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Article

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The significance of a forum selection agreement as an indicator of the implied choice of law in international contracts: a global comparative perspective

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Abstract

Where the parties to an international contract fail to specify the choice of law, a forum selection agreement is one of the most, if not the most, significant factors to consider in implying the choice of law in many international, supranational, regional instruments, and national jurisdictions. However, it is an ill-defined, notoriously complex, and hotly debated issue as to the weight that should be attached to a forum selection agreement in implying the choice of law. Hence, this article is devoted to discussing this topic from a comparative perspective, in order to propose a guide to global uniform criteria. To achieve this, the article covers all relevant international, regional, and supranational instruments, and selected legal systems in Africa, Asia, Australasia, Europe, the Middle East, and North and South America. The legal systems compared include those from the global North and global South, including common law, civil law, and mixed legal systems. The article's core proposal is that an exclusive forum selection agreement should be a key factor in implying the choice of law. However, except in such cases as where a forum is chosen on a neutral basis, there should be a general requirement of corroboration with at least one other factor of significance. The aim of the proposal is to contribute to greater uniformity, predictability, and certainty in the global community in this field of law.

I. Introduction

Globally, the general principle is that there are three stages to determining the applicable (governing or proper) law of contracts.[1] The first of these is where the parties make an express or explicit choice of law; the second is where the parties make an implied choice of law; and the third is where the applicable law is determined in the absence of a choice of law in a contract. An express choice of law is preferable for the parties because it enhances

[1] See generally, D Girsberger et al, *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague Principles* (Oxford: Oxford University Press 2021); SC Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford: Oxford University Press 2014).

legal certainty and predictability, reduces transaction costs, hedges against risks, and provides commercial efficacy and neutrality. However, it has the disadvantage of usually favouring the economically stronger party. Many countries in the global South do not generate revenue from choice of law agreements because it is unusual for international commercial parties to choose their law.

Parties may fail to make their choice of law explicit due to inexperience and inadvertence. It is also not uncommon for parties in international contracts to specify the forum to resolve their disputes but ignore an express choice of law. Strictly speaking, an implied choice of law means that the parties actually made a choice of law to govern their international contract, but there was a flaw in communicating that choice explicitly. In the given context, the flaw refers to a mistake of the parties in communicating their choice of a particular law expressly to govern their international contract, resulting in an implied choice of law. An implied choice of law is also referred to as a tacit choice of law. In global terms, the choice of law is generally implied, whether from: (i) the terms of the contract and surrounding circumstances of the case; (ii) the terms of the contract alone; (iii) the surrounding circumstances alone; or (iv) the terms of the contract and the surrounding circumstances of the case combined.[2]

A forum selection agreement (encompassing a jurisdiction and arbitration agreement) is, *inter alia*, a significant factor, perhaps even the most significant factor, to consider in implying the choice of law of contracts in many international, supranational, regional, and national jurisdictions. This article demonstrates that determining the weight to attach to a forum selection agreement in implying a choice of law is ill-defined, notoriously complex, and a hotly debated issue, both in theory and practice. It explains why the topic is singled out for attention in this article. The article does not examine the applicable law for a forum selection agreement, which is a separate issue.

The central question in this article may be worded as follows: what should be the global significance of a forum selection agreement as an indicator of the implied choice of law in international contracts? This article's key and distinct contribution is that based on a comparative perspective it is devoted to suggesting a theoretical framework of a guide to global uniform criteria for the significance of a forum selection agreement in implying a choice of law in contracts. Previously, scholars have failed to commit to providing a clear guide to such global uniform criteria.[3] For example, in a recent study, Garth Bouwers proposed a 'case-by-case basis, avoiding fixed criteria' in using a forum selection agreement as an indicator to imply a choice of law.[4]

This article adopts a different approach based on the premise that a guide to global uniform criteria would contribute to greater certainty and predictability in international commercial transactions. To achieve this, the article presents all relevant international, regional, and supranational instruments, as well as examines selected legal systems in Africa, Asia, Australasia, Europe, the Middle East, and North and South America. The legal systems compared include those from the global North and global South, including common law, civil law, and mixed legal systems. A study of this nature could also impact on theory and practice in rethinking the subject. The article's core proposition is that an exclusive forum

[2] JL Neels and EA Fredericks, 'Tacit Choice of Law in the Hague Principles on Choice of Law in International Contracts' (2011) *De Jure* 101, 106–7; Symeonides (ibid), 121. See also, GJ Bouwers, *Tacit Choice of Law in International Commercial Contracts – A Global Comparative Study* (Cham: Schulthess 2021), 68–75; Girsberger et al (ibid).

[3] Bouwers (ibid); JL Neels, 'Choice of Forum and Tacit Choice of Law: The Supreme Court of India and the Hague Principles on Choice of Law in International Commercial Contracts (an Appeal for an Inclusive Comparative Approach to Private International Law)' in UNIDROIT (ed), Eppur Si Muove — The Age of Uniform Law: Essays in Honour of Michael Joachim Bonell to Celebrate his 70th Birthday (UNIDROIT 2016), 358. *Cf* M Scherer, 'Le choix implicite dans les jurisprudences nationales: vers une interprétation uniforme du règlement? – L'exemple du choix tacite résultant des clauses attributives de juridiction et d'arbitrage' in S Corneloup and N Joubert (eds), *Le règlement communautaire* 'Rome I' *et le choix de loi dans les contrats internationaux* (Litec 2011), 253.

[4] Bouwers (ibid), 237, 247.

selection agreement should be a significant factor to consider in implying a choice of law. However, except in cases where, for example, a forum is chosen on a neutral basis, there should be a general requirement of corroboration with at least one other significant factor.

To achieve this aim, the article is divided into four sections, including the introduction and conclusion. The second section critically evaluates the approach that should be taken to identify the implied choice of law, whereupon three alternatives are considered: no implied choice of law, a liberal approach, and a strict approach. A strict approach finds favour in this article in that, *inter alia*, it will balance the requirement for certainty and flexibility in international commercial practice. It will also retain the significance given to a forum selection agreement in implying a choice of law. The third section then critically evaluates various factors to consider regarding the significance of a forum selection agreement in implying a choice of law. These factors are identified as whether: (i) it should be a decisive factor or strong presumption; (ii) it should be neither a decisive factor nor strong presumption; (iii) corroboration is required; (iv) the neutrality of the chosen forum is a strong indicator; (v) the nature of the forum selection agreement is considered; or (vi) there are negative or conflicting inferences. The fourth section concludes by suggesting a draft model instrument and the core proposal.

