1. Introduction

The substantial increase in the growth of international trade and commerce gives added importance to the satisfactory resolution of problems in private international law.¹ In the world of business, especially in the modern era, it would seem as though everything moves at a rate of knots. Technology is constantly developing, which has an enormous impact on the way business is conducted. This is particularly true when it comes to international commercial transactions. At a click of a button, a businessperson sitting in his/her office in Turkey can conclude a contract with a South African supplier for the purchase of wheat. Contracts can be concluded between persons on different continents without actually ever meeting face-to-face. With that in mind, more emphasis should be placed on the private international law systems of states, ensuring that they do not remain stagnant and are up to international standards in dealing with the issues that invariably arise in international transactions.

¹ Setalvad *Conflict of laws* (2009) at 10; Hay, Weintraub and Borchers *Conflict of Laws* (1997) at 6. See also, McClean and Beavers *The Conflict of Laws* (2009) at 2: Individual and corporate activity may be increasingly international, but with no corpus of international law and no system of international courts to deal with disputes that arise in private international law, it is essential that courts of particular national legal systems have satisfactory conflict of laws rules to turn to.
2. The Law applicable to the Contract

As cross-border trade continues to grow, an important issue in private international law that deserves consideration is the law applicable to international commercial contracts. As Lord Diplock put it:

“My Lords, contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a court of justice for failure to perform any of those obligations.”

However, ascertaining the applicable law in an international commercial contract would be more of a challenge that almost any other topic in private international law, for the simple reason that an international commercial contract may carry with it a multiplicity of connecting factors each pointing to different legal systems. In these cases, a court would have to determine which system of law would govern the creation, validity and effect of the contractual obligation.

3. Autonomy in International Commercial Contracts

In most jurisdictions, the first rule is to have regard to the parties’ choice of law. When parties choose the law applicable to their contract, they are understood to have made a choice regarding the substantive applicable law, also referred to as the proper law of the contract. Although there is no one correct determinate of the proper law, the general principle is that the contract is governed by the law which the parties intended should govern. To determine the proper law of the contract, one must first examine whether an express choice of law was made. The most obvious manner in which parties’ can

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2 Amin Rasheed Shipping Corporation v Kuwait Insurance Co 1984 AC 50 at 65.
3 North and Fawcett Cheshire and North’s Private International Law (1987) at 444.
4 North and Fawcett (n 3) at 448.
7 Schwenzer, Hachem and Kee (n 6) at 52. The proper law of the contract is also referred to as the “governing law” and under the Regulation (EC) on the Law Applicable to Contractual Obligations [Rome I] (2008) as the “applicable law”.
8 Van Niekerk and Schulze The South African Law of International Trade: Selected Topics (2011) at 59-60. Legal systems have offered different solutions to the ascertainment of the proper law. See for example, North and Fawcett (n 3) at 449.
express their choice is by explicitly stating, at the time of contracting, the law by which the contract shall be governed.

In the modern era, most legal systems adopt some form of autonomy under which parties are free to choose the law with which to govern the contract. There are sound reasons for allowing parties the right to choose the applicable law. These include, the freedom to contract, and secondly, certainty and economic efficiency. Here the question that arises is, do the parties have an unfettered discretion as to their choice? The ability to choose the applicable law is, however, not absolute. Certain limitations that may come into play in this regard include mandatory provisions of the lex fori and perhaps the law of third states and also public policy considerations.

4. Tacit Choice of Law

Given the vast problems that could occur in international transactions, and assuming that parties to an international commercial contract have a certain autonomy in selecting the proper law, parties are advised to express their intention in this regard. However, this is not always the case in practice. Ever so often, individuals fail to take the necessary precaution in selecting the proper law with which to govern their contract.

