned with ordering the relationships between individual members of society. Two interests shape the content of those laws, namely the interests of the individuals and public interests. The primary interest reflected in private laws is the interests of the parties. The public interest is secondary.[4]

The interests of the parties in contract law, a law of voluntary undertakings, are primarily realising the expectations of the parties[5] and promoting certainty of result.[6] The secondary public interest is of two types. First,

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1 *Chung Chi Cheung* v *The King* [1939] AC 160 at 167-168 per Lord Atkin.
2 K Zweigert, "What is Justice in Conflict of Laws" (1973) 44 U Colo L Rev 283, 284-286.
3 H Yntema "Basic Issues in Conflicts Law" (1963) 12 Am J Comp L 474, 481; O Kahn-Freund *The Growth of Internationalism in English Private International Law* Jerusalem, Magnes Press, 1960, 7-8.
4 G Kegel "The Crisis of Conflict of Laws" (1964) II Hague Recueil 180, 186.
5 M Rheinstein, "The Place of Wrong" (1944) 19 Tulane L Rev 4, 21.
6 A J E Jaffey "The English Proper Law Doctrine and the EEC Convention" (1984) 33 ICLQ 531, 544.

it may be said to be in the interests of society as a whole, that is, of its constituent individuals collectively, to impose limitations on party interests. The rule of consideration, that only promises which have been bargained for may be enforced, is an example. Second, it may be in the interests of the state as a corporate entity distinct from its individuals to impose limitations. An example is a refusal to order the enforcement of a contract which would require breach of the law of a foreign state.

From this idea that the central purpose of choice of law rules is to do justice between the parties[7] according to the forum's notions of justice, several things follow. First, a primary reason for selecting a system of law to govern a contract should not be to further the public interests of a state as such. And if state interests are not the primary concern, *foreign* state interests are even further removed from the central purpose of conflicts.[8]

Second, it follows that when a foreign law is chosen, it is because a court thinks that in the circumstances its own notions of justice between the parties will better be served by applying that foreign law.[9] It is not chosen out of any sense of duty to the foreign country.[10] In fact it is not a foreign rule which is applied in such a case, but a foreign rule adopted as a rule of New Zealand law.[11] A fortiori, it is not the *public* interests of a foreign state which influence a New Zealand court.

## Objects and Summary

In this paper I will examine the common law test for determining the proper law of a contract from the points of view both of internal consistency and consistency with the policy of the law in this area. I submit that it has shortcomings from both points of view. I will assess the efficacy of the suggestions of the Law Reform Commission of Australia[12] and the provisions of the Rome Convention[13] in overcoming these shortcomings.

7 A J E Jaffey "The Foundations of Rules for the Choice of Law" (1982) 2 Oxford J Leg Stud 368, 377.

8 Even the implementation of the EC Convention on the Law Applicable to Contractual Obligations has not changed this attitude. The UK took advantage of the power in Article 22(1)(a) to reserve the right not to apply Article 7(1). (See s 2 of the Contracts (Applicable Law) Act 1990 c 36.) Article 7(1) would have allowed British courts to give effect to "mandatory rules of another country with which the situation has a close connection" whatever the proper law. The rejection confirms that in English law the object of choice of law rules is not to give effect to foreign state interests.

9 R H Graveson "Philosophical Aspects of the English Conflict of Laws" (1962) 78 LQR 337, 348.

10 P M North and J J Fawcett, *Cheshire and North's Private International Law,* 12th edition, London, Butterworths, 1992, 5.

11 *Guinness* v *Miller* (1923) 291 Fed 768, 770 per Learned Hand J; W W Cook *The Logical and Legal Bases of the Conflict of Laws* Cambridge, Harv Uni Press, 1942, 391.

12 Report No 58, 1992, *Choice of Law,* chapter 8, "Contracts".

13 The Convention on the Law Applicable to Contractual Obligations 1980 ("The Rome Convention") was signed by the UK on 7 December 1981 and became English law on 1 April 1991. It was implemented by the Contracts (Applicable Law) Act 1990 c 36, which was brought into force by Statutory Instrument 1991/707.

In outline, my criticisms are these. The common law choice of law rules give the parties to a foreign contract freedom to choose the governing law and thus avoid application of the compulsory, though not the mandatory, laws of the forum. Yet no attempt coherent in terms of policy is made to define foreign as distinct from domestic contracts. The definition can be formulated once the fallacy is revealed of assuming that freedom to choose the governing law is part of freedom of contract. Given that the parties qualify for freedom to choose the governing law, the limitations on their freedom should be confined to obedience of mandatory statutes of the forum and to limitations dictated by the public policy of the forum, including comity. Notions such as bona fides, legality by foreign law, and the public policy of foreign states should play no part in limitations on party freedom to choose, since they suggest allowing the interests of foreign states to override the interests of the parties. The policy objective of choice of law rules as part of the private municipal law of the forum is to do justice between the parties according to the values of the forum, subject only to the public interests of the forum. If the parties to a foreign contract have not exercised their freedom to choose, it is irrational and inconsistent with that policy objective, and with the freedom to choose, to apply a purely objective test. A rule needs to be developed (or the present rule interpreted) so that a law is chosen in the absence of actual intention which reflects primarily the joint interests of the parties at the time the contract was made, only secondarily the interests of the forum state, and not at all the interests of foreign states. However, since the policy objective is to do justice between the parties, a rule which focuses upon their interests at the time of contracting needs to be complemented by a presumption which will make the governing law reasonably predictable. Throughout the paper I adopt the assumption that justice between the parties will be promoted by the application of a rule of law which leaves only limited scope for judicial discretion.

## THE BONYTHON TEST

In *Bonython* v *Commonwealth of Australia*[14] in 1951 Lord Simonds defined the law governing a contract as "the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connexion". This was interpreted by Lord Diplock in a 1983 House of Lords case, *Amin Rasheed Shipping Corporation* v *Kuwait Insurance Co*[15] as two tests covering two distinct situations. The "system of law by reference to which the contract was made" referred to the situation where the parties had actually formed an intention as to what law should govern their contract.[16] The so-called second leg of *Bonython,* the phrase after the word "or" reading "that with which the transaction has its closest and most real connexion", dealt with the situation where no actual intention of the parties could be discerned.

14 [1951] AC 201, 219.
15 [1984] AC 50, 61; [1983] 2 All ER 884, 888.
16 "Actual intent" is broader than "express intent".

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The first leg means that if the parties have manifested an intention as to the governing law, the law they have chosen will govern their contract.[17] In other words they have freedom to choose the governing law. Is it consistent with the policy of the law in this area that they should have this freedom? To answer this question, we must first look at the types of legal rules which the governing law might encompass. Rules affecting contracts are of three types.[18]

First, there are *optional rules* designed to deal with situations which the parties may not have thought of. Examples of these are the postal rule concerning acceptance by post[19] and the rule that the innocent party has the right to terminate the contract only upon commission of a serious breach.[20] If the parties want to, they are free to make contractual arrangements altering or replacing these rules.

The second type is *compulsory rules.* In the context of English law, these rules apply to an English contract regardless of the parties' intention. One example is the consideration rule. The parties cannot by agreement alone make their undertakings binding without consideration.

The third type is *mandatory rules.* These apply to all contracts, domestic and foreign, regardless of the proper law.[21] Occasionally a mandatory statute will control the law to govern a contract. An example is section 11 of the Australian Carriage of Goods by Sea Act 1991,[22] the effect of which is to make the law governing a bill of lading the law of the jurisdiction in Australia from which the goods are shipped, regardless of factors or intention to the contrary. More common is a statute which is interpreted to extend its provisions to all contracts having a specified connection with the forum.[23]

When the parties exercise the freedom to choose the governing law, they are free to contract out of optional and compulsory rules of the forum, but not mandatory ones. This means that they *can* contract out of the need for consideration.[24]

There is something apparently contradictory about compulsory rules which one cannot contract out of directly, but can do so indirectly by choosing a foreign law.

17 *James Miller & Partners Ltd* v *Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, 611 per Viscount Dilhorne; *Coast Lines Ltd* v *Hudig & Veder Chartering NV* [1972] 2 QB 34, 46 per Megaw LJ.

18 Martin Wolff "The Choice of Law by the Parties in International Contracts" (1937) 49 Juridical Review 110, 112-113.

19 *Holwell Securities Ltd* v *Hughes* [1974] 1 WLR 155.

20 *Bunge Corporation* v *Tradax Export SA* [1980] 1 Lloyd's Rep 294.

21 M Pryles, "An Australian Perspective" in P M North, ed, *Contract Conflicts,* North-Holland Publishing, 1982, 331.

22 No 160 of 1991 (Commonwealth).

23 As the Queensland Act governing real estate agents was interpreted by the High Court of Australia in the appeal from *Golden Acres Ltd* v *Queensland Estates Pty Ltd* [1969] QdR 378, sub nom *Freehold Land Investments Ltd* v *Queensland Estates Pty Ltd* (1970) 123 CLR 418.

24 *Re Bonacina, Le Brasseur* v *Bonacina* [1912] 2 Ch 394 (CA).

The freedom to choose the governing law has been defended as a corollary of the principle of freedom of contract.[25] For example, "The fundamental reason for allowing parties to choose the law to govern their contract is that it accords with the principle of freedom of contract."[26] Freedom to choose and freedom of contract have a common root in the general principle of freedom or laissez-faire,[27] but a moment's reflection shows that they are distinct ideas. Freedom of contract is an idea which operates inside domestic law. It means that people are free to contract with whomever they like, and on the terms they like. But contracting means creating legally enforceable undertakings. If they wish their undertakings to be enforceable, their freedom is a markedly qualified one. Their undertakings must be in a transaction of a certain character (a bargain), they must avoid inducing agreement by misrepresentation, and so on. These are the compulsory rules within which freedom of contract may be enjoyed. If these rules represent the *limits* of freedom of contract, how can that principle justify permitting the parties to evade those limits by choosing to have their contract governed by another law?[28] To allow them to do so is to allow them to decide, *for the forum,* whether their promises are legally enforceable or not.

Freedom of contract thus provides no rational justification for freedom to choose the applicable law. What policy justification can there be for this freedom? One suggestion[29] is that the policy basis is threefold: fulfilling party expectations, making the result predictable,[30] and enabling parties to choose a law convenient to them, one with which they are familiar or which is "neutral". But surely these arguments are not peculiar to foreign contracts. They could also apply to domestic contracts, which would imply abandoning the domestic limits on freedom of contract, mentioned above.

To find a justification it is necessary to go back to first principles. The limits on freedom of contract represent public interest qualifications of private interests, the latter being chiefly expectations and certainty. But to what contracts are these limits on freedom of contract meant to apply? The limits are imposed in the interests of the society in which the court sits, so the answer must be that they are intended to apply to contracts which affect that society.