II. The notoriously difficult issue of an implied choice of law: what is the solution?

1. No implied choice of law

The focus here is whether there is even a need to retain the doctrine of an implied choice of law, as some scholars have suggested its deletion in the past.[5] If the doctrine of implied choice of law is deleted, then a consideration of the significance of a forum selection agreement as an indicator of an implied choice of law will be otiose. There are several reasons that could be advanced in favour of doing away with the doctrine of an implied choice of law. First, its deletion could lead to more certainty, predictability, and uniformity in the choice of law process worldwide. Eradicating the doctrine would encourage practitioners to advise their clients to either make an express choice of law or simply leave it for the forum to determine. Discretion and flexibility are required by the decision-maker in determining the applicable law, where no express choice is made. However, discretion and flexibility are the enemies of certainty, predictability, and uniformity.[6] For example, even with a uniform instrument like the Convention on the Law Applicable to Contractual Obligations (Rome Convention),[7] a divergent practice existed for implying a choice of law under the Convention's Article 3 in the English and German courts, who applied a relatively low threshold, and the courts of other Member States, like France, which applied a high threshold.[8]

In addition, the doctrine of an implied choice of law is artificial and appears to be a legal fiction,[9] as there is a degree of conjecture in attributing a choice to parties, which they might

[5] CSA Okoli and GO Arishe, 'The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation' (2012) 8 Journal of Private International Law 513, 524–9; J Hill and M Shúilleabháin, *Clarkson and Hill's Conflict of Laws* (5th edition, Oxford: Oxford University Press 2016), 224, para 4.43.

[6] R Fentiman, 'Choice of Law in Europe: Uniformity and Integration' (2007–08) 82 Tulane Law Review 2021, 2048.

[7] Art 18 of Convention 90/934/EEC on the Law Applicable to Contractual Obligations Opened for Signature in Rome on 19 June 1980 (Rome Convention).

[8] The Green Paper on the Conversion of Rome Convention of 1980 on the law Applicable to Contractual Obligations into a Community Instrument and its Modernisation, COM (2002) 654 final, 14 January 2003 [3.2.4.1–3.2.4.3]; Scherer (n 3); MP Fons, *Elección tácita de ley en los contratos internacionales* (Thomson Reuters Aranzadi, Spain), 49–58; A Bonomi, 'The Principles of Party Autonomy and Closest Connection in the Future EC Regulation "Rome I" on the Law Applicable to Contractual Obligations' (2005) 3 *DeCITA, derecho del comercio internacional, temas y actualidades* 335.

[9] *Miller Farm Equipment* [2005] *Inc v Mike Shewchuk* [2009] CarswellSask 292 [26]; *Pacific Recreation Pte Ltd v S Y Technology Inc (Pacific Recreation)* [2008] 2 SLR 491 (CA) [47] (citing, *inter alia*, J-G Castel, *Canadian Conflict of Laws*, 4th ed (Toronto: Butterworths 1997), 448.

never have considered.[10] If the parties have not made an express choice of law, it is likely that the forum is undertaking for them towards this end under the guise of an implied choice. Had the parties thought about their choice of law, they should have expressed it in their contract or left it for the forum to determine in the absence of an explicit choice. Thus, the doctrine of an implied choice of law might be regarded as intellectually dishonest. This could explain why some judges, in the absence of express choice, move directly to the third stage of the law (especially the principle of close connection)—applicable law in the absence of express and implied choice of law. This position also exists in the judicial decisions of many common law countries, such as Australia[11] and common law Africa,[12] in applying the principle of closest connection. In one case, a court in Hong Kong held that '[i]n the absence of an express agreement on the proper law of the contract, the law implies that the proper law is that system of law which has the closest and most real connection with the transaction'.[13] Moreover, in one decided case in New Zealand, the court held that, where there is no express choice of law, the court must engage in 'an objective test, not a search for the parties' subjective implicit intentions' in order 'to identify the law with which the contract is most closely connected'.[14] Furthermore, a judge in Singapore held: 'At this juncture, the proper approach would be to move on to the third stage. . . . It is not always the case that the parties' intention as to governing law can be realistically inferred and it is better in such instances to acknowledge that it may be a fruitless and artificial exercise to embark on the second stage of the test.'[15]

Furthermore, an implied choice of law could frequently serve as a pretext for the forum to apply its own law. The element of discretion can be tailored in such a way as to ensure that the decision on whether to imply a choice of law normally leads to the law of the forum being applied. For example, under Article 3 of the Rome Convention, English judges have implied a choice of English law in many cases.[16] Thus, the doctrine of an implied choice of law may lack transparency in practice, and could ultimately be used to serve protectionist goals, such as promoting the law of the forum being applied for economic reasons.[17] Finally, the same factors that are used in implying a choice of law may also be used in determining the applicable law in the absence of a choice—principle of closest connection and/or escape clauses. This is evidenced in practice in certain cases under English law.[18] For example, in

[10] *Lawlor v Mining and Construction Mobile Crushers Screens Ltd* [2013] EWCA Civ 365 [32]; PB Carter, 'The Proper Law of the Contract' (1950) 3 International Law Quarterly 255, 259.

[11] *A-G (Botswana) v Aussie Diamond Products Pty Ltd (No 3)* [2010] WASC 141 [206–7] (the Court's conclusions on this point were not challenged on appeal: *Attorney-General of Botswana v Aussie Diamond Products Pty Ltd* [No 2] [2012] WASCA 73 [56]); *Fleming v Marshall* [2011] NSWCA 86, (2011) [78–81]; *Thomson Aviation Pty Ltd v Dufresne* [2011] NSWSC 864 [17]; *Busst v Lotsirb Nominees Pty Ltd* [2002] QCA 296 [14]; *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 141 ALR 374, 391.

[12] RF Oppong, 'Common Law Africa: Common Law African Perspectives on the Hague Principles' in Girsberger et al (n 1) para 11.14. See, for example, the Kenyan Case of *Karachi* [1965] ALR Comm 42, 53, 56–8.

[13] *First Laser Ltd v Fujian Enterprises (Holdings)* [2008] HKEC 227 [75].