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9 Nygh (n 5) at 272-273. See also, North and Fawcett (n 3) at 451: it has been recognised that at the time of making the contract the parties may expressly select the law by which it is to be governed.
10 Nygh (n 5) at 272. See also, North and Fawcett (n 3) at 452: the parties may declare their intention by a single statement in the contract that it be governed by the law of a particular state.
11 North and Fawcett (n 3) at 449; Nygh Autonomy in International Contracts (1999) at 13: today the freedom of the parties to choose the applicable law is almost universally recognized. See also, Schwnezer, Hachem and Kee (n 6) at 52: almost all jurisdictions recognize merchants to choose the law applicable to their contracts.
12 Nygh (n 11) at 2.
13 Nygh (n 11) at 2. The freedom to contract is of the outmost importance in the market economy. The parties to the contract must be free to regulate its terms and conditions.
14 Nygh (n 11) at 2-3. An international contract requires certainty. Where there are several potentially applicable laws, parties should be able to avert such uncertainties by choosing the applicable law.
15 See for example, North and Fawcett (n 3) at 453: it has been admitted that certain limitations must be placed upon the freedom to choose the applicable law. See also, Schwnezer, Hachem and Kee (n 6) at 53: even in jurisdictions which fervently support the parties’ ability to choose the law, the circumstances of that choice are not unrestricted.
16 See for example, Edward, Sykes and Pryles Australian Private International Law (1991) 596-598: a choice of law will not be legal if a mandatory provision of the lex fori denies the parties the autonomy to choose the governing law. See also, Van Niekerk and Schulze (n 8) at 61: a choice of law may be flawed and not given effect to if it was made to avoid legal prohibitions in the legal system most closely connected to the contract.
17 Van Niekerk and Schulze (n 8) at 60.
18 Forsyth “Enforcement of foreign arbitral awards, choice of law in contract, characterization and the new attitude to private international law” 1987 SALJ 4 at 14.
Where parties have not expressed a choice of law, it is open to the court to determine the proper law of the contract.\textsuperscript{19} Here the court will attempt to determine the parties’ unexpressed or tacit choice of law by searching not only within the four corners of the contract, but also the circumstances surrounding the contract.\textsuperscript{20}

Although falling short of an express choice by the parties, tacit choice of the proper law still amounts to a true or real choice of law.\textsuperscript{21} However, tacit choice of law may seem a confused concept, and one that has not always been clearly perceived.\textsuperscript{22} The notion of inferring an actual intention is based upon making assumptions which may or may not be correct.\textsuperscript{23} This may have undesirable consequences for the parties to the contract, as their reasonable expectations may not be portrayed in the inferences drawn by the court. With that being said, most legal systems around the world recognize a tacit or implied choice of law.\textsuperscript{24} However, as previously stated, the uncertainty around tacit choice of law remains apparent.

The Giuliano and Lagarde Report\textsuperscript{25} provide a number of examples where a choice of law may be inferred.\textsuperscript{26} Despite these indicators, there is no approach that can claim universal recognition.\textsuperscript{27} The determination of tacit choice of law around the world remains highly divergent, with the weight attached to issues like choice of forum, monetary unit and form often at odds. It was Ernst Rabel who wrote “it has been customary to regard the attainment of uniform solutions as the chief purpose of choice-

\textsuperscript{19} North and Fawcett (n 3) at 457; Nygh (n 5) at 277.
\textsuperscript{20} Nygh (n 5) at 277. See also, Van Niekerk and Schulze (n 8) at 62. The term “tacit”, “implied” and “presumed” have been used interchangeably in private international law.
\textsuperscript{21} Neels and Fredericks “Tacit choice of law in the Hague Principles on Choice of Law in International contracts” 2011 De Jure 101 at 104. See also, Nygh (n 11) at 108: tacit choice is a subcategory of “express choice”, concerned only with instances where the parties’ intention is clear but appears through other means than a choice of law clause.
\textsuperscript{22} Forsyth Private International Law (2012) 294. See also, Nygh (n 5) at 277: there remains a fair amount of uncertainty as to the applicable test.
\textsuperscript{23} North and Fawcett (n 3) at 461.
\textsuperscript{24} Schwenzer, Hachem and Kee (n 6) at 55; Nygh (n 11) at 109.
\textsuperscript{26} Nygh (n 11) at 113-114: they include: (1) The use of standard form which is known to be governed by a particular system of law; (2) where parties have had previous dealings under similar contracts containing an express choice of law which has been omitted from the existing contract; (3) choice of a particular form; (4) reference to specific provisions of a particular legal system contained in the contract; and (5) choice of a particular place of arbitration. Other factors that may be added include: (6) Common residence or domicile of the parties; (7) place of performance of the contract; and (8) from the several possible systems that could apply, that system which will give effect to the contract.
Although there has been a significant movement in recent years toward harmonisation of private international law rules between countries, there remains a continuous pursuit in bringing some semblance of harmonisation and uniformity across private international law systems around the world. This is particularly true of tacit choice of law. The uncertainty surrounding its application in conjunction with the conflicting approaches in the determination of tacit choice around the world is a problematic issue in private international law, and one that has to be redressed.