25 J G Collier *Conflict of Laws* CUP 1987, 143; R H Graveson "The Proper Law of Commercial Contracts in the English Legal System" in *Lectures on the Conflict of Laws and International Contracts* University of Michigan Law School, Ann Arbor, 1951, 6.

26 Law Reform Commission, Australia [ALRC], Report No 58, 1992, para 8.4.

27 P M North and J J Fawcett, *Cheshire and North's Private International Law,* 12th edition, London, Butterworths, 1992, 476.

28 M Wolff "The Choice of Law by the Parties in International Contracts" (1937) 49 Juridical Review 110, 116.

29 By the Australian Law Reform Commission, *Choice of Law Rules,* Discussion Paper No 44, July 1990, para 2.7.

30 P M North and J J Fawcett, *Cheshire and North's Private International Law,* 12th edition, London, Butterworths, 1992, 476; John Prebble *Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws* University Microfilms, Ann Arbor, Michigan, 1972, 135; I F G Baxter "Choice of Law" (1964) 42 Can BR 46, 72.

DEFINITIONS OF DOMESTIC AND FOREIGN CONTRACTS

It is here that a weakness appears in common law choice of law rules. It is assumed that parties to a domestic contract do not have the freedom to choose their law,[31] but that parties to a *foreign* contract do. The definition of these terms must be important, because on one side of the line lies this powerful freedom, while on the other side the parties are stuck with the compulsory rules of domestic law.

Yet it seems that no effort has been made to formulate a definition of a foreign contract. It is assumed that a foreign element in the transaction makes it a foreign contract. So if the contract was made abroad, or one of the parties lives abroad, for example, there is authority for regarding the contract as foreign.[32] But surely not every foreign element can justify enabling the parties to contract out of the compulsory rules of the forum's law.

There is an element of public interest in these rules. By that I do not mean the interests of the *state* as a corporate entity, but the interests of the members of the society as a whole. In the case of the rule that a promise is legally enforceable only if it has been paid for, the policy behind it is not merely to do justice between the parties; in the context of New Zealand, the rule says something about the New Zealand view of enforcement of promises as essentially a commercial matter, and about the appropriate distinction between law and morality. Only certain promises should be subject to legal sanctions; for the rest moral sanctions alone suffice.

Whatever the precise policy reasons for the various limitations on freedom of contract, it is evident that they are, in the context of New Zealand, New Zealand reasons, products of the values and goals of that society. The existence of choice of law rules contemplating the application of the rules of a foreign system shows that New Zealand law does not regard these values as universal. To which contracts are these limits meant to apply?[33] They apply only if the contract is a "New Zealand" contract. The members of New Zealand society have "an interest in seeing that the rules by which they wish their relationships to be ordered are applied".[34] Since the purpose of imposing these limitations on freedom of contract is protection of the interests of New Zealand society, it is only parties to contracts which do not affect, or impinge on, New Zealand society who should have this freedom.

But not every foreign element in a contract can suffice to make the contract foreign. "Why should the mere circumstance that, for example, the contract was signed in country X confer upon the parties a freedom to

31 John Prebble *Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws* University Microfilms, Ann Arbor, Michigan, 1972, 148.

32 M Wolff "The Choice of Law by the Parties in International Contracts" (1937) 49 Jur Rev 110, 110; M Wolff "The Autonomy of Contracting Parties" (1950) 35 Trans Grot Soc 143, 148.

33 See M Wolff "The Choice of Law by the Parties in International Contracts" (1937) 49 Juridical Review 110, 114-116.

34 W S Maslechko "Interest Analysis and Conflict of Laws in Canada" (1986) 44 U of T Fac L Rev 57, 63.

select the laws of any country in the world as the governing law?"[35] Imagine a transaction for the supply of goods. One of the parties might have been born abroad, or be habitually resident or domiciled abroad, or be a foreign national. The goods might have been made abroad, or made in New Zealand by a company owned abroad. On the other hand, they might be situated abroad. If so, the agreement might require their delivery elsewhere abroad, or delivery in New Zealand.

Some of the foreign connections mentioned here would intuitively be dismissed as irrelevant, as for example that the goods were made by a foreign-owned company. But why? The criteria for assessing relevance never seem to be identified. Indeed the need to define the distinction between domestic and foreign contracts is not addressed, although it is always assumed that choice of law rules apply only to the latter. Wolff, for example, says, "it is common ground that in the case of contracts with a foreign element – foreign domicil, foreign nationality, foreign place of contracting, foreign place of performance – the parties themselves have, within limits, a right to determine what law is to be applied to their contract."[36] And he gives an example of the "curious results" which follow from the autonomy principle of *Vita Food* and an unthinking assumption of what makes a contract foreign. If a contract is entirely English, he says, the parties cannot avoid the compulsory rules of English law "by declaring that Italian law governs the contract".[37] But if one of the parties were a New Yorker, they could choose, not just New York law, but Italian law "or any third law with which [the contract] has no connection".[38] Thus they could avoid the need for consideration required by both English and New York law.

The important definition is not foreign contracts but New Zealand, or domestic, contracts. This is so because freedom is the norm and limits will be imposed only if the interests of New Zealand society override those of the individuals. A domestic New Zealand contract could be defined as one which impinges on New Zealand society.

How could one tell whether a contract impinges? Perhaps a strictly logical approach would be to examine the purpose behind the limits imposed by any compulsory rule in question in a case, and to see if the effect of the contract were to frustrate that purpose. However, this approach would make the law unpredictable and difficult to administer, not least because of the nearly impossible task of settling the purpose of each rule. It would require a rule-by-rule analysis such as that employed in the USA, but rejected in England and the Commonwealth. If a contract does impinge, New Zealand society has an interest in "seeing that socially undesirable anomalies are not created by having another state's law applied to persons or activities that are part of its own social or economic system."[39]

35 P B Carter "Contracts in English Private International Law" (1986) 57 BYIL 1, 11.

36 M Wolff "The Choice of Law by the Parties in International Contracts" (1937) 49 Juridical Review 110 at 110.

37 M Wolff "The Autonomy of Contracting Parties" (1950) 35 Trans Grot Soc 143, 147.

38 Ibid at 148.

39 Joost Blom "Choice of Law Methods in the Private International Law of Contract" (Part 2) (1979) 17 CYIL 206, 218.

A contract does not touch the life of the community directly until it is performed. Could impingement therefore be equated with performance? A New Zealand contract would then be a contract to be performed to any substantial degree in New Zealand. There are several difficulties with this idea.

First, it is not always clear where a contract is performed, so that resort must be had to arbitrary or theoretical rules to find the place of performance. On the other hand, if the idea of performance in the forum equalling impingement on the forum is sound, this objection might be dismissed as merely an example of dealing with inevitable borderline cases.

Second, does a contract impinge on the forum only if it is performed there, or might it be that performance of the contract abroad impinges on the forum if one of the parties lives in the forum?

Third, if performance is to amount to impingement, what degree of performance is required? Would any performance do, or any substantial performance, or would substantial (most) performance be required? To say that less than substantially the whole performance amounts to impingement, and therefore causes the imposition of the forum's compulsory rules, could lead to inconsistency and forum-shopping, since the contract could be "domestic" to more than one forum adopting this rule.

Fourth, all contracts except unilateral ones require *two* lots of performance, one by each party. Performance by one party is usually the payment of money, while the other has to do the thing which identifies the type of contract. So in a sale of goods contract it is transferring the property in goods, not paying the price, which gives the contract its character. Should that mean that only the "characteristic performance" should constitute impingement, or would either sort do? It is perhaps arguable that doing the characteristic performance touches the life of the community more than the mere payment of money.[40]

A solution to these difficulties could be to equate impingement with the habitual residence of the characteristic performer. Thus if the person charged with the performance characteristic of the contract were habitually resident in New Zealand, the contract would be held to impinge on New Zealand.[41] It would be a domestic contract and the parties would not have freedom to choose a law which evaded the compulsory rules of New Zealand law.

40 The ALRC expresses this idea: "it appears reasonable to presume that the contract is more closely connected with the law of the vendor's habitual residence than with that of the purchaser, if only because the pecuniary obligations of the purchaser are less likely to require supplementation by law than the specific obligations of the vendor . . .". Report No 58, 1992, para 8.46.

41 If the characteristic performer were a corporation or a firm, impingement would be equated with that party's place of central administration, or, if the contract were entered into in that party's course of business, it would be the place of business through which performance was to be effected under the contract. See Rome Convention Art 4(2) and A J E Jaffey "The Foundations of Rules for the Choice of Law" (1982) 2 Oxford J Leg Stud 368, 384.

The concept of characteristic performer is used by the Rome Convention, not to limit freedom of choice, but as a presumption to indicate the applicable law in the absence of choice. As the Giuliano and Lagarde Report explains, "The concept of characteristic performance essentially links the contract to the social and economic environment of which it will form a part".[42] In a contract where one party's duty is to do something and the other's is to pay money, it is the non-pecuniary performance which is regarded as characteristic. This approach has been justified by the idea that the non-pecuniary performance is more complex and in need of regulation, whereas the duties of the party paying money are said to be more precisely specified by the terms of the contract and less in need of supplementing.[43] However, if the object is to identify the society which will be most affected by the contract, it has been suggested that it is not obvious that payment of money is any less socially important than, for example, providing goods under a sale of goods contract.[44] Another difficulty, acknowledged by the Rome Convention,[45] is that both parties may be required to do something other than pay money, as in a contract of barter.[46] It will be necessary to establish, by precedent, categories of contracts with the characteristic performance identified for each, a process foreign to the common law.[47] It is not clear what criteria would be used to identify the characteristic performance in each category.[48] The idea of social or economic importance is so vague as to be little guide.[49] And in any case, complex contracts may be impossible to fit into a category.[50] Despite these weaknesses, however, there is support for the idea of a rebuttable presumption to connect a contract with a particular country, and for the view that the notion of characteristic performance is potentially useful in establishing such a presumption.[51] In any case, where the concept of characteristic performer is being used, as advocated here, to define a "domestic" con-

42 M Giuliano & P Lagarde "Report on the Convention on the Law Applicable to Contractual Obligations" OJC C282 31-10-80, 20.

43 Kurt Lipstein, "Characteristic Performance – A New Concept in the Conflict of Laws in Matters of Contract for the EEC" (1981) 3 Northwestern Journal of International Law and Business 402, 410; A J E Jaffey, "Choice of Law in Relation to *Ius Dispositivum*" in P M North, ed, *Contract Conflicts,* North-Holland Publishing, 1982, 37.

44 H U J D'Oliveira, " 'Characteristic Obligation' in the Draft EEC Obligation Convention" (1977) 25 Am J Comp L 303, 310.