[14] *Chevalier Wholesale Produce Ltd v Joes Farm Produce Ltd* HC Auckland CIV 2010-404-4229, 17 November 2011 [19].

[15] *Pacific Recreation* (n 9), [47]. See also, *Shaikh Faisal v Swan Hunter Singapore Pte Ltd* [1995] 1 SLR 394; *Sinotani Pacific Pte Ltd v Agricultural Bank of China* [1999] 4 SLR 34; *Oversees Union Insurance Ltd v Turegum Insurance Co* [2001] 3 SLR 330 [82–3]; *Las Vegas Hilton Corporation v Khoo Teng Hock Sunny* [1997] 1 SLR 341.

[16] See, for example, *BAT Industries Plc v Windward Prospects Ltd* [2013] EWHC 4087 (Comm) at [74]; *Alliance Bank JSC v Aquanta Corp* [2012] EWCA Civ 1588 [54]; *Faraday Reinsurance Co Ltd v Howden North America Inc* [2012] EWCA Civ 980 [10–12], [31]; *Golden Ocean Group Ltd v Salgaocar Mining Industries & Anor* [2012] EWCA Civ 265 [45–9]; *Pathfinder Minerals Plc v Veloso* [2012] EWHC 2856 [46]; *Star Reefers Pool Inc v JFC Group Ltd* [2011] EWHC 339 (Comm) [15–24]; *Emeraldian Ltd Partnership v Wellmix Shipping Ltd* [2010] EWHC 1411 [170-171]; *Gard Marine & Energy Ltd & Or v Glacier Reinsurance AG & Or* [2010] EWCA Civ 1052 [37–45]; *FR Lurssen Werft GMBH & Co KG v Halle* [2010] EWCA Civ 587 [20–2]; *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange* [2010] EWHC 2279 [23]; *Marubeni Hong Kong & South China Limited v Mongolia* [2002] All ER (Comm) 873 [41–3]; *CGU Intl Insurance Plc v Ashleigh v Szabo & Ors* [2002] 1 All ER (Comm) 83 [33]; *Tiernan v Magen Insurance Co Ltd* [2000] ILPr 517 [12–13]; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [1999] 2 All ER (Comm) 54.

[17] See further, MP Fons, 'Commercial Choice of Law in Context: Looking Beyond Rome' (2015) 78 Modern Law Review, 241–95.

[18] *Tiernan v Magen* (n 16) [12–13]; *Gan Insurance* (n 16); *American Motorists Insurance Co v Cellstar Corp* [2003] EWCA Civ 206; *New European Bank for Reconstruction and Development v Tekoglu & Ors* [2004]

Singapore, one judge held that '[t]o bypass the second stage is not as significant a step as it seems in that the same factors as those considered at the second stage would often have to be addressed when one seeks, at the third stage, to determine the law which has the closest and most real connection with the contract'.[19]

This blurs the distinction between an implied choice of law and the law applied in the absence of choice, resulting in their being conflated and merging with each other.[20] In determining the applicable law in the absence of a choice, a forum is not constrained in the factors it should consider, but can consider the factors used to imply a choice of law.[21] One obvious example is the doctrine of very closely related contracts (that is, a single law applying to similar contracts), which is significant in either implying the choice of law or determining the applicable law in the absence of choice.[22] Conversely, there have also been a number of decided cases in England,[23] New Zealand,[24] Ghana,[25] Kenya,[26] Israel,[27] Japan,[28] Lebanon,[29] Qatar State,[30] Bahrain,[31] Switzerland,[32] and many national courts in the European Union (EU),[33] where judges have used objective connecting factors like, *inter alia*, the place of performance, place of concluding the contract, place of the parties' residence, and payment currency to imply a choice of law. This may explain why some judges in New Zealand have referred to and used the concepts of implied choice of law and applicable law in the absence of choice interchangeably.[34] Similarly, a Canadian judge held that in the absence of an express choice of law, 'the court must determine whether the proper law can be inferred from the terms of the contract and the surrounding circumstances, an exercise that requires the Court to determine the system of law that has the closest and most

EWHC 846 (Comm); *Emeraldian* (n 16); *Pathfinder* (n 16); *Golden Ocean* (n 16). See also, *Mahmood v The Big Bus Co* [2021] EWHC 3395 (QB) [68–9].

19 *Pacific Recreation* (n 9), [47]

20 *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 [265]; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50, 69; *York Airconditioning & Refrigeration Inc v Lam Kwai-Hung Trading as North Sea A/C Elect Co* [1995] 2 HKLR 256 [20] (Hong Kong).

21 *British Arab Commercial Bank Plc v Bank of Communications and Commercial Bank of Syria* [2011] EWHC 281 (Comm) [32].

22 See Recitals 20 and 21 of EC Regulation 593/2008 on the Law Applicable to Contractual Obligations (Rome I Regulation). The doctrine of very closely related contracts in implying a choice of law should only apply where it is both an express choice of law in the main contract and between the same parties. See M Giuliano and P Lagarde, Report on the Convention on the Law Applicable to Contractual Obligations (Giuliano–Lagarde Report) [1980] OJ C282/1, 17.

23 *Stonebridge* (n 16), [35]; *Lupofresh Ltd v Sapporo Breweries* [2013] EWCA Civ 948 [17]; *American Motorists Insurance* (n 18), applying art 3 of the Rome Convention. See also, *Coast Lines Ltd v Hudig and Veder Chatering NV* [1972] 2 QB 34, 50, which is a common law decision.

24 *Bexhill Funding Group Ltd v MBA Ltd* HC Wellington CIV 2003-485-205, 15 September 2003 [33]; *New Zealand Club Mediterranée NZ v Wendell* [1989] 1 NZLR 216 (CA).

25 *Fattal* [1999–2000] GLR 331, 351; *Société Générale de Compensation* [1972] 1 GLR 413, 421–3; *Godka Group of Companies v PS International Ltd* [1999–2000] 1 GLR 409, 420.

26 *Radia* [1975], Eklr 1.

27 *Chaim Efrima, Adv v HP Capital Ltd* CA (Tel-Aviv) 2385/00, tak-District 2002(2), 6350 (27 June 2002). Cited in T Einhorn, Israel, 'Israeli Perspectives on the Hague Principles' in Girsberger et al (n 1), para 27.42, footnote 26.