This paper will examine tacit choice of law in Turkey, with the intention of bringing more clarity on the determination of tacit choice of law. Emphasis will be placed on related issues, including the level of strictness of the criterion for a tacit choice of law and the factors that have been relied upon, as well as the weight that has been attached to these factors. The legal position in Turkey will be compared to that under the Rome Convention, which has inspired the new Turkish Code on Private International Law of 2007. The reach that the Rome I Regulation, together with its predecessor, the Rome Convention has had is nothing short of noteworthy, not only within the European Union, but elsewhere in the world. The basic provisions of codification in many states are based in principle on the Rome model. As a result of the influence that the Rome Convention has enjoyed over Turkish private international law, the analysis of its provisions will provide valuable insight into the Turkish Code.

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29 Fawcett and Curruthers (n 27) at 9.
31 (Translation in 2007 Yearbook of Private International Law at 583) Hereinafter referred to as the ‘Turkish Code; Tekinalp “The 2007 Turkish Code concerning private international law and international civil procedure” 2007 Yearbook of Private International Law 313 at 314-320. See also, Tekinalp, Nomer and Odman Botztosun Private International Law in Turkey (2012) at 86”; Neels and Fredericks (n 21) at 104-105.
32 (n 7) supra.
33 Neels “Rome in the Far East” (unpublished lecture University of Amsterdam, University of British Columbia and the University of Johannesburg) (2011-2012) 2: these include: non-EU European countries such as Liechtenstein, Macedonia, Russia, Switzerland and the Ukraine; countries in the Far East, including China, Japan, Mongolia and South Korea; as well as countries in the Middle East as Azerbaijan, Turkey and Uzbekistan.
34 Tekinalp (n 31) at 314-322.
5. TURKEY

5.1 The Law Applicable to the Contract

The freedom to contract recognized in Turkish law has ensured the development of the notion of choice of law and party autonomy in Turkish private international law. It is generally accepted that parties are permitted to agree on the law applicable to their contracts. The Turkish Code does, however, make provision for the limitation of the applicable law. The limitations may include public policy considerations, mandatory rules of Turkish law and also mandatory rules of third countries. Nonetheless, the general rule governing the applicable law is contained in article 24(1), which states: “Obligations arising from contracts shall be governed by the law explicitly chosen by the parties…” However, where parties fail to make an express choice of law, Turkish courts will have to consider whether there exists a tacit or implied choice of law.

5.2 Tacit Choice of Law

5.2.1 Level of strictness

The Turkish Code makes it possible for the parties to express a choice of law, or for the court to determine whether there is an implied choice of law. Article 24(1) of the Turkish Code provides: “…Choice of law may be understood with reasonable certainty from the provisions of the contract or the relevant circumstances shall also be valid.” As a result of the influence that the Rome Convention has enjoyed over the Turkish Code,

35 Ansay and Wallace Introduction to Turkish Law (2011) at 164.
36 Tekinalp, Nomer and Odman Botzotosun (n 31) at 83.
37 Ansay American-Turkish Private International Law (1966) at 41. See also, Tekinalp (31) at 329; Tekinalp, Nomer and Odman Botzotosun (n 32) at 84; Gungör “The principle of proximity in contractual obligations: the new Turkish Law on Private International Law and International Civil Procedure” 2008 Ankara Law Review 1 at 6.
38 Article 5: “Where a provision of foreign law applicable, applied to a specific case, is clearly contrary to Turkish public policy, this provision shall not apply; where deemed necessary, Turkish law shall apply”.
39 Article 6: “Where foreign law is applicable, overriding mandatory rules of Turkish law shall apply in cases within their scope as regards their particular purpose and sphere of application”.
40 Article 31: “when the law governing the relationship arising from the contract is being applied, the overriding mandatory rules of a third country may be given effect in the case where these rules are closely connected with the contract. Regarding giving effect to and applying or not applying the rules at issue, the purpose, nature content and consequences of these rules shall be taken into consideration”.
41 Tekinalp, Nomer and Odman Botzotosun (n 31) at 84; Tekinalp (n 31) at 329; Gungör (n 37) at 6-7.
the Convention provides us with valuable guidance in interpreting the provisions of the Turkish Code. The Rome Convention requires the tacit or implied choice to be “demonstrated with reasonable certainty”.\(^\text{42}\) While the Turkish Code also uses the phrase “reasonable certainty” to indicate the level of strictness of the criterion for a tacit choice of law. Other provisions regulating tacit choice of law suggests a more stringent test than the one contained in the Turkish Code and the Rome Convention.\(^\text{43}\) The Hague Convention on the Law Applicable to Contracts for the International Sale of Goods of 1986, requires the tacit choice to be “clearly demonstrated in the terms of the contract”.\(^\text{44}\) This stricter test can also be found, \textit{inter alia},\(^\text{45}\) in the Rome I Regulation\(^\text{46}\) and the Russian Civil Code of 2001.\(^\text{47}\) The most stringent test is set out in the \textit{Convention sur la loi applicable à caractère international d’objects mobiliers corporels}\(^\text{48}\) (the Hague Sales Convention of 1955).\(^\text{49}\) Article 2 states that:

“A sale shall be governed by the domestic law of the country designated by the Contracting Parties. Such designation must be contained in an express clause, or unambiguously result from the provisions of the contract…”

\(^\text{42}\) Article 3(1): “A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case…” See article 25(1) of the South Korean \textit{Private International Law Act}: “A contract shall be governed by the law expressly or impliedly chosen by the parties, provided that an implied choice may be acknowledged only when it is reasonable to do so in the light of the terms of the contract or the circumstances of the case” (translation in 2003 Yearbook of Private International Law 315).

\(^\text{43}\) Neels and Fredericks (n 21) at 105; Nygh (n 11) at 110.

\(^\text{44}\) Article 7(1): “A contract of sale in governed by the law chosen by the parties. The parties’ agreement in this choice must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety…” \textit{per} \text{www.hcch.org}.

\(^\text{45}\) See Neels and Fredericks (n 21) at 105: s 7(1) of the Oregon \textit{Conflicts Law Applicable to Contracts of 2001}: “[T]he contractual rights and duties of the parties are governed by the law or laws that the parties have chosen…”; s 7(2): “The choice of law must be express or clearly demonstrated from the terms of the contract…” See also, article 34 of the Puerto Rico \textit{Project}: “Contractual obligations are governed by the law or laws chosen for that purposes by the parties. The choice must be express or must be demonstrated clearly from the provisions of the contract or from the conduct of the parties…” \textit{per} \text{www.oas.org/juridico/english/treaties}.

\(^\text{46}\) Article 3(1): “A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case…”; Neels and Fredericks (n 21) at 105. There are also other texts that are similarly worded in this regard. For instance, the Inter-American Convention on the Law Applicable to International Contracts of 1994 (Mexico City Convention), article 7: “The contract shall be governed by the law chosen by the parties. The Parties’ agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties’ behavior and from the clauses of the contract, considered as a whole…” \textit{per} \text{www.oas.org/juridico/english/treaties}.

\(^\text{47}\) Article 1210(2): “An agreement of parties as to the selection of law to be applicable shall be expressly stated or clearly enuise from the terms and conditions of the contract or the complex of circumstances of the case” (translation in 2002 \textit{Yearbook of Private International Law} at 349).

\(^\text{48}\) (The Hague) (1955) (translation \textit{per} \text{www.lexmercatoria.org} or original \textit{per} \text{www.hcch.net}).

\(^\text{49}\) Nygh (n 11) at 109.
The recently adopted Hague Principles on Choice of Law in International Commercial Contracts,⁵⁰ sets forth the general principles concerning choice of law in international commercial contracts that may be used as a model for national, regional, supranational or international instruments.⁵¹ Although the Hague Principles constitute a non-binding instrument, they are inter alia intended to be used to interpret, supplement and develop rules of private international law.⁵² The Hague Principles also uses the phrase “clearly inferred” to indicate the level of strictness in determining a tacit choice of law, which corresponds to the phrases previously mentioned.⁵³

The need for a “clear demonstration” or “clearly inferred” or “without doubt” or even “unambiguously result from”, as a criterion for the establishment of a tacit choice of law leaves very little leeway for a court to speculate whether or not a choice was made.⁵⁴ This formulation may be regarded as a stricter test than the requirement of “reasonable certainty” provided by the Turkish Code and the Rome Convention.⁵⁵ For instance, if a tacit choice of law only needed to be established with “reasonable certainty”, a court only has to be satisfied that it was more likely than not that the parties to the contract intended a particular legal system to apply.⁵⁶ To allow readily deduced tacit agreements may leave too much to the discretion of the individual judge, and accordingly, could result in unpredictability of decision.⁵⁷