45 Article 4(5), dealing with the possibility that characteristic performance cannot be determined.

46 P M North and J J Fawcett, *Cheshire and North's Private International Law,* 12th edition, London, Butterworths, 1992, 491.

47 H U J D'Oliveira, "Characteristic Obligation" in the Draft EEC Obligation Convention" (1977) 25 Am J Comp L 303, 317.

48 J C Schultsz, "The Concept of Characteristic Performance" in P M North, ed, *Contract Conflicts,* North-Holland Publishing, 1982, 186.

49 H U J D'Oliveira, " 'Characteristic Obligation' in the Draft EEC Obligation Convention" (1977) 25 Am J Comp L 303, 321.

50 M Pryles, "An Australian Perspective" in P M North, ed, *Contract Conflicts,* North-Holland Publishing, 1982, 329; F K Juenger, "The EEC Convention: An American Assessment" in ibid at 301.

51 M Pryles, "An Australian Perspective" in P M North, ed, *Contract Conflicts,* North-Holland Publishing, 1982, 329.

tract, if it were not clear who the characteristic performer was, the contract could be classified domestic if either of the parties were habitually resident in New Zealand.

The object of this search is a definition of impingement. Impingement in turn defines a domestic New Zealand contract to which New Zealand compulsory rules must be applied. A rule of thumb is needed to give certainty. The place of habitual residence of the characteristic performer is not a perfect reflection of the idea of impingement on New Zealand society, but it may carry enough of that idea while at the same time being relatively certain to be an attractive compromise.

The effect of classifying a contract as a "New Zealand" one is to interfere with the freedom of the parties to choose the governing law.[52] However, since I argue below at page 104 that even parties to wholly domestic contracts should have freedom to contract out of optional rules, and since mandatory rules apply regardless of choice anyway, "impingement" would affect only the right to contract out of compulsory domestic rules. For example, every domestic contract would have applied to it the rule concerning consideration. If by this test a contract did not impinge on New Zealand, it would be a foreign contract, and the parties would have freedom to choose their law, despite other factors connecting it to New Zealand.[53]

To summarise, it is inconsistent with the policy of New Zealand domestic law to allow parties to a contract freedom to choose the law governing their contract merely because it contains foreign elements, unless those elements are sufficient to prevent its "impinging" on New Zealand society. If it is denied that the "compulsory" rules of domestic contract law evidence a policy interest in seeing them applied in appropriate circumstances, then the parties to even a wholly domestic contract should be given the freedom to contract out of them by choosing a foreign law as the proper law of their contract.

Many writers have expressed opposition to the parties to even foreign contracts having freedom to choose the law governing the validity of their contract,[54] saying that if they choose the law to define validity, they are pulling on their own bootstraps.[55] The answer seems to be that the parties

52 The test of impingement should also be applied to cases where the parties have manifested no choice. See below at p 121.

53 An awkward problem is that occcasionally applying the idea of impingement might lead to the application of forum compulsory rules to a contract which was part of a string of foreign contracts as in the case of a series of sale of goods contracts. For instance, an exclusion clause might be valid by foreign law but invalid by forum law. (See M Wolff "The Choice of Law by the Parties in International Contracts" (1937) 49 Jur Rev 110, 121.) The temptation is to say that the impingement test must be qualified by an exception which allows it to be overridden in a case of demonstrated injustice to the parties. But that increases uncertainty and suggests that the policy behind applying forum compulsory rules to domestic contracts is a weak one.

54 Eg A Thomson "A Different Approach to Choice of Law in Contract" (1980) 43 MLR 650, 657.

55 Learned Hand J in *Gerli & Co Inc* v *Cunard SS Co Ltd* (1931) 48 F 2d 115, quoted by D G Pierce "Post-Formation Choice of Law in Contract" (1987) 50 MLR 176, 190.

are not by choosing the law to govern validity making their undertaken obligations legally enforceable. It is the law of the forum which does that. And for the forum the question must be, "given our desire in the interests of justice between the parties of giving them maximum freedom in contract, what policy reason have we for refusing to treat as valid this foreign agreement which is valid by the chosen law?" The Australian Law Reform Commission recommends that matters of contract formation affecting validity continue to be governed by the proper law of the contract.[56]

As well as compulsory rules, New Zealand domestic contract law contains many optional rules. These are rules designed to assist the parties by filling out unexpressed terms of their contract, or to help in interpreting it. The parties are free to override these rules by express provision. The object of optional rules is not to advance the public interest of the country, but "rather it is to achieve a just or commercially convenient or expedient solution to disputes".[57] Given a lack of public interest in the application of optional rules, there is no reason to impair the freedom of the parties. The distinction between domestic and foreign contracts should control compulsory rules only,[58] so that parties to a wholly domestic contract should be free to choose to have it governed by the optional rules of a foreign law.

But is there this freedom to split the proper law? Although the almost invariable practice is that there is a single proper law which governs all aspects of a contract, as a judge in a recent case said, "parties may choose that different parts of the contract should be governed by different laws".[59] If this opportunity is available, there seems no reason why it could not be applied to divide compulsory from optional rules. In the case cited, validity (compulsory rules) was governed by the English proper law, but interpretation (optional rules) by Norwegian law.[60]

CONCLUSION ON FREEDOM TO CHOOSE

The first leg of *Bonython,* granting the parties to a foreign contract freedom to choose the governing law, makes good sense provided that the definition of foreign is framed to exclude all contracts which impinge on the forum society in that the characteristic performer habitually lives there. Such an approach would harmonise freedom of contract with freedom to choose the proper law.

56 Report No 58, 1992, para 8.59.

57 A J E Jaffey "The English Proper Law Doctrine and the EEC Convention" (1984) 33 ICLQ 531, 540.

58 Would it create practical problems if a single contract were governed by compulsory and optional rules from two different systems? As one writer says, "frequently the discharge of the obligation, for instance, cannot be separated from its interpretation." (F A Mann "The Proper Law of the Contract" (1950) 3 Int LQ 60, 72.) However, the EC Convention allows such splitting: Art 3(1) and (3).

59 *Forsikringsaktieselskapet Vesta* v *Butcher* [1986] 2 All ER 488, 504; affirmed by the Court of Appeal [1989] AC 852; [1988] 2 All ER 43 and the House of Lords [1989] AC 852; [1989] 1 All ER 402 on the basis of construction rather than choice of law.

60 [1986] 2 All ER 488, 505.

By which law is impingement tested? If freedom to choose the law governing validity is granted to parties to foreign contracts, but not to parties to domestic ones, and the test for deciding between them is impingement, then impingement itself must be an an idea of the law of the forum since it controls the application of a choice of law rule, just as classification does. Classification is the process of deciding to which category of law a dispute belongs so that one knows which choice of law rule to apply. Arguably classification is as fundamentally a matter for the forum law as are the choice of law rules themselves.[61] The content of the rules is intimately linked to their classification. The content of the contract choice of law rules, for example, must have been formed with the idea in mind of what a contract is.

But to tell if the contract impinges on domestic society, one has to know the effect of its terms and their validity. Since I argue that the parties to even domestic contracts should be able to choose foreign optional rules, including those governing interpretation, interpretation of the terms should in every case be done by the chosen law. The result may be that a term concerning performance, when construed by the chosen foreign law, identifies X as having a duty to perform under the contract. If by domestic law he is the characteristic performer, and if by that law he is habitually resident in New Zealand, then a New Zealand court would hold that the contract *does* impinge on New Zealand and is a "New Zealand" contract, and that the parties are bound by New Zealand compulsory rules.

Both the Australian Law Reform Commission and the Rome Convention support freedom to choose the governing law, and in effect preserve the first leg of *Bonython*. Provided that evidence of actual intention to choose is manifested, it should be given effect.[62] If not, an objective test is applied.[63] The ALRC does not appear to address the issue of *who* should have freedom to choose. That is, it does not consider the distinction between domestic and foreign contracts.

The Rome Convention applies to "contractual obligations in any situation involving a choice between the laws of different countries".[64] No guide is given as to what situations involve such a choice, but it appears from Article 3(3) that the choice of a foreign law by the parties to an otherwise purely domestic contract creates such a situation.[65] Since the Convention preserves the first leg of *Bonython,* namely that actual intention as to the governing law is given effect,[66] the parties to a domestic contract are able to choose to have it governed by a foreign law. At first sight, the Convention is even less rational than the common law, which at least requires some objective international element before choice of law rules may be resorted to.

61 *Oceanic Sun Line* v *Fay* (1988) 165 CLR 197, 225 per Brennan J.

62 ALRC Report No 58, 1992, para 8.9; Convention Article 3(1).

63 ALRC Report paras 8.9 and 8.48; Convention Art 4(1).

64 Article 1(1).

65 Current Law Statutes Annotated 1990 p 36-13. See also P M North, ed, *Contract Conflicts,* Amsterdam, North-Holland Publishing, 1982, p 9.

66 Article 3(1).

However, article 3(3) provides that where the parties have chosen the law of country A, but all the other elements "relevant to the situation at the time of the choice"[67] are connected with country B, then the choice does not prejudice the application of mandatory *and* compulsory rules of B.[68] The freedom of parties to a wholly domestic contract to choose a foreign law is thus confined to optional rules, as I argue it should be. To this extent the Convention is an advance on the common law, but the new law suffers from two defects as a model for reforming New Zealand common law. First, the restriction to optional rules applies not only when the contract is wholly connected to the forum, but also when it is wholly connected to some foreign country, which need not even be a Convention state. To this extent, the restriction on freedom of choice is too wide. There is no apparent domestic policy served by limiting the choice of the parties where the contract impinges on a non-Convention state. However, the Convention represents a pooling of interests which may justify interfering with freedom where the contract is connected with another Convention state. Second, the restriction applies only when *all* elements are connected with one country.[69] New Zealand public interests may be affected by a contract which impinges on New Zealand society, even though not all elements are connected with New Zealand. To this extent, the restriction is too narrow.

LIMITS ON FREEDOM TO CHOOSE

Are the parties to a foreign contract free to choose *any* foreign law, or must they choose a law which has a substantial connection with the transaction? The American view is that they are so limited.[70] English common law clearly is that they are not,[71] although some ineffective judicial attempts have been made to upset this rule.[72]

What justification could there be for such a limitation? It cannot be because of any interest of a foreign state. Since English and New Zealand law have rejected the "state interests" approach to conflicts, foreign state

67 Current Law Statutes Annotated 1990 p 36-20.

68 See above p 96 for my distinction between mandatory and compulsory rules. Article 3(3) uses the word "mandatory" alone, but it is apparent from a comparison of this article with article 7(1) that a broader meaning is intended in article 3(3). See Current Law Statutes Annotated 1990 p 36-20.