28 Tokyo HC, 19 July 1982, 1051 HJ 149 [*Northwest Airlines*]; ex-Art 479 Commercial Code (Law No 48 of 9 March 1899); The Tokyo DC judgment of 30 March 1998 (1658 HJ 117). Cited in Y Nishitani, 'Japan: Japanese Perspectives on the Hague Principles' in Girsberger et al (n 1), para 28.23, footnotes 60–1.

29 Cassation Court, 1st Civ Ch, 28 January 1999 [1999] Baz 191; First Instance Court of Beirut, no 326, 27 May 2003, unpublished; Appeal Court of Mount Lebanon, 20 May 2004 [2004] 5 Cassandre 865. Cited M-C N Kobeh, 'Lebanon: Lebanese Perspectives on the Hague Principles' in Girsberger et al (n 1), para 30.27, footnotes 27 and 30.

30 Qatar State, Court of Appeal, decision No 39/1992, dated 7 November 1992, 271. Cited in A Dawwas, 'Palestine: Palestinian Perspectives on the Hague Principles' in Girsberger et al (n 1), para 33.30, footnote 57.

31 BCC, Appeals No 143 and 158/1994 of 4 December 1994 (Appeal No 143/1994). Cited in B Elbalti and HO Shaaban, 'Bahrain: Bahraini Perspectives on the Hague Principles' in Girsberger et al (n 1), para 20.30, footnote 80.

32 Federal Court, 19.01.2001-4C.54/2000. Cited in TK Graziano and H Meyle, 'Switzerland: Swiss Perspectives on the Hague Principles' Girsberger et al (n 1), para 48.33, footnote 32.

33 TK Graziano et al, 'European Union: European Union Perspectives on the Hague Principles' in Girsberger et al (n 1), para 43.44. See, for example, Rb. Den Haag 28 May 2014, ECLI:NL:RBDHA:2014:7406 [4.4].

34 *McConnell Dowell Constructors Ltd v Lloyd's Syndicate* [1988] 2 NZLR 257 (CA) 272–3.

real connection to the contract'.[35] Recently, a Kenyan court also held that 'the court was able to clearly discern and establish the tacit or implied choice of the parties in the present case, being in this case the law with the close connection to the place of characteristic performance of the contract'.[36]

The doctrine of an implied choice of law may therefore be regarded as a waste of resources and one that leads to delays and increases transaction costs. If parties were solely required to apply the express choice of law, and the law in the absence of choice stage, more resources could be saved and devoted to other goals.

Despite the above critique, there may be some good reasons for retaining the doctrine of an implied choice of law. It is not in all transactions that parties will explicitly choose the law to be applied, and there should be deserving cases where the forum can imply the choice of law. In this article, the key reason for advancing the doctrine of an implied choice of law is based on the use of a forum selection agreement as an indicator of this implicit choice. The truth is that an implied choice of law will not always give rise to the same decision as the applicable law in the absence of choice, especially where a forum selection agreement is the main indicator of an implied choice of law. Usually, little or no significance is given to a forum selection agreement in determining the applicable law in the absence of choice, as compared to objective connecting factors.[37] This is especially the case where the chosen forum has no objective connection to the parties, therefore constituting a forum chosen on a neutral basis. The use of a forum selection agreement as a significant factor, even in combination with another significant factor, may point to an implied choice of law in favour of one country. However, where the doctrine of the applicable law in the absence of choice is adopted, objective connecting factors may successfully lead to the law of a different country being applied.[38] Consequently, if the doctrine of an implied choice of law is deleted, it could mean the adoption of a narrow view of party autonomy. Furthermore, the doctrine of an implied choice of law is now a widely accepted global practice, except in countries like China,[39] Taiwan,[40] Dubai,[41] and Peru.[42] By analogy, the doctrine of implying terms into a contract is likewise a widely established practice, particularly in common law jurisdictions.[43] Altering this more or less globally accepted practice and conformity to propose very radical reform, in terms of deleting the option of implied choice of law, could disrupt international commercial practice.[44] Furthermore, an implied choice of law 'meets a need in modern commercial practice'.[45] It is a private international law process that completes the contract. By analogy, a Kenyan court recently held that '[i]mplied contract terms are items that a court will assume are intended to be included in a contract, even

[35] *Richardson International, Ltd v Ship Mys Chikhacheva* [2002] 4 FCR 80, 2002 FCA 997 (CanLII) [28].

[36] *Fredrick Otieno Oluoch v Oryx Energies (K) Limited & another* [2020] ELRC No 128 of 2017 [79]. See also. *Radia* (n 26), 5.

[37] By analogy on the law applicable to torts in art 4 of the Rome II Regulation, see *Winrow v Hemphill* [2015] ILPr 12 [45], [61]. *Cf Stylianou v Toyoshima* [2013] EWHC 2188 (QB) [79–82]. See also, CSA Okoli and E Roberts, 'The Operation of Article 4 of Rome II Regulation in English and Irish Courts' (2019) 15 Journal of Private International Law 605, 623.

[38] See the English cases, *Egon Oldendorff v Libera Corp* (No 2) [1996] CLC 482; *Hellenic Steel Co v Svolmar Shipping Co Ltd, The Komninos S* [1991] 1 Lloyd's Rep 370, 376. *Cf GDE LLC and another v Anglia Autoflow Ltd* [2020] EWHC 105 [122–59] (Dias QC); *Lawlor* (n 10) [26–8]; *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm). For Hong Kong, see *Chan Chi Keung & Another v Delmas Hong Kong Ltd* [2004] HKEC 10422004 WL 6684 [41–7]. For Hungary, see Judgment 2020.3.72.a, 31 October 2019 (Hungarian Supreme Court), [9], [14–22].

[39] Art 3 of the Chinese Private International Law Act 2010; art 8(2) of the (p 440) Supreme People's Court Private International Law Interpretation 2012. Cited in Q He, 'China (Mainland): Chinese Perspectives on the Hague Principles' in Girsberger et al (n 1), para 21.17, 21.24.

[40] Art 20(1) of the Taiwanese Private International Law Act 2010.

[41] Art 9 of the Dubai International Financial Centre Application Law No 10 of 2005.

[42] Art 2095 of the Peruvian Civil Code 1984.

[43] *Vizcaya Partners Ltd v Picard* [2016] UKPC 5 [58].