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⁵¹ See the Preamble to the Hague Principles per www.hcch.net.
⁵² (n 51) supra.
⁵³ Article 4 of the Hague Principles on Choice of Law in International Commercial Contracts: “A choice of law, or any modification of a choice of law, must be made expressly or appear clearly form the provisions of the contract or the circumstances….” per www.hcch.net. See the Commentary par 4.14: “A tacit choice of law must appear clearly from the provisions of the contract or the circumstances. This means that the choice must be evident as a result of the existence of strong indications for such a choice.”
⁵⁴ Nygh (n 11) at 111. See also, Neels and Fredericks (n 21) at 106: “To allow readily deduced tacit or implied agreements leads to unpredictability of decision and legal uncertainty and undermines the conflicts rule that applies in the absence of a choice of law.”
⁵⁵ McClean and Beevers (n 1) at 360; Nygh (n 11) at 110.
⁵⁶ Nygh (n 11) at 111.
5.2.2 Indicators of a Tacit / Implied Choice

Similar to the position under article 3(1) the Rome Convention, the Turkish Code refers to the “terms of the contract or the circumstances of the case…” when determining the existence of a tacit choice of law. Although some codes refer to the provisions of the contract only, there should be no reason to limit the search for a tacit choice to the provisions of the contract without taking note of the surrounding circumstances. As such, a Turkish court will examine not only the wording of the contract, but also all the circumstances surrounding the contract in searching for indicators of a tacit choice.

As previously mentioned, the Giuliano and Lagarde Report illustrates the many factors from which a tacit choice of law may be inferred. Again, these factors are not conclusive of a choice of law. It must be remembered that a court is still searching for the real or true intention of the parties. Since a tacit choice is only concerned with instances where the parties’ intentions are clear but falls short of an express choice of law, the court must consider the factors in the whole of the circumstances of the case and be mindful not to give rise to any presumptions. This is particularly true when the question arises, should a choice of forum constitute a choice of law?

5.2.3 Choice of Forum and Choice of Law

Although it is generally accepted that choice of forum should be a factor in the determination of a tacit choice of law, choice of law and choice of forum are, in

58 Article 3(1) of the Rome Convention (n 30) supra.
59 Article 24(1) of the Turkish Code (n 31) supra. Neels and Fredericks (n 21) at 107: the word “or” suggests that either the wording of the contract or the circumstances of the case can indicate a tacit choice, or both the wording and the circumstances cumulatively. See also, Neels “Choice of forum and tacit choice of law: the Supreme Court of India and the Hague Principles on Choice of Law in International Commercial Contracts (an appeal for an inclusive comparative approach to private international law)” (forthcoming).
60 Neels and Fredericks (n 21) at 107: Article 2 of the 1955 Hague Convention; Section 7 of the Oregon Conflicts Law Applicable to Contracts; article 3111 of the Quebec Civil Code.
61 Neels and Fredericks (n 21) at 107: the phrase “circumstances” will encompass the conduct of the parties.
62 Nygh (n 5) at 277; McClean and Beevers (n 1) at 360.
63 (n 26) supra. See also, Forsyth (n 22) at 328.
64 Schwenzer, Hachem and Kee (n 6) at 56. See for example, Nygh (n 11) at 115-120 for a general discussion on the various factors.
65 Nygh (n 11) at 114.
66 Nygh (n 11) at 108; Gungör (n 37) at 6-7. See also, Nygh (n 5) at 277: in other words, the search is for the parties’ unexpressed intentions; Forsyth (n 22) at 326.
67 Nygh (n 11) at 114-115. See also, Forsyth (n 22) at 329: it must be remembered that we are considering an actual choice of law. As such, the inducia from which a choice may be inferred, remain only inducia.
68 (n 26) supra. See Neels (n 21) 108; McClean and Beevers (n 1) at 361; Schwenzer, Hachem and Kee (n 6) at 56; Neels (n 25).
principle, separate issues and must be distinguished.\textsuperscript{69} A forum may be chosen for its neutrality, experience or expertise and not necessarily for the application of its domestic law.\textsuperscript{70} The GEDIP\textsuperscript{71} has suggested that a choice of forum should not in itself be equivalent to a choice of law of that forum.\textsuperscript{72} This approach is followed in the Hague Principles on Choice of Law in International Commercial Contracts,\textsuperscript{73} and supported by various authors as well.\textsuperscript{74} Indeed, the legal systems of the world provide divergent views on this issue.\textsuperscript{75} However, the correct starting point is that choice of forum may be one of the factors taken into account to determine the existence of a tacit choice of law, but it should not be conclusive of a tacit choice. The Turkish Code is silent on this issue, it may be useful to add a provision addressing the role of forum selection in determining a tacit choice of law.\textsuperscript{76}