69 Art 3(3) does say "all the other elements relevant to the situation", but no criterion of relevance is provided.

70 By the Second Restatement of the Conflict of Laws, s 187(2), the law chosen by the parties governs unless, inter alia, the "chosen state has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the parties' choice." See also W W Cook *The Logical and Legal Bases of the Conflict of Laws* Cambridge, Harv Uni Press, 1942, 392, and John Prebble *Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws* University Microfilms, Ann Arbor Michigan, 1972, 155-158.

71 *Vita Food Products Inc* v *Unus Shipping Co Ltd* [1939] AC 277, 291 per Lord Wright: "Connection with [the chosen] law is not as a matter of principle essential."

72 *Re Helbert Wagg & Co Ltd* [1956] Ch 323, 341, per Upjohn J: Express choice will not govern "where a system of law is chosen which has no real or substantial connexion with the contract looked upon as a whole".

interests are relevant only as part of the interests of New Zealand society or the New Zealand state, as reflected in the idea of public policy, to be discussed below.

Mann[73] suggested a limitation on freedom which at first sight looks plausible but which on closer examination has no more clear policy reason behind it than the requirement of a substantial connection. He would have limited choice to a law which the court *could* have found was the proper law in the absence of express intent. In 1950, when the article was written, the search, in the absence of express intent, was for presumed intent. If the notion of intent is present in both actual-intent[74] and no-intent situations, arguably it makes sense to place the same limit on freedom in both cases. But does it? Imagine all the systems of law in the world as represented by a circle. One segment of the circle, "X", is removed. This represents the laws excluded by Mann's limitation. That is, these are the laws which in the absence of actual intention the court could not have found was a law pointed to by "presumed intention". But why not? Giving presumed intention its widest possible meaning, the answer would be because none of the laws in segment X was the law of the *most* substantial connection, nor were any of them laws of *a* substantial connection, and nor was there any other discernible reason, such as a familiar neutral law, why the parties might have chosen one of these laws. The reason why the limit exists in the no-intent situation is simply that the court cannot think of any reason for presuming an intention to choose a law within X. But if the parties for some apparently senseless reason *do* choose a law in that area, defying expectations, why not give effect to their intention? Justice to the parties means giving effect to their actual intention, unless there is a clear policy reason for not doing so.[75]

In 1939 Lord Wright said in *Vita Food,* "Connection with English law [the chosen law] is not as a matter of principle essential" provided that "the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy".[76] These limits are accepted by the current common law, but it is not clear what they mean. A preliminary point is that a particular limitation could have one of two effects. In rare cases it could render ineffective the choice itself, so that none of the chosen law would apply.[77] A much more common effect is that a particular provision of the chosen law is disregarded, but the proper law in other respects remains that chosen.[78] My conclusion as to the meaning of Lord Wright's limitation formula is that bona fide

73 F A Mann "The Proper Law of a Contract: A Rejoinder" (1950) 3 Int LQ 597, 601.

74 Actual intent is wider than express intent and includes inferred intent. It has replaced express intent in the modern formulation of the contract choice of law rule. See *Amin Rasheed Shipping Corp* v *Kuwait Insurance Co* [1984] AC 50, 61; [1983] 2 All ER 884, 888.

75 E Rabel, *The Conflict of Laws: A Comparative Study* 2nd ed (1958-64), Vol 2, 404.

76 [1939] AC 277, 290.

77 *Golden Acres Ltd* v *Queensland Estates Pty Ltd* [1969] QdR 378; and see Australian Commonwealth Carriage of Goods by Sea Act 1991 (No 160 of 1991) s 11, which deems parties to have intended to contract according to the law of the place of shipment and which renders ineffective any contrary choice.

78 As in *The Hollandia* [1982] QB 872.

has no meaning, legal means subject to being overridden by particular provisions of the mandatory rules of the forum,[79] and the rest of the content of the limitations is contained within the idea of public policy.

PUBLIC POLICY

It is not the choice itself which is capable of offending public policy, but the effect of applying that chosen law. It follows that where the public policy limitation is applied, its effect is not to nullify the choice, but to override that part of the proper law which is inconsistent with policy.[80] For instance, in *Ralli Bros* v *Compañia Naviera Sota y Aznar*[81] where the proper law was English but public policy dictated taking notice of the Spanish law of performance, that part of the law of England which said payment was legal was overridden by the provision of Spanish law which said it was illegal. The proper law did not become Spanish, though. In all other respects the contract remained governed by English law.

Public policy is concerned with mandatory rules of the forum, which I earlier distinguished from compulsory ones. Mandatory rules can never be contracted out of, directly or indirectly. A New Zealand court will apply them, if appropriate to the circumstances of the case, regardless of the proper or governing law of the contract.

Public policy of course extends far beyond questions of conflicts, but in all cases it is the public policy of the forum which is being applied.[82] Just as the principles of conflicts as part of New Zealand municipal law are formulated with the purpose of doing justice between the parties according to New Zealand notions, not foreign ones, so public policy, as a general qualifier of municipal law, is concerned with New Zealand policies, not those of foreign states.

Whereas private laws, that is those like conflicts rules concerned with ordering relations between the members of society, are framed primarily with the interests of the parties in mind,[83] sometimes public interests in specific cases must take precedence. Public interests can be the interests of the society as a whole, that is of its members collectively, or of the state as a distinct corporate entity.[84]

Public policy as a limitation on choice of law can be subdivided into two types: questions of morality and practical questions.[85]

79 Although in rare cases the effect of a mandatory rule can be to prohibit the choice altogether, as in the case of the Australian Carriage of Goods by Sea Act 1991.

80 A Thomson "A Different Approach to Choice of Law in Contract" (1980) 43 MLR 650, 660; D St L Kelly "Reference, Choice, Restriction and Prohibition" (1977) 26 ICLQ 857, 869.

81 [1920] 2 KB 287. See below at n93 for a discussion of conflicting views of the meaning of this case.

82 I F G Baxter "Choice of Law" (1964) 42 Can BR 46, 64.

83 E Rabel, *The Conflict of Laws: A Comparative Study* 2nd ed (1958-64), Vol 2, 560; G Kegel "The Crisis of Conflict of Laws" (1964) II Hague Recueil 95, 183.

84 G Kegel "The Crisis of Conflict of Laws" (1964) II Hague Recueil 95, 182.

85 O Kahn-Freund "Reflections on Public Policy in the English Conflict of Laws" (1954) 39 Trans Grot Soc 39, 40.

In rare cases English courts have decided that to apply the chosen proper law would offend against fundamental English notions of justice or morality. For example, by the proper law property in a slave might be legal, but the idea is so offensive that the court cannot give effect to that part of the foreign law.[86] In this category of case it is the *idea* of giving effect to the foreign law, not its actual effect upon the forum society, which justifies the application of public policy. The courts are rightly reluctant to interfere with a contract on moral grounds. Confiscation of property as such is not regarded as immoral,[87] although discriminatory confiscation on grounds such as race may be.[88]

In most cases, however, public policy has been concerned not with morality but with the practical effect which applying the chosen foreign law will have on England or English society. It might be, for example, that a contract valid by its French proper law contained a term which if enforced would have the effect of restraining trade in England.[89] That part of the contract could be refused enforcement, but only because of its effect of restraining trade in England,[90] not because the court disapproved of restraints of trade in general as immoral. That is an example of public interest in the sense of the collective interests of the members of the society.

In the context of conflicts a more important type of practical public policy reason is comity.[91] This idea concerns the interests of the state, as distinct from society. But of course it is the interests of the forum state, not of a foreign state, which lie behind it.[92] It means that if the application of a particular provision of the proper law will jeopardise New Zealand's friendly relations with other states, that may be a reason for interfering. So in *Ralli Bros* v *Compañia Naviera Sota y Aznar*[93] the court

86 *Somerset's Case* (1772) 20 St Tr 1. See O Kahn-Freund "Reflections on Public Policy in the English Conflict of Laws" (1954) 39 Trans Grot SDoc 39, 40. See also *Kaufman* v *Gerson* [1904] 1 KB 591. But see *Santos* v *Illidge* (1860) 8 CB (NS) 861. Apparently in the same category, that is of choice of law clauses against public policy on grounds of morality, is the proposal by the ALRC that the court have a power to reject a choice of law clause where its enforcement would be unconscionable. See Report No 58, 1992, para 8.25 and Appendix B, s 9(5)(b)(ii).

87 *Re Helbert Wagg & Co Ltd* [1956] Ch 323, 349. Nor is a gaming contract governed by a foreign law "contrary to essential principles of morality or justice". *Saxby* v *Fulton* [1909] 2 KB 208, 228, per Buckley LJ.

88 *Oppenheimer* v *Cattermole* [1976] AC 249.

89 *Rousillon* v *Rousillon* (1880) 14 ChD 351, 369.

90 A J E Jaffey "Essential Validity of Contracts in the English Conflict of Laws" (1974) 23 ICLQ 1, 8.

91 *Regazzoni* v *K C Sethia (1944) Ltd* [1958] AC 301, 323 per Lord Reid; F A Mann *Foreign Affairs in English Courts* Oxford, Clarendon, 1986, 149.

92 A J E Jaffey "The Foundations of Rules for the Choice of Law" (1982) 2 Oxford J Leg Stud 368, 382; F A Mann "Illegality and the Conflict of Laws" (1958) 21 MLR 130, 131.

93 [1920] 2 KB 287. There is some difference of opinion as to whether this case is a rule of English contract law (in which case it would apply only if the proper law were English) or an overriding rule of English public policy. (See F A Mann, "Proper Law and Illegality in Private International Law" (1937) 18 BYIL 97 at 107-113.) In terms it is expressed as the former. Both Warrington LJ (at 296) and Scrutton LJ (at 304) base their

refused to order payment which was legal by the proper law but illegal by the mandatory law of Spain, where payment was to be made. And in *Regazzoni* v *KC Sethia (1944) Ltd*[94] the court refused to give any effect to a contract because it was shown to have been made for the purpose of evading the mandatory provisions of the law of India, where the contract was partly performed. This decision again was a matter of comity, that is, part of public policy.[95] Although the case was unlike *Ralli Bros* in that the court was not asked to *order* something illegal to be done in the foreign jurisdiction,[96] the whole contract was tainted by the illegal purpose, so that for the court to enforce the contract would give the appearance of condoning the evasion of Indian law and so jeopardise relations with India. This was particularly true as the law in question was a sensitive racial one banning exports from India to South Africa.[97] Viscount Simonds said in *Regazzoni* that public policy "will avoid at least some contracts which violate the laws of a foreign State" on grounds of comity.[98]

When public policy is invoked for practical reasons such as restraint of trade or comity, it is apparent that it is only justifiable to override the interests of the parties if the actual effect of enforcing the very contract in question will be sufficiently prejudicial to the New Zealand society or state. This idea has two results. First, the likely prejudice to the public interest must be balanced against depriving the parties of their civil rights. Kahn-Freund says, "the strength of a public policy argument must in each case be proportional to the intensity of the link which connects the facts of the case with this country."[99] Sometimes the effect on the public interest may be demonstrated but insufficient to warrant interfering with the parties' choice. As Lord Wright said, "public policy . . . may at times

decisions on its being an implied condition of the contract that performance be legal by the law of the place of performance. However, Scrutton LJ follows that reason by saying (at 304), "This country should not in my opinion assist or sanction the breach of the laws of other independent States." This statement probably accounts for the fact that *Ralli Bros* is usually seen as stating a rule of public policy. (See *Euro-Diam Ltd* v *Bathurst* [1990] 1 QB 1 at 15 per Staughton J, citing *Regazzoni* v *K C Sethia* (1944) Ltd [1958] AC 301.) If it is a rule of public policy, Reynolds is surely right in suggesting that it should not be applied automatically, but only where the forum court is asked to give a remedy for a failure to do what was illegal in the place where it was to be done – in effect where the actual needs of comity require refusing enforcement. (F M B Reynolds (1992) 108 LQR 553 at 555.)