[44] See also, Bouwers (n 2), 216–17.

[45] P Mankowski, 'Article 3 of Rome I Regulation' in U Magnus and P Mankowski, *European Commentaries on Private International Law vol II* (Munich: Sellier European Law Publishers 2017), para 106.

though they are not expressly stated. *Implied terms occur because all contracts are necessarily incomplete*'.[46]

To conclude here, retaining the doctrine of an implied choice of law would retain some of the necessary flexibility in international commercial practice. It would also retain the significance of a forum selection agreement as an indicator of an implied choice of law. If the doctrine of an implied choice of law is deleted, the potential significance of a forum selection agreement as an indicator of the implied choice of law would be otiose. Therefore, the deletion of an implied choice of law is not the solution proposed in this article.

2. A liberal approach to an implied choice of law

Another possibility on the extreme side is to have a liberal approach to implying a choice of law. This approach would give a great deal of weight to a forum selection agreement as an indicator of an implied choice of law and could even give decisive weight. A liberal approach means that the threshold for determining whether the parties have made an unexpressed choice of law will be very low. This is otherwise referred to as hypothetical will or imputed intention. It is in fact the practice in some common law jurisdictions, as established by the Privy Council when it held that 'the Court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract'.[47] This approach has been reflected in cases in Hong Kong[48] and South Africa[49] and in Angola and Mozambique statutes.[50]

The way in which an instrument is drafted, a judicial test is stated, or a low threshold of an implied choice of law is practised are all ways of demonstrating a liberal approach to an implied choice of law. For example, the wording 'necessary implication',[51] used by Lord Diplock in implying a choice of law, has been suggested as a low threshold.[52] Meanwhile, the wording 'reasonable certainty',[53] under Article 3 of the Rome Convention, has also been regarded by some scholars as a low threshold for implying a choice of law.[54] The addition of the word 'reasonable' to 'certainty' indicates a liberal approach to implying a choice of law because a reasonable implication of the parties' choice of law may not be strict.[55] The legislative history and development of Article 3 of EC Regulation 593/2008 on the Law Applicable to Contractual Obligations (Rome I Regulation) (from Article 3 of the Rome Convention) suggests that the change in the wording 'clearly demonstrated' (from 'reasonable certainty') was to render the test for implying a choice of law more stringent.[56] However, this refutes the position adopted by some English judges and scholars, wherein

[46] *Polyphase Systems Limited v Sterling & Wilson Solar Limited; Malindi Solar Group Limited (Interested Party)* [2021], eKLR [115] (emphasis added). I am grateful to my student Anam Majid for referring me to this case.

[47] *Mount Albert Borough v Australasian Temperance and General Mutual Life Assurance Society, Ltd* [1938] AC 224, 240. (Privy Council). See also, *Amin Rasheed* (n 20), 60–5.

[48] *Century Yachts Ltd v Xiamen Celestial Yacht Ltd* [1994] 1 HKC 331 [31].

[49] *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171, 185.

[50] Art 41 of both the Angolan and Mozambican Civil Codes indicate as the applicable law the one that parties 'have designated or have had in view'. Cited in R Dias and CF Nordmeier, 'Angola and Mozambique: Angolan and Mozambican Perspectives on the Hague Principles' in Girsberger et al (n 1), para 10.20.

[51] *Amin Rasheed* (n 20), 61.

[52] M Phua and M Chan, 'Persistent Questions after Enka v Chubb' (2021) 137 Law Quarterly Review 216, 220–1; BA Marshall, 'Reconsidering the Proper Law of the Contract' (2012) 13 Melbourne Journal of International Law 505, 516. *Cf Enka Insaat* (n 20), [35].

[53] Similar wording is used in s 25(1) of the Private International Law Act of South Korea (Act No 6465 of 2001 as last amended by Act No 13759 of 2016), and art 24(1) of the Turkish Civil Code on Private International Law 2007.

[54] M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford: Oxford University Press 2015), [9.37]; Scherer (n 3); PR Beaumont and PE McEleavy, *Private International Law AE Anton* (3rd edition, Edinburgh: W Green, 2011), 444 para 10.70; Bouwers (n 2), 218–19.

[55] 'The mere fact that it would be "reasonable" will not suffice'; *American Motorists Insurance* (n 18), [44]. See also *GDE* (n 38), [119–20], (Dias QC) [120].

[56] McParland (n 54), paras 9.37–9.72. See also, Lord Lawrence Collins and Jonathan Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th edition, London: Sweet and Maxwell 2022), 32-087.

the new Article 3 of Rome I Regulation was merely included to align the English and German language versions with that of the French.[57]

The use of objective connecting factors, such as the place of performance, place of concluding the contract, parties' place of residence, and payment currency to imply a choice of law is a liberal approach to this implication. This is because these factors are more appropriate for determining the applicable law in the absence of choice. There are three other significant ways in which common law practice lowers the threshold for implying a choice of law, the first being the validation principle. This means that if the parties' contract is valid under one law but invalid under another, the parties are presumed to have intended their contract to be governed by the valid law, as applied in common law England,[58] Canada,[59] and Australia.[60] If this approach is generally applied,[61] the threshold for implying a choice of law will be low and will also confuse the issue of contract validity with the implied choice of law.

The second is the use of a particular law's expertise in a transaction as a basis for implying a choice of law. This means that, for example, if English law possesses expertise and is very developed in reinsurance contracts, compared to another law, the parties will be presumed to have intended English law to govern their contract in the absence of an express choice of law.[62] If this approach is applied generally, the threshold for implying a choice of law will be low and could lead to the forum using it as a pretext for applying its own law.

The third is the use of commercial expectations as a basis for implying a choice of law. In one case, an English court held that in the absence of an express choice, 'the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intentions of the parties'.[63] This approach has been justified by Richard Fentiman, who argues that, in determining the parties' intentions, the decision-maker should consider the commercial context, and if the commercial expectations doctrine represents a legitimate practice in determining the applicable law in the absence of choice, there is no good reason why it should not be used to determine the intention of the parties.[64] This approach lowers the threshold of an implied choice of law because the factors used to determine the applicable law in the absence of choice—for example, the place of performance (being the essence of a contract) and the professional's habitual residence (being the place of the crucial planning of the essence of a contract)—can be significantly utilized in this inquiry since the above factors are based on commercial expectations.