6 Conclusion

The determination of tacit choice of law remains highly divergent between and within various legal systems. Important issues like the level of strictness of the criterion for a

\textsuperscript{69} Neels and Fredericks (n 21) 107; Neels (n 25).
\textsuperscript{70} Neels and Fredericks (n 21) 107; Sykes and Pryles (n 16) at 116; Neels (n 59).
\textsuperscript{71} European Group of Private International Law or Groupe européen de droit international privé. \textit{per} \url{http://www.gedip-egpil.eu/}.
\textsuperscript{72} GEDIP “Third consolidated version of a proposal to amend articles 1, 3, 4, 5, 6, 7, 9, 10bis, 12 and 13 of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, and article 15 of the Regulation 44/2001/EC (Brussels I)” (Vienna 2003) \url{www.gedip-egpil.eu/documents/gedip-documents-20vce.html}: “In particular, the choice of a court or the courts of a given State shall not in itself be equivalent to a choice of law of that State.”
\textsuperscript{73} See article 4 of the Hague Principles on Choice of Law in International Commercial Contracts: “…An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law.” \textit{per} \url{www.hcch.net}. According to the official commentary on the Principles, submission to jurisdiction may nevertheless be one of the factors to be taken into account to determine whether there was a tacit choice of law. See, in the same sense, article 7(2) of the Mexico City Convention: “…Selection of a certain forum by the parties does not necessarily entail selection of the applicable law.”
\textsuperscript{74} Neels and Fredericks (n 21) 108; as referred to in Nygh (n 11) at 117: Professor Legarde has indicated that a jurisdiction clause is merely a factor to be taken into account; Neels (n 59).
\textsuperscript{75} The traditional common-law position: see for instance, Nygh (n 11) at 116: there is a general agreement in Anglo-Commonwealth law that the submission to the exclusive jurisdiction of a foreign court indicates that the parties intended the law of that court to apply; Davies Bell and Brereton \textit{Nygh’s Conflict of Laws in Australia} (2010) at 398: in Australian law, it has been suggested that the inclusion of a clause stipulating that a particular court or arbitral tribunal shall have jurisdiction, creates a very strong presumption that the parties have chosen the law of that country to govern the contract. See also, Edward, Sykes and Pryles (n 16) at 584; North and Fawcett (n 3) at 457.
\textsuperscript{76} Neels and Fredericks (n 21) 107. See the proposed formulations on choice of law provision at 108-109.
tacit choice of law, the indicators that have been relied upon and choice of forum often at odds.

With regard to the level of strictness, a stringent test for the establishment of a tacit choice of law leaves very little leeway for a court to speculate whether or not a choice was made.\(^{77}\) This may reduce the discretion of the individual judge, and accordingly, could result in more predictability of decision.\(^{78}\)

One must also be mindful of the fact that the search is for an actual choice of law, albeit a tacit one.\(^{79}\) If we are only concerned with the real intention of the parties, the presence of a particular factor cannot be considered conclusive.\(^{80}\) A court must consider all factors and surrounding circumstances in its determination of a tacit choice of law and be careful not to give rise to presumptions.

Choice of forum and choice of law are different notions and must be distinguished. A forum may be chosen for its neutrality, experience or expertise.\(^{81}\) It is submitted that choice of forum may be a one of the factors to be taken into account to determine whether there was a tacit choice of law.\(^{82}\) However, a choice of forum is not automatically indicative of the choice of a legal system.

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\(^{77}\) Nygh (n 11) at 111. See also, Neels and Fredericks (n 21) at 106.

\(^{78}\) Neels and Fredericks (n 21) at 106; Neels and Fredericks (n 57) at 125.

\(^{79}\) Forsyth (n 22) 329.

\(^{80}\) (n 33) supra.

\(^{81}\) (n 36) supra.

\(^{82}\) (n 73) supra.
Bibliography