94 [1958] AC 301.

95 P B Carter "Contracts in English Private International Law" (1986) 57 BYIL 1, 30. Speaking of comity in *Regazzoni* v *K C Sethia* (1944) Ltd [1958] AC 301, 323, Lord Reid said, "The real question is one of public policy." Mann agrees: F A Mann *Foreign Affairs in English Courts* Oxford, Clarendon, 1986, 149.

96 P B Carter "Contracts in English Private International Law" (1986) 57 BYIL 1, 31.

97 Ibid, 30.

98 *Regazzoni* v *K C Sethia* (1944) Ltd [1958] AC 301, 319.

99 O Kahn-Freund "Reflections on Public Policy in the English Conflict of Laws" (1954) 39 Trans Grot Soc 39, 58. See also W E Holder "Public Policy and National Preferences: The Exclusion of Foreign Law in English Private International Law" (1968) 17 ICLQ 926, 951.

be better served by refusing to nullify a bargain . . .".[1] Second, effect is given to foreign mandatory laws not part of the proper law only if public policy in the circumstances requires it. Such foreign mandatory laws are not enforced for their own sake.[2] Comity is not a principle of public international law requiring a New Zealand court go give effect to them.[3] Legality by foreign law other than the proper law has no meaning as an independent idea.[4] It is only if it is in the interests of New Zealand, through its concern to maintain friendly relations with other states, to avoid contravention of such a foreign law that it will have any effect. Sometimes the breach of applicable foreign laws will be ignored, as in *Vita Food* where the mandatory law of Newfoundland was not given effect. Comity was apparently not applicable there because enforcing the contract did not require the court to order the breach of the law as in *Ralli Bros,* and nor would enforcement be seen to be condoning the purposeful evasion of a law with sensitive foreign relations implications as in *Regazzoni.*

## LEGALITY

Lord Wright required the expressed *intention* to be legal. This language is apparently directed to whether there is a prohibition of an express choice of law, something which statutes occasionally impose.[5] The other possible meaning of the limitation is that instead of the choice itself being illegal, the terms of the contract or its performance involve a breach of the law. In either case, "legal" could mean legal by the law of the forum or by a foreign law.

Forum mandatory rules are rules which, by definition, apply to the contract in all cases without regard to the intention of the parties. The court is bound by its own law to apply them to the contract. They take two forms: common law rules of public policy (discussed above), and statutory rules. As to statutory rules of the forum, since the court is bound to obey its own legislature, the question is always one of interpretation. Does Parliament intend the statute in question to apply to this contract? If so, that is the end of the matter. If the "legal" requirement of *Vita Food* means no more than that the court must apply its own mandatory statutes even where the parties have chosen a foreign law, it is really too obvious to need stating.[6]

As to legality by a foreign law other than the proper law, it is clear that only mandatory foreign laws are referred to. As discussed above under public policy, such a foreign mandatory law will be given effect only if comity, an aspect of forum public policy, requires it. A court will not necessarily give effect to a foreign mandatory law, not even a law of a juris-

1 *Vita Food Products Inc* v *Unus Shipping Co Ltd* [1939] AC 277, 293.
2 *Vladikavkazsky Railway Company* v *NY Trust Co* (1934) 189 NE 456, 460.
3 L Collins, *Dicey & Morris on the Conflict of Laws,* 11th ed, London, Stevens, 1987, 6.
4 Cheshire & North *Private International Law* 11th ed, London, Butterworths, 1987, 486. See discussion below.
5 Eg the Australian Carriage of Goods by Sea Act 1991 s 11. See ALRC Report No 58, 1992, para 8.26.
6 *Mynott* v *Barnard* (1939) 62 CLR 68, 80, per Latham CJ.

diction substantially connected with the contract. In *Oceanic Steamship Co* v *Queensland State Wheat Board*[7] an English court gave effect to s 9 of the Australian Sea Carriage of Goods Act 1924, prohibiting the choice of a law other than Australian. However, it did so only because the statutory section was incorporated by reference in the contract, not because the statute itself had any effect in an English court. In *Vita Food* the Privy Council, sitting as a Nova Scotian court, refused to apply a Newfoundland statute to the contract even though the contract was partially to be performed there. A Newfoundland court would of course have been bound to obey its own legislature. But for a Nova Scotian court the Newfoundland law was foreign and not entitled to be given effect.[8] *Ralli Bros*[9] does not stand for the rule that a contract illegal in its place of performance is necessarily unenforceable in England.[10] Indeed, it could not, in light of *Vita Food*. The distinction between the two cases is that in *Ralli Bros*, where the court was asked to order something to be done in Spain which was illegal there,[11] a question of English public policy (comity) was involved; in *Vita Food* it was not.[12]

As public policy is a separate heading in Lord Wright's limitation formula, the requirement that the choice be "legal" adds nothing to the question of the application of foreign mandatory laws. As to forum mandatory laws, "legal" merely reiterates the obvious truth that the court must obey its own legislature and apply its own rules of public policy.[13]

The Law Reform Commission recommends providing by legislation that the law of the place of performance "can be pleaded as a defence in so far as it prohibits performance" at that place.[14] It is not made clear what the rationale for the proposed rule is. If, as I think, the rationale should be comity, then the defence should be narrowed so that it would be available only where the court was asked to order something to be done in the country where it was illegal. In a case like *Vita Food* itself, illegality by the law of a foreign country in the shipping of the goods should not be available as a defence to enforcement of the contract, since the enforcement would not involve doing anything in the foreign country. In any case, such a principle should not be exclusive. Wider applications of the idea of comity should continue to be available to deal with cases like *Regazzoni*.

7 [1941] 1 KB 402.
8 [1939] AC 277, 296-298, per Lord Wright, who says that the result would have been the same even if the Newfoundland statute had been mandatory. See W W Cook *The Logical and Legal Bases of the Conflict of Laws* Cambridge, Harv Uni Press, 1942, 419-427.
9 *Ralli Bros* v *Compañia Naviera Sota y Aznar* [1920] 2 KB 287.
10 Cheshire & North *Private International Law* 11th ed, London, Butterworths, 1987, 486.
11 J Blom "Choice of Law Methods in the Private International Law of Contract" (Part 3) (1980) 18 CYIL 161, 182.
12 See supra at p 110.
13 L Collins, *Dicey & Morris on the Conflict of Laws,* 11th ed, London, Stevens, 1987, 1172.
14 Report No 58, 1992, para 8.17. In the report the sentence finishes "performance of . . . the obligations *of* that place", but surely "at" is meant. See Appendix B of the Report, s 9(10).

BONA FIDE

The requirement of bona fides means that the choice be made in good faith. This is a subjective idea,[15] and refers to the motive of the parties in making their choice. They must not have made the choice for a bad motive. This limitation is directed to the effectiveness of the choice itself, not to the applicability of particular provisions of the chosen law.

It is not explained why a court should be concerned to reject a choice on the grounds of bad faith alone, although numerous writers assume that it will. For example, "It is difficult to conceive of any case in which a purely arbitrary choice of law can be said to be made in good faith."[16] That suggests that the choice must show evidence of some reasonable basis.

But the requirement of bona fides goes beyond reasonableness. Earlier editions of Dicey stated that a choice should be rejected as made in bad faith if it appears to be made to avoid the mandatory rules of the system of the most substantial connection, whether that be the forum or a foreign system.[17] However, that proposition has been abandoned in the 1987 edition, where it is stated,

> "Nor is it easy to imagine circumstances, not covered by an overriding United Kingdom statute, or by public policy, in which an English court would fail to give effect to a choice of foreign law not connected with the contract, at least if the choice is 'bona fide' in the sense of not being a mere pretence or a sham."[18]

So the requirement of bona fides can mean "reasonable" or it can mean "not evasive". Can either meaning be justified as a matter of policy?

In the highly unlikely event that the parties have made a capricious choice, why should the courts not give effect to it? Not to do so will introduce an element of uncertainty. It will thus interfere with the interests of the parties, without advancing any overriding interest of the forum society or state. Limits on freedom are imposed only where necessary for the protection of forum public interests, which brings us back to public policy.

Lord Wright's bona fide requirement has been interpreted to mean not "intended to evade the imperative law of another" country.[19] If it is the imperative law of the forum which is evaded, the restriction makes perfect sense,[20] but it is unnecessary because the protection it affords is already provided by other rules. If the contract impinges on the forum society,

15 J H C Morris "The Proper Law of a Contract: A Reply" (1950) 3 Int LQ 197, 202-203.

16 H C Gutteridge (1939) 55 LQR 323, 325. See to the same effect Dicey & Morris, 11th ed, 1176.

17 J H C Morris, *Dicey & Morris on the Conflict of Laws,* 10th ed, London, Stevens, 1980, 755-756 and 792.

18 L Collins, *Dicey & Morris on the Conflict of Laws,* 11th ed, London, Stevens, 1987, 1175.

19 O Kahn-Freund *The Growth of Internationalism in English Private International Law* Jerusalem, Magnes Press, 1960, 52. See also C M Schmitthoff "New Light on the Proper Law" (1968) 3 Manitoba LJ 1, 9.

20 D St L Kelly ("Reference, Choice, Restriction and Prohibition" (1977) 26 ICLQ 857, 870-871) says Lord Wright's bona fide idea was meant to apply only to evasion of the forum law.

it should, as I argue, have been defined as domestic, and the parties will have no freedom to choose the applicable compulsory rules anyway. If the contract does not impinge sufficiently to make it a domestic contract, then the application of any other mandatory statutory laws of the forum is simply a matter of statutory construction. In neither case is the notion of bona fides necessary to ensure that forum laws apply when they should.