Nevertheless, there is no suggestion that a court should not look at the commercial context of a contract or case. Indeed, using the terms of the contract and circumstances of the case will permit this exercise. The main quarrel with the commercial expectations approach

[57] *Cf Lawlor* (n 10) [3]; *Aquavita International SA v Ashapura Minecham Ltd* [2014] EWHC 2806 (Comm) [20], both Cases citing scholars.

[58] *Enka Insaat* (n 20), [95]; *Lancashire County Council v Municipal Mutual Insurance Ltd* [1997] QB 897, 910; *Monterosso Shipping Co Ltd v International Transport Workers' Federation* [1982] ICR 675 (CA); *Coast Lines* (n 23); *Co Tunisienne de Navigation v Co d'Armement Maritime* [1971] AC 572, 598; *Sayers v International Drilling* [1971] 3 All ER 163; *J Smits Import-Export NV v English Exporters (London)* Ltd [1955] 2 Lloyd's Rep 317 (CA); *Spurrier v La Cloche* [1902] AC 445; *South African Breweries v King* (1899) 2 Ch 173, 181; *Hamlyn & Co v Talisker Distillery* (1894) AC 202, 208; *Re Missouri Steamship Co* (1889) 42 Ch D 321; *Peninsular Line v Shand* (1865) 16 ER 103.

[59] *Miller Farm* (n 9), [50] (citing Castel (n 9), 448); *Morgaurd Trust Company v Affkor Group Ltd* 1984 CanLII 781 (BC CA) [30–1]; *Nike Infomatic Systems Ltd v Avac Systems* Ltd 1979 CanLII 667 (BC SC) [22–4]; *Etler v Kertesz* 1960 OR 672 CanLII 128, 142.

[60] *Tipperary Developments Pty Ltd v Western Australia* [2009] WASCA 126, (2009) 38 WAR 488 [72]; *Monterosso* (n 58).

[61] It is possible that this doctrine could operate strictly in implying a choice of law, specifically in cases of applying an express choice of law in a contract to another very closely related contract, on the basis that an incongruous solution would not have been intended by the parties. However, this should not be the general rule.

[62] *Amin Rasheed* (n 20); *Marubeni* (n 16), [41–3].

[63] *Jacob, Marcus & Co v Credit Lyonnais* (1884) QBD 589, 601.

[64] R Fentiman, *International Commercial Litigation* (2nd edition, Oxford: Oxford University Press 2015), para 5.69.

is that it can lead to uncertainty, and the possibility of tailoring the applicable law to suit the forum. Expectations can mean different things, depending on the context. For example, there may be a commercial expectation to generally apply the law of the forum because it saves costs and time. The parties may also have conflicting commercial expectations of applying their law. Moreover, the truth is that expectations and intentions are not the same thing; expectations are not really concerned with proof of intentions.[65]

To conclude here, a liberal approach could give greater utility to a forum selection agreement as a basis for implying a choice of law because it will often be used positively. However, the problem with this approach is that it is arbitrary and gives too much discretion and flexibility to the judge. This flexibility and discretion can then be abused, leading to uncertainty, unpredictability, a lack of uniformity, and a general application of the law of the forum, even in cases where it is not justified. Therefore, the use of a liberal approach in implying a choice of law is not an approach that is subscribed to in this article, particularly as it relates to the significance of a forum selection agreement as an indicator of an implied choice of law.

3. A strict test for an implied choice of law

A strict test can also be used as a basis for implying a choice of law. This is a middle ground between no implied choice of law and a liberal approach to an implied choice of law, which were discussed in the preceding sections. A strict approach will allow a forum selection agreement to be used as an indicator for implying a choice of law, but its operation will be properly policed. In theory, a strict test for implying a choice of law means that the parties actually made a choice of law for their international contract but there was a flaw in communicating that choice explicitly.[66] The way in which an instrument is drafted, a judicial test is stated, or a high threshold of an implied choice of law is practised, are all ways of demonstrating a strict approach to implying a choice of law. For example, in determining an implied choice of law, the following wording demonstrates a strict test: 'apparent',[67] 'clearly demonstrated',[68] 'must be evident',[69] 'clearly evident',[70] 'certain and evident',[71] 'appear clearly',[72] 'manifestly clear',[73] 'inferred with certainty',[74] 'unambiguous',[75] 'properly

[65] *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] 3 WLR 1843 [14–21], [57], [75], [77]. *Cf Coward v Ambrosiadou* [2019] EWHC 2105 (Comm) [164–6].

[66] L Gama, 'Tacit Choice of Law in the Hague Principles' (2017) 17 *Uniform Law Review* 336; A Briggs, *Private International Law in English Courts* (2nd edition, Oxford: Oxford University Press 2023), 448–9.

[67] Art 19(1) of the Civil Code of United Arab Emirates (Federal Law No 5 of 1985).

[68] Art 3 of Rome I Regulation; art 7(1) of the Hague Convention on the Law Applicable to Contracts for International Sales of Goods 1986; art 575(1) of the Organization for the Harmonization of Business Law in Africa (OHADA) Preliminary Draft Uniform Act 2015; § 81.120(2) of Oregon Revised Statute 2005. Although the addition of the word 'demonstrated' has been criticized for being one of procedural proof that is inappropriate in a choice of law context (JL Neels, 'The Role of the Hague Principles on Choice of Law in International Commercial Contracts in the Revision of the Preliminary Draft Uniform Act on the Law of Obligations in the OHADA Region' (2018) Journal of Contemporary Roman–Dutch Law 464, 469; Neels and Fredericks, (n 2) 106), it is submitted that this standard on implied choice of law is still stringent.

[69] Art 7 of the Inter-American Convention on the Law Applicable to International Contracts 1994 (Mexico City Convention).

[70] Art 116(2) of the Swiss Private International Law Act 2018.

[71] Art 2651 of the Civil and Commercial Code of Argentina 2015.

[72] Art 4 of the Principles on Choice of Law in International Commercial Contracts 2015 (Hague Principles); art 3(3)(1) Asian Principles on Private International Law 2018; Part 8 of Guide of the Organization of American States on the Applicable Law to International Commercial Contracts 2019; art 6 of Paraguayan Law 5953 on the Law Regarding the Applicable Law to International Contracts 2015. Art 4 of the Hague Principles was the first to use the wording 'appear clearly', and these other laws referred to in this footnote were inspired by that provision.