In a Queensland case the judge refused to give effect to a choice of law clause, saying "the attempt to invoke the law of Hong Kong was for the express purpose of avoiding the application of the Queensland law".[21] The notion of bona fides which the judge applied was unnecessary. He could have reached the same result by construction of the Queensland statute in question[22] or by classification of the contract as domestic. Since Queensland was the forum as well as being arguably the law of the most substantial connection (although there were substantial connections with Hong Kong), the judge's statement can be interpreted as an objection to evasion of either a mandatory law of the forum or a mandatory law of the country of the most substantial connection,[23] that is, the country of the "objective proper law".[24]

Similarly, Kahn-Freund's idea of evasion is not confined to evasion of the law of the forum, but includes evasion of the law of a foreign country. His formulation refers to "imperative" laws, by which he means mandatory as opposed to compulsory laws.

Surely an attempt to evade a mandatory foreign law should not affect the rights of the parties unless the forum would in the circumstances give effect to those laws. I concluded above under the discussion of public policy that a court will only enforce or take notice of a foreign mandatory law which is not part of the proper law when the needs of comity, part of public policy, require it. Since this idea is already covered by public policy, there is no need for a doctrine of evasion.[25] And despite occasional remarks to the contrary, the common law has not developed a theory of

21 *Golden Acres Ltd* v *Queensland Estates Pty Ltd* [1969] QdR 378, 384.

22 As the High Court of Australia did on appeal: *Freehold Land Investments* v *Queensland Estates Pty Ltd* (1970) 44 ALJR 329. See D St L Kelly "Reference, Choice, Restriction and Prohibition" (1977) 26 ICLQ 857, 871.

23 In *Nike Infomatic Systems Ltd* v *Avac Systems Ltd* (1979) 105 DLR (3d) 455 a clause avoiding the law of the most substantial connection (Alberta) and choosing the law of the forum (British Columbia) was given effect to.

24 Note that the effect of the judgment was that since the "purported selection of the [sic] Hong Kong law was not a bona fide selection", . . . "Queensland law applies to the legal relationship arising between the defendant and the claimant." ([1969] QdR 378, 385.) That indicates that the result of a lack of bona fides is to nullify the whole intended choice of law, not merely to apply the particular evaded mandatory statute, while leaving the remainder of the contract governed by the chosen law. See D St L Kelly "International Contracts & Party Autonomy" (1970) 19 ICLQ 701, 704.

25 John Prebble *Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws* University Microfilms, Ann Arbor Michigan, 1972, 164.

evasion.[26] The idea of a doctrine for preventing the evasion of foreign laws suggests a focus on the interests of foreign states inconsistent with the approach of the common law.

As noted above at page 105, the Rome Convention would not allow the mandatory or compulsory rules of the country with which the contract is wholly connected to be evaded by choice of another law, whether the country of connection is the forum or a foreign country.[27] The Convention thus preserves a form of the "bona fide" limitation. The Law Reform Commission rejects the relevance of evasive motive,[28] and recommends that the idea of bona fides be replaced by "rules to determine when parties cannot choose to evade the operation of a mandatory law of the place of closest connection".[29] The draft legislation provides the rule that if a contract has its most real and substantial connection with a foreign country and a written law of that country prevents exclusion or modification of a provision of law of that country by choice of law, then that provision is to apply to determine the dispute.[30] This proposal would allow the interests of a foreign state to take precedence over the interests of the parties, a precedence which in my view cannot be justified except perhaps within a federation.

### SUMMARY – LIMITS ON FREEDOM OF CHOICE

Lord Wright's limitations on freedom to choose the governing law should be understood to mean that the application of the chosen law as a whole or of its particular provisions must not be contrary to mandatory statutes of the forum, and not against the forum's public policy. That is to say, Lord Wright's formula "bona fide, legal, and not contrary to public policy" can be reduced to two ideas: supremacy of parliament and public policy.

The court must obey Parliament and therefore apply any statute of the forum to the contract regardless of its proper law, provided that properly interpreted the statute is intended to apply to the contract. In that sense, the contract must be "legal" by the law of the forum. This is the only sense in which "legal" has a meaning independent of public policy.

The forum's public policy may occasionally require giving effect to foreign mandatory laws and in those circumstances alone, the contract must be "legal" by foreign law.

26 F A Mann "The Proper Law in the Conflict of Laws" (1987) 36 ICLQ 437, 446. But in *McClelland* v *Trustees Executors and Agency Co Ltd* (1936) 55 CLR 483, 492 Dixon J spoke of the parties "evading the operation of the law of a country justly claiming to control them".

27 Art 3(3).

28 Report No 58, 1992, para 8.12.

29 Para 8.13.

30 ALRC Report No 58, 1992, Appendix A (Draft Federal Legislation), p 150, subsection (9). Appendix B (Draft Uniform State and Territory Choice of Law Bill) is in the same terms: s 9(9).

## THE SECOND LEG OF *BONYTHON*

Up to this point, the discussion has concerned the first leg of the *Bonython* contract choice of law rule, which assumes that the parties have formed an actual intention as to what the governing law should be. If they have not, the second leg comes into operation. That requires the court to apply as the proper law that of the "closest and most real connection".

Lord Diplock decided in *Amin Rasheed Shipping Corp* v *Kuwait Insurance Co*[31] that the second leg of *Bonython* should be distinct from the first, so that "closest and most real connection" was not merely a different way of expressing the first leg, which was acknowledged to refer to actual intention. The second leg was divorced from the idea of intention, and was to be "objective".[32]

This test concerns a connection between two things, but what exactly? On the one hand, is it the contract itself, that is, the set of agreed undertakings, or is it the whole commercial transaction out of which the contract grew and of which it forms a part? On the other, is it the country as a whole with which connections must be discovered, or just the system of law of that country? The cases have vacillated, but now seem to have settled on looking for connections between the transaction and the country. This is logical, because the test is supposed now to be entirely objective and not to be looking for the presumed intention of the parties.[33]

If the search were for the presumed intention of the parties, it would be appropriate to focus on the link between the *contract* and the *system,* because that is what parties think about when they do form an intention. Thus in *Rossano,*[34] where the presumed intention test was applied and affected the outcome,[35] McNair J expressly adopted "system" rather than "country" as the correct test from *Bonython.* But if the second leg is an attempt to "localise" the matter, to find the geographical area where the facts belong, and *then* apply the law thrown up by that localisation, it is the link between *transaction* and *country* which should be sought.[36]

## POLICY

"The 'closest and most real connection' formula . . . prompts the question: closest and most real from what point of view?"[37] How can one tell

31 [1984] AC 50; [1983] 2 All ER 884.

32 For a recent endorsement of the subjective-objective, two-part test, see *Helenic Steel Co* v *Svolamar Shipping Co Ltd (The "Komninos S")* [1991] 1 Lloyd's Rep 370 (CA) at 373 and 374 per Bingham LJ.

33 *Bonython* v *Commonwealth of Australia* [1951] AC 201, 219; *Amin Rasheed Shipping Corp* v *Kuwait Insurance Co* [1984] AC 50, 61; [1983] 2 All ER 884, 888, per Lord Diplock; *James Miller & Partners Ltd* v *Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, 603, per Lord Reid. See also *Coast Lines Ltd* v *Hudig & Veder Chartering NV* [1972] 2 QB 34, 48, per Megaw LJ.

34 *Rossano* v *Manufacturers' Life Insurance Co* [1963] 2 QB 352, 369.

35 The contract was most closely connected with the legal system of Ontario (found to be the proper law), although the transaction as a whole was arguably most closely connected with Egypt.

36 P B Carter "Contracts in English Private International Law" (1986) 57 BYIL 1, 22.

37 J Blom "Choice of Law Methods in the Private International Law of Contract" (Part 3) (1980) 18 CYIL 161, 175.

what facts are relevant (and if so their weight) without identified criteria? Some system of values, presumably, must underlie the test, but what?[38]

Without answers to these questions the law cannot be rational. It cannot be applied so as to achieve a coherent policy objective. "If we are to make value judgments on the class of potential connecting factors *inter se,* we will require a standard of value."[39] There is a mindlessness about a test which requires a judge to count up contacts with no idea of the importance of each. The meaninglessness of the test may give the cynic a clue to the real policy objective: to replace a rule of law with judicial discretion.[40] That appears to be the effect of the objective substantial connection test,[41] since without criteria for evaluating factors it will in many cases be impossible to predict the decision which a court will make.[42]

The almost unfettered effect given to intention in the first leg of *Bonython* shows that the philosophy lying behind it is promotion of the interests of the parties. But that does not appear to be the policy behind the second leg, although the judges seldom if ever discuss the matter. Why should the second leg be objective?[43] It has been suggested that the second leg is now based on the idea that the "state with the strongest territorial link has the greatest claim for its laws to be applied".[44] This is the idea of localising the legal relationship.[45] How can physically localising the contract by counting contacts between the transaction and a country indicate the system of law to govern the contract which will best serve the interests of the parties? As Jaffey says, "there is no basis for suggesting that the law of the country in which the contract has its 'centre of gravity' is, from the point of view of the parties, any more just or efficacious or convenient than any other law".[46]

The objective test as stated sounds completely neutral, which suggests that a court should simply count up the contacts which the transaction has with various countries and hold that the one with the greatest number is the winner. All contacts are relevant and presumptions are no longer

38 As one writer says, "closest connection" is not a rule, only an approach, since so many interpretations of it are possible. H U J D'Oliveira, " 'Characteristic Obligation' in the Draft EEC Obligation Convention" (1977) 25 Am J Comp L 303, 303.
39 I F G Baxter "Choice of Law" (1964) 42 Can BR 46, 71.
40 C M Schmitthoff "New light on the Proper Law" (1968) 3 Manitoba LJ 1, 1; but see F K Juenger, "The EEC Convention: An American Assessment" in P M North, ed, *Contract Conflicts,* North-Holland Publishing, 1982, 304, where this effect is acknowledged but seen as desirable.
41 M Wolff "The Choice of Law by the Parties in International Contracts" (1937) 49 Juridical Review 110, 117-118.
42 D Wyatt, "Choice of Law in Contract Matters: A Question of Policy" (1974) 37 MLR 399, 414.
43 A J E Jaffey "The English Proper Law Doctrine and the EEC Convention" (1984) 33 ICLQ 531, 535.
44 Law Reform Commission, Australia *Choice of Law Rules,* Discussion Paper No 44, July 1990, par 2.8.
45 C M Schmitthoff "New Light on the Proper Law" (1968) 3 Manitoba LJ 1, 15.
46 A J E Jaffey "The English Proper Law Doctrine and the EEC Convention" (1984) 33 ICLQ 531, 537.

available as a guide.[47] In *Sayers* v *International Drilling Co NV*,[48] for example, Lord Denning MR mechanically counted the contacts the transaction had with England and Holland and would have decided on that basis that the proper law of the contract alone was England.[49] But in the same case, Salmon and Stamp LJJ held that the proper law of the contract was Dutch because of the inconvenience of having contracts with different employees governed by different laws.[50] This case illustrates the danger of having no defined criteria to guide the court: different judges may in fact decide by different criteria.

The failure to consider the policy behind the second leg is strange in light of the fact that the law has undergone a deliberate change in this area.

The test used to be that in the absence of express intention "the intention will be presumed by the Court from the terms of the contract and the relevant surrounding circumstances.[51] In the days of presumed intention, the notion of intention pervaded all aspects of the search for the proper law. Even if it was manifest that the parties had not applied their minds to the matter, and even if no circumstance pointed unequivocally one way or the other, still the court had to decide the proper law on the basis of the "presumed intention" of the parties. The law yielded by this presumed intention was the "proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the matter when they made the contract'.[52] There was, in those days, no objective second leg to be applied in the absence of actual intention. Actual intention and presumed intention merged into each other.[53]

The idea of presumed intention was a fictitious one in that it operated when the parties had formed no intention, but it did have the merit that it expressed a point of view consistent with the first leg, and consistent with the policy of the law, namely to find as the governing law that law which would best suit the joint interests of the parties,[54] unless there was an overriding public policy reason for not doing so. Given the inconsistency of the second leg with the first and with the policy of the law, it is open

47 Cheshire & North *Private International Law* 11th ed, London, Butterworths, 1987, 465. However, in *Hellenic Steel Co* v *Svolamar Shipping Co ("The Komninos S")* [1991] 1 Lloyd's Rep 370, a choice of forum clause was treated as raising an inference of actual intention to have the law of the forum govern (at p 375 per Bingham LJ).

48 [1971] 1 WLR 1176, 1180.

49 Lord Denning listed these factors connecting the contract with England: place of contracting, nationality of plaintiff, language of contract, currency of payment, nationality of insurance scheme of plaintiff, home of plaintiff, place of administration of contract.

50 [1971] 1 WLR 1176, 1184. See A J E Jaffey "The English Proper Law Doctrine and the EEC Convention" (1984) 33 ICLQ 531, 535-537.

51 Lord Atkin in *R* v *International Trustee for the Protection of Bondholders Akt* [1937] AC 500, 529.

52 *Mount Albert BC* v *Australasian Temperance and General Mutual Life Assurance Society Ltd* [1938] AC 224, 240, per Lord Wright.

53 See the judgments of Lord Wilberforce in *James Miller & Partners Ltd* v *Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, 614-615, and in *Amin Rasheed Shipping Corp* v *Kuwait Insurance Co* [1984] AC 50, 69.

54 AJE Jaffey "The English Proper Law Doctrine and the EEC Convention" (1984) 33 ICLQ 531, 540.

to question whether the *Bonython* test as a whole, as interpreted by Lord Diplock in *Amin Rasheed,* has any coherent policy objective.[55] "Presumed intention" reminded the court that it was to have the interests of the parties primarily in mind.[56] If no actual intent could be discerned, then the law could be chosen which would be most likely to further the interests of the parties at the time the contract was made.[57]

Why have the courts moved away from this notion, which was capable of being interpreted so that the interests of the parties ran as a coherent thread through the whole contract choice of law rule?

The first reason may have been a desire to achieve international uniformity even at the expense of coherence. United States law adopted the "most significant contacts" test in 1954.[58] Germany and Switzerland after 1950 changed to an objective test in the absence of intention.[59] Other European countries[60] appear to take the same view.[61]

The second reason seems to have been confusion about the meaning of presumed intention. Judges became uncomfortable with a test so patently fictitious as a search for presumed intention when it was manifest that not only had the parties not agreed on a governing law but that had they thought about the matter they probably would not have agreed anyway. For example, Singleton LJ, referring to the presumed intention test, said, "That does not appear to me to be very helpful, for in most cases neither party has given it a thought, and neither has formed any intention upon it; still less can it be said that they have any common intention".[62] In the same case Birkett LJ said he was struck by the unreality of looking for presumed intent, when each party says he would never have agreed to the other's law.[63]

55 See D Wyatt, "Choice of Law in Contract Matters: A Question of Policy" (1974) 37 MLR 399, 414-5.

56 J Blom "Choice of Law Methods in the Private International Law of Contract" (Pt 3) (1980) 18 CYIL 161, 175. Although the balance of recent authority has rejected presumed intention, there is still support for the idea, chiefly from Lord Wilberforce: *Amin Rasheed Shipping Corp* v *Kuwait Insurance Co* [1984] AC 50, 69; [1983] 2 All ER 884, 893; *Compagnie Tunisienne de Navigation SA* v *Compagnie d'Armement Maritime SA* [1971] AC 572, 595; *James Miller & Partners Ltd* v *Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, 614-5. Also McNair J in *Rossano* v *Manufacturers' Life Insurance Co* [1963] 2 QB 352, 369: ". . . under the *Bonython* test the question is still what intention is to be imputed to the parties". See a recent example: *Forsikringsaktieselskapet Vesta* v *Butcher* [1986] 2 All ER 488, 504.

57 M Wolff "The Choice of Law by the Parties in International Contracts" (1937) 49 Juridical Review 110, 132.

58 *Auten* v *Auten* (1954) 308 NY 155, 124 NE 2d 99; see F K Juenger, "The EEC Convention: An American Assessment" in P M North, ed, *Contract Conflicts,* North-Holland Publishing, 1982, 304.

59 E J Cohn "The Objectivist Practice on the Proper Law of Contract" (1957) 6 ICLQ 373, 376.

60 D F Cavers *The Choice of Law, Selected Essays, 1933-1983* Durham, Duke University Press, 1985, 224-228.

61 The adoption by the EC Convention (substantially worked out before the UK joined negotiations) of an objective test for the second leg indicates this.

62 *The Assunzione* [1954] P 150, 164.

63 Ibid at 185-186.

THE NEUTRAL ADVISER

In the absence of actual intention, the "closest and most real connection" of the second leg of *Bonython* should be interpreted so as to further the joint interests of the parties. It would not be necessary to return to the uncomfortable fiction of "presumed intention". If one starts with the assumption that the parties *did* intend to make a contract, an assumption justified by the fact that they have made an agreement,[64] a law could be chosen which best serves their joint interests by adopting the notion of a "neutral adviser to the parties". This is an adviser who assumes that the parties want to make the contract. He would then look at what the parties jointly want to achieve by making the contract and advise them to have it governed by the legal system which, in all the circumstances, would best achieve those goals.[65] Numerous factors could have a bearing on his choice. For example, familiarity of the parties with the system might be one of them. For this reason he would be unlikely to choose a law having no connection with the transaction. However, he might do so if on examination he saw that the likely laws would frustrate the intentions of the parties as, for example, by making the contract void, or by excluding one of the parties from liability for one of the obligations undertaken in the contract.[66] A court putting itself in the shoes of such an imaginary adviser would know what it was looking for, and the law would have a logical and philosophical consistency absent from the present *Amin Rasheed* test.

The chief objection to the current test, apart from the lack of consistency just discussed, is its lack of certainty.[67] The neutral adviser test, by providing a criterion of choice, would lessen uncertainty, but in many cases it might be far from clear without litigation what law that test would yield. I would therefore adopt, as part of the neutral adviser test, the presumption of the law of the residence of the characteristic performer,[68] the presumption used by the Australian Law Reform Commission[69] and the Rome Convention,[70] except that I would substitute "system of law" for "country" or "place". That is, in the absence of actual intention, the contract should be governed by the system of law with which the contract has its most real and substantial connection, which is to be understood

64 Assuming that general agreement itself is not in issue.

65 If the issue were agreement itself, it would be resolved by applying the putative proper law, that is, the law which the neutral adviser would have chosen for them to govern the contract if they had been able to agree. See *The Parouth* [1982] 2 Lloyd's Rep 351.

66 *Rossano* v *Manufacturers' Life Insurance Co* [1963] 2 QB 352 is an example of the difference it can make if the second leg is applied with party interests in mind. The transaction had most contacts with Egypt, but the proper law was found to be that of Ontario. A factor influencing the judge was that one reason why an Egyptian living in Egypt would choose a foreign (Ontario) insurance company was because of faith in the system of law under which it operated (at 369). Another example is *Sayers* v *International Drilling Co NV* [1971] 1 WLR 1176, per Salmon LJ, 1184, where it was in the interests of an international company to have all its employment contracts governed by one law.

67 ALRC Report No 58, 1992, para 8.38.

68 See above at p 101 for a discussion of the notion of characteristic performer.

69 Report No 58, 1992, Appendix B, s 9(6)(a).

70 Article 4(2).

to be the law which the neutral adviser would choose. That law should rebuttably be presumed to be that operating in:

> "the place where the party to the contract that is to effect the performance that is characteristic of the contract has at the time when the contract is made:
> (i) his or her habitual residence; or
> (ii) if that party is a body corporate or unincorporate — its principal place of business."[71]

Thus in the scheme I propose, the notion of characteristic performance would be used twice: first to determine whether or not a contract impinged on the forum society so as to define it as a domestic or foreign contract, and second, if it is a foreign contract manifesting no actual intention as to choice of law, then to yield the governing law which would be chosen by a neutral adviser with the joint interests of the parties (at the time of the contract) in mind. That law would rebuttably be presumed to be that of the habitual residence of the characteristic performer. In the scheme of the ALRC and the Rome Convention, the presumption favouring the law of the residence of the characteristic performer gives way if "it appears from the circumstances as a whole that the place with which the contract has the most real and substantial connection is some other place".[72] This is as unsatisfactory as the common law. No criteria or point of view for assessing closeness of connection are mentioned, so the provision in effect gives the court the discretion to ignore the presumption if it chooses.[73] The invitation to apply the law of a country of close connection also appears to take account of foreign public interests. The presumption should be rebutted, not because of closer connection with another country, but because the law yielded by the presumption would, perhaps because of invalidity, fail to reflect joint party interests.

VALIDITY

It is plain that the neutral adviser with the joint interests of the parties in mind would intend their contract as a whole to be valid, and barely conceivable that he would intend any term to be invalid. Thus a court examining the connecting factors from this point of view would reject as the governing law any system which would render the contract invalid. If it is the whole contract which would be rendered invalid by a foreign law, then how can it be in the interests of the parties to apply that law to the contract?[74] It has to be assumed that by agreeing to them, the par-

71 ALRC Report No 58, 1992, Appendix B, s 9(6)(a).

72 ALRC Report No 58, 1992, s 9(6) and, in almost the same terms, Rome Convention Art 4(5).

73 AJE Jaffey "Choice of Law in Relation to *Ius Dispositivum*" in P M North, ed, *Contract Conflicts,* North-Holland Publishing, 1982, 439-440.