[73] Art 5(2) of the draft of the envisaged African Principles on the Law Applicable to International Commercial Contracts. See JL Neels, 'The African Principles on the Law Applicable to International Commercial Contracts – A First Drafting Experiment' (2021) 25 Uniform Law Review 426, 431; JL Neels and EA Fredericks, 'The African Principles of Commercial Private International Law and the Hague Principles' in Girsberger et al (n 1), paras 8.09–8.11.

[74] Art 3111 of the Civil Code of Quebec 1991.

[75] Art 2(2) of the Hague Sales Convention 1955; art 1210(2) of the Russian Civil Code of 2002.

inferred',[76] 'clearly relied upon',[77] 'realistically inferred',[78] 'not readily implied',[79] 'clearly inferred',[80] and 'without reasonable doubt'.[81] The inclusion of the sentence, 'was so obvious that it went without saying and was one which the parties would have said "of course". The mere fact that it would be "reasonable" will not suffice'[82] also suggests a strict standard.

The test that is preferred when applying a strict standard for implying a choice of law is one where it would 'appear very clearly'. This is a slightly modified version (with the addition of 'very') of the one used in Article 4 of the Principles on Choice of Law in International Commercial Contracts (Hague Principles). It admits that a choice of law is being implied with the use of the word 'appear'. It also adds the word 'very' to emphasize the strictness of the standard for implying a choice of law. Some academic and judicial authorities have taken the stance that a strict approach to implying a choice of law is the parties' 'real choice of law'[83] and one of 'true intention'[84] or 'real intention'.[85] These views are, however, open to question. This is because the distinction between 'implying', on the one hand, and 'imputing', on the other hand, a choice of law in determining the intention of the parties is difficult to appreciate and apply in practice. In any given case, one decision-maker's implication is another decision-maker's imputation.[86] Moreover, the United Kingdom Supreme Court (UKSC) has rightly held that the distinction between an express and implied choice of law is not a sharp one because there is still some element of judicial discretion and inference in implying a choice of law.[87] Thus, the better view is that the strict approach is a case where the bar is raised high in implying a choice of law. Hence, the discretion exercised in implying a choice of law is properly policed. It is suggested that the better test is that the 'inference to be drawn from the facts must be irresistible'.[88] This approach admits that the choice of law is implied, but the standard is stringent.

The burden of proof in implying a choice of law rests on the party putting the case forward.[89] This is justified on the basis of making the requirement for implying a choice of law strict, and reducing the problem of creating a clear distinction between an implied choice of law and the law in the absence of choice.[90] The threshold for such a party who seeks to rely on an implied choice of law is a 'high hurdle'.[91] This means that the test for an implied choice of law is not readily satisfied without appearing very clearly to the decision-maker. Where the evidence presented on an implied choice of law is vague, ambiguous, ambivalent, or creates a reasonable doubt, the decision-maker should not imply a choice of law.[92] Indeed, it has been held that a court should not strain itself to find an implied choice of law.[93] In such cases, the court should rather move on to determining the applicable law in the absence of an express and implied choice of law.[94]

[76] See the Australian Cases of *John Kaldor Fabricmaker Pty Ltd v Mitchell-Cotts Freight (Australia) Pty Ltd* (1989) 18 NSWLR 172, 186; *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418, 441. See the Canadian Cases, *O'Brien v Canadian Pacific Railway Company* (1972) CanLII 807 (SKCA) [14]; *Snap-On Tools Canada Ltd v Korosec* (2002) BCSC 1844 (CanLII) [10].

[77] Art 3540 of Louisiana Civil Code 2009.

[78] *Pacific Recreation* (n 9), [47].

[79] See the South African Case, *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 2 SA 138, 145.

[80] See the Indian Case, *National Thermal Power Corporation v Singer Company* (1992) SCR (3) 106, 118. See also, Australian Law Reform Commission Report 58 on Choice of Law (28 May 1992) 84.

[81] Art 3, para 1 of Act No 43/2000 Iceland.

[82] *American Motorists Insurance* (n 18), [44].

[83] Art 4.6 of the Hague Principles Commentary; Giuliano–Lagarde Report (n 22), 17.

[84] *National Thermal* (n 80), 119.

[85] Art 4.6 of the Hague Principles Commentary; Fentiman (n 64), paras 5.68–5.69.

[86] *Jones v Kernott* [2011] UKSC 53 [65] (Lord Collins).

[87] *Enka Insaat* (n 20), [35].

[88] Ibid, para 5.65.

[89] *Lawlor* (n 10), [29].

[90] Ibid.

[91] *GDE* (n 38), [120].

[92] *Lawlor* (n 10), [34].

[93] *GDE* (n 38) , [121], [154]; *FR Lurssen* (n 16), [33(3)].

[94] Ibid (all).

A strict test is an objective one.[95] Thus, evidence of what the parties would have decided, had they thought about it, is usually not admissible.[96] In other words, subjective intentions are generally excluded from the inquiry. It is suggested that a strict test should not apply the validation principle; the parties generally intend that their transaction should be governed by a law that is valid rather than invalid.[97] Neither should a strict test apply the approach where the expertise of the law is sought—namely, where it is generally intended that a more sophisticated law in a commercial transaction will govern the parties' commercial transaction.[98] Neither should the strict test generally apply the test of reasonable commercial expectations in implying a choice of law.[99] Moreover, the strict test should not generally apply objective connecting factors, like the place of performance, place of concluding the contract, the parties' place of residence, or payment currency, in order to imply a choice of law.[100]

However, the fact that a strict test is applied in implying a choice of law does not mean that it should be applied mechanically or without thought. Consequently, it has been held that 'the circumstances which may be taken into account when deciding whether the parties have made an implied choice of law . . . range more widely in certain respects than the considerations applicable to the implication of a term into a written agreement'.[101] It also includes supervening events.[102] Additionally, the indicators (such as a forum selection agreement) to be considered in implying a choice of law are not exhaustive or fixed.[103]

The strict test for implying a choice of law results in greater certainty, predictability, and uniformity. At the same time, it preserves a minimum of flexibility and discretion, which are required to imply a choice of law. The strict test is currently the prevailing approach on the global stage for this purpose.[104] It is this strict approach that is subscribed to in the present article, where the significance of a forum selection agreement is considered as an indicator of an implied choice of law.