74 Unless of course the invalidating provision is ignored, as Jaffey (A J E Jaffey "Essential Validity of Contracts in the English Conflict of Laws" (1974) 23 ICLQ 1, 4) suggests, in which case the whole problem of validity is avoided.

ties intend all the terms to be valid.[75] If the court is choosing the proper law with the interests of the parties at the time of the contract[76] as its primary concern[77] then validity should play a crucial role.[78] If in a case validity is given substantial weight, that implies application of the presumed intention theory.[79] Conversely, validity is "a consideration which only has weight if intention, however artificially, comes into the ascertainment of the proper law".[80]

If a purely objective, counting of contacts, approach is taken to the second leg, it follows that invalidity is irrelevant. This indeed seems to be the modern view.[81]

PUBLIC INTERESTS

It may be worth emphasising at this point that to adopt a party interests point of view would not prejudice forum public interests. They can be safeguarded by applying to the second leg of *Bonython* the same limitations as are applied to the first leg.

The first, as I argue, is that the objective test of governing law is applied only to foreign contracts, distinguished from domestic contracts by the test of impingement. If the contract impinges on New Zealand because its characteristic performer is habitually resident there,[82] then New Zealand compulsory rules apply regardless of the notional advice of the neutral adviser. Since it applies to both legs of *Bonython* to cause compulsory rules to apply to the contract, the test of impingement is really a subsidi-

75 Lord Denning MR in *Coast Lines Ltd* v *Hudig & Veder Chartering NV* [1972] 2 QB 34, 44, said, "it cannot be assumed that the Dutch charterers put their signatures to a contract which they did not intend to honour." See also *Peninsular & Oriental Steam Navigation Co* v *Shand* (1865) 3 Moo PCNS 272, 292: by agreeing to the exclusion clause, the parties must have intended it to be valid, and hence must have intended the law under which it would be valid (English law) to govern. In one rare case the court decided that extrinsic evidence indicated that the plaintiff employer intended the restraint of trade clause to be valid but the employee, who had been advised that the clause was probably invalid under South African law where he was to work, did not. (*South African Breweries Ltd* v *King* [1899] 2 Ch 173, 181.) The court applied the presumed intention test and expressly said that invalidity "will influence the Court in determining whether the contract is to be governed by that law". It is open to doubt whether the court could properly look at extrinsic evidence of intention. See also D Wyatt, "Choice of Law in Contract Matters: A Question of Policy" (1974) 37 MLR 399, 410.

76 See supra p 117.

77 In the absence of actual intention, the German courts apparently use "hypothetical intention", which is the appropriate law from the point of view of the interests of the parties. See J Blom "Choice of Law Methods in the Private International Law of Contract" (Part 1) (1978) 16 CYIL 230, 268-270.

78 *In re Missouri SS Co* (1888) 42 ChD 321, 341, per Fry LJ.

79 *Coast Lines Ltd* v *Hudig & Veder Chartering NV* [1972] 2 QB 34, 48, per Megaw LJ. It is hard to see how validity can be relevant but not conclusive as it was in *Etler* v *Kertesz* (1961) 26 DLR (2d) 209, 222. This looks like a fuzzy compromise which avoids having to examine the theory behind the rule.

80 *Coast Lines Ltd* v *Hudig & Veder Chartering NV* [1972] 2 QB 34, 51, per Stephenson LJ.

81 *Monterosso Shipping Co Ltd* v *International Transport Workers Federation* [1982] 3 All ER 841, 848, per May LJ; Cheshire & North *Private International Law* 11th ed, London, Butterworths, 1987, 465.

82 See supra p 101.

ary choice of law rule: Where the contract impinges on the forum, it is governed by the compulsory laws of the forum. The test is not merely a limitation on freedom to choose the governing law. Which optional rules should govern a domestic contract in the absence of choice? In principle, since the parties to a domestic contract under my proposals would be free to choose foreign optional rules, the neutral adviser could be employed in every domestic contract to find the most efficacious optional rules. However, this would make the law unduly complicated to administer. I would therefore conclude that if the parties to a domestic contract have exercised their freedom to choose foreign law for the governing optional rules, their choice should be given effect to, but if they have not, domestic optional rules should apply, as is the case at present.

The second limitation is that even if the contract is properly classified foreign, the law indicated by the neutral adviser, interests-of-the-parties, test may still be overridden by public policy just as can a choice indicated by party intention.

Third, any mandatory forum statute will of course apply to the contract anyway.

If the rejection of a party interests point of view in applying the objective test in the second leg is not designed to protect forum public interests or, of course, the interests of the parties, the only likely purpose can be to protect foreign public interests.

As I mentioned above, to apply the law of the objective closest and most real connection by counting contacts may render the contract invalid. Jaffey gives the example of a contract between an Englishman and a Frenchman to be performed entirely in Italy. If it is valid by English and French law but invalid by an Italian law designed to protect the Italian economy, to apply Italian law, as the law of the most substantial connection, and render it invalid would clearly not serve the interest of the parties viewed from the time the contract was made. "The only possible rationale for the law of the country with which the contract is most closely connected . . . is that it is a rough and ready way of selecting the country whose public interests are most likely to be affected by a contract."[83] A recent case gives a similar real-life example. There were factors in a shipping transaction pointing to both England and Greece, but more pointed to Greece. By Greek law an exclusion clause in the contract was void. Leggatt J refused to be swayed by the validation argument and held that the proper law was Greek. He expressly refused to look for the presumed intention of the parties.[84]

83 A J E Jaffey "The Foundations of Rules for the Choice of Law" (1982) 2 Oxford J Leg Stud 368, 374.

84 *Hellenic Steel Co* v *Svolamar Shipping Co; "The Komninos S"* [1990] 1 Lloyd's Rep 541, 544. The judgment was reversed by the Court of Appeal: [1991] 1 Lloyd's Rep 370. Bingham LJ found evidence of actual intention and so applied the first leg of *Bonython.* He agrees with Legatt J's view that the second leg is divorced from the concept of intention (at p 374) and does not disagree with the trial judge's view that invalidity is irrelevant to determining the proper law under the second leg (at p 376). See note by F M B Reynolds in (1992) 108 LQR 395, 396.

What logic can there be in so firmly refusing to give effect to foreign state interests in the first leg, and yet adopting a test in the second leg which furthers those interests? The interests of a foreign state, like the interests of the forum state, are of two types, first, the interests of the society as the accumulation of its members, and second, those of the state as an entity distinct from its individuals. One reason for giving effect to foreign state interests could be comity, as discussed above under public policy. But, as discussed above, comity means giving effect to foreign laws because not to do so would prejudice the relations of the forum state with foreign states. There are two things to note about this giving effect to foreign laws: first, it is the interests of the forum state, not the foreign one, which prompts it, and second, it is done only if the circumstances of the individual case warrant the exceptional course of preferring the interests of the state to those of the individual. Comity is concerned with the public interests of the state as an entity.[85] It is difficult to see how a court can consider as its primary concern in a private dispute the interests of foreign public state entities.

The other kind of foreign public interests[86] are the interests of the society as a whole. Such interests are really the complex of values and social norms which underlie the private law rules of any given system. These rules do not exist for the benefit of the state, but for the benefit of the members of the society, sometimes collectively and sometimes individually, which the state governs. That these rules differ from one society to the next is a reflection of these different values. One explanation of the "closest and most real connection" test is that it is concerned with the interests of a foreign *society,* though not with foreign *state* interests. This explanation suggests that the test expresses an idea of the *lex fori* that it is just that disputes with such a connection be decided by a law which reflects the values of that society. By this reasoning, the test is more consistent with the English common law approach than giving effect to the interests of foreign states. But by what criterion is it just? Whatever else it may mean, justice suggests deciding between competing interests by some criterion expressing a value. What value requires preferring the interests of a foreign society to those of the parties before the court?

Uniformity of result is a possible apparent answer. Building a system which will ensure uniform results in different jurisdictions will benefit individuals in the long run and may justify overriding party interests and suppressing the forum's notions of justice. However, uniformity is likely to occur only as the result of international agreement,[87] such as the EC Convention on Contractual Obligations, which ensures that the members of a group of nations all use the same rule. The preferring of the interests of a foreign state or society in a common law rule applied in individual cases does not lead to uniformity.

85 See A J E Jaffey "The Foundations of Rules for the Choice of Law" (1982) 2 Oxford J Leg Stud 368, 368.

86 The expression "state interest" is really inconsistent with this idea.

87 Or agreement between states of a federation, as proposed by the ALRC Report No 58, 1992, para 2.4 and Appendix B, Draft Uniform State and Territory Choice of Law Bill.

Given that there does not spring to mind any obvious reason why the common law rules for contract choice of law should shift from party interests, as reflected in the first leg of *Bonython* and in the presumed intention version of the second leg, it is strange that the trend has been a change to the "objective" approach. As this approach consciously does not decide according to the interests of the parties, either it has no rationale at all (beyond abandoning the result to judicial discretion) or its rationale is the interests of foreign states[88] or societies.

SUMMARY – PROPOSED MODIFIED CONTRACT CHOICE OF LAW RULES

Let me briefly summarise the form which I think contract choice of law rules should take if they are to achieve the private-law, contract-law objective of reflecting primarily the interests of the parties and only secondarily public interests of the forum.

The first task is to classify the contract as domestic or foreign. Only if the contract will not impinge in its operation on the forum society,[89] is it classified foreign. If it is so classified, then if the parties have manifested an intention, expressly or otherwise, that a foreign law should govern, that intention should be given effect, unless a mandatory forum statute overrides it, or forum public policy[90] in the circumstances of the case takes precedence. If the parties have manifested no intention, then the law which a neutral adviser to the parties with their joint contractual interests in mind would choose to achieve the objects of the contract should be adopted as the law of the closest and most real connection. This law, rebuttably presumed to be the law of the place of residence of the characteristic performer, would govern unless, again, it is overriden by a mandatory forum statute or forum public policy.

In neither situation are foreign public interests relevant in their own right, although they may come to be considered from the point of view of forum public interests.

If the contract impinges and is classified as a domestic one, forum compulsory rules should apply to it. Even so, if the parties have manifested an actual intention to choose a foreign governing law, the optional rules of that law should apply. If they have shown no such intention, forum optional rules should apply.

88 A J E Jaffey "The English Proper Law Doctrine and the EEC Convention" (1984) 33 ICLQ 531, 537; A J E Jaffey "The Foundations of Rules for the Choice of Law" (1982) 2 Oxford J Leg Stud 368, 374.

89 That is, the characteristic performer is not habitually resident in the forum. See supra p 101.

90 Chiefly comity.