III. Factors to consider in using a forum selection agreement as an indicator of an implied choice of law

1. Decisive factor or strong presumption?

In some jurisdictions, a forum selection agreement is a decisive factor or strong presumption that, by implication, the parties intended that the law of the chosen forum be applied. This was especially true in English common law practice during the very late nineteenth century to the twentieth century.[105] For example, in one case, the English Court of Appeal held that

[95] See English cases of *Lawlor* (n 10), [31]; *GDE* (n 38), [119–20], (Dias QC).

[96] Ibid (all). See also Restatement (Second) § 187, comment a (stating that it 'does not suffice to demonstrate that the parties, if they had thought about the matter, would have wished to have the law of a particular state applied.').

[97] See text accompanying footnotes 58–61. See also Fentiman (n 64), para 5.68. *Cf* P Stone, *Private International Law in the European Union* (Cheltenham: Edward Elgar 2018), para 17.72.

[98] See text accompanying footnote 62. See also, Fentiman (ibid), para 5.68. *Cf* Stone (ibid), para 17.72.

[99] See text accompanying footnotes 63–5. *Cf* Fentiman (ibid), para 5.69.

[100] *Egon Oldendorff* (n 38); *GDE* (n 38), [120].

[101] *Aeolian Shipping SA v ISS Machinery Services Ltd* [2001] EWCA 1162 [16] (Potter LJ). See also, *Mahmood v Big Bus* (n 18), [60]; *Avonwick Holdings Ltd v Azitio Holdings Ltd* [2020] EWHC 1844 (Comm) [490]; *Coward v Ambrosiadou* (n 65), [170].

[102] *Egon Oldendorff* (n 38), 501; *Lawlor* (n 10), [12], [47]; *FR Lurssen* (n 16), [38]; *GDE* (n 38), [107]; *Mahmood v Big Bus* (n 18), [60].

[103] *Mahmood v Big Bus* (ibid), [65–9].

[104] Girsberger et al (n 1), para 1.240; Bouwers (n 2).

[105] *Hamlyn* (n 58), 208; *Spurrier* (n 58); *Tzortzis v Monarch Line A/B* [1968] 1 WLR 406, 413 (Salmon LJ); *NV Kwik Hoo Tong Handel Maatschappij v James Finlay & Co Ltd* [1927] AC 604, 608–10; *Hellenic* (n 38); *Co Tunisienne* (n 58); *Coast Lines Ltd* (n 23). See also, *Evans Marshall & Co Ltd. V Bertoia SA* [1973] I WL.R. 349, 364; *Atlantic Underwriting Agencies v Compagnia di Assicurazione di Milano* [1979] 2 Lloyd's Rep 240, 245; *Bangladesh Chemical Industries v Henry Stephens Shipping* [1981] 2 Lloyd's Rep 389, 392 (CA); *Compania Naviera Micro SA v Shipley International Inc.* [1982] 2 Lloyd's Rep 351, 353 (CA); *Ilyssia Compania Naviera SA v Ahmed Abdul-Qawi Bamaodah* [1985] 1 Lloyd's Rep. 107, 112; *Star Shipping AS v China National Foreign Trade Transportation* [1993] 2 Lloyd's Rep 445, 448 (CA).

in the absence of an express choice of law, an arbitration clause as an indicator of an implied choice of law 'raises an irresistible inference which overrides all other factors'.[106] In the latter case, although the House of Lords (now UKSC) disapproved of giving decisive weight to an arbitration clause in implying a choice of law, the judges in that case regarded an arbitration clause as 'a sound general rule' for implying a choice of law,[107] 'an important factor and in many cases it may be the decisive factor', [108] 'a weighty indication',[109] and a 'strong inference'.[110]

In an older edition[111] of *Dicey, Morris & Collins, the Conflict of Laws*[112] (the leading English practitioner work on conflict of laws),[113] it is stated that in the absence of an express choice of law, if the parties 'agree that the courts of a given country shall have jurisdiction in any matters arising out of a contract, they can—in the absence of evidence to the contrary—be assumed to have intended those courts to apply their own law and thus to have selected that law as the proper law of the contract'.[114] Moreover, in *Hellenic Steel Co v Svolmar Shipping Co Ltd, the Komninos S*,[115] the English Court of Appeal stated the position in stronger terms regarding choice of court agreements, to the effect that 'it should be inferred that parties intend their contracts to be governed by the law of the forum where their disputes are to be tried unless there are strong indications that they did not intend or may not have intended that result'.[116] However, this weight attached to a forum selection agreement in England, as an indicator of an implied choice of law, no longer holds true as it did in the nineteenth and twentieth centuries.[117]

Some judges in other common law countries have retained the nineteenth- and twentieth-century English common law tradition in giving great weight to a forum selection agreement as an indicator of an implied choice of law. In two decided cases in Hong Kong, given the absence of an express choice of law, an arbitration clause was regarded as a 'strong and compelling inference that the parties intended that the proper law of the contract should be the law of the forum where the parties intended their disputes to be determined'[118] and a 'strong inference that the proper law of the contract should be determined by the place of arbitration'.[119]

Meanwhile, two judges in Canada approved Castel's view,[120] to the effect that:

> [i]f the parties agree that arbitration shall take place in a particular legal unit, the court will usually, although not always, conclude that the parties have impliedly chosen the law of the legal unit of arbitration as the proper law. Similarly, if the parties agree that the courts of a particular legal unit shall have jurisdiction over the contract, there is a strong inference that the law of that legal unit is the proper law.[121]

106 *Tzortzis v Monarch Line* (ibid), 413.
107 *Co Tunisienne* (n 58) 596B (Lord Wilberforce). See also, Lord Diplock in the same case at 609E.
108 Ibid, 584E (Lord Reid).
109 Ibid, 596B (Lord Wilberforce).
110 Ibid, 609E (Lord Diplock). See also, *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm) [102]; *Bangladesh Chemical Industries* (n 105), 392.
111 JHC Morris (ed), *Dicey and Morris on the Conflict of Laws* (10th edition, London: Stevens & Sons 1980), 761.
112 Collins and Harris (eds), (n 56).
113 See *Angola v Perfectbit Ltd* [2018] EWHC 965 (Comm) [200].
114 Morris (ed) (n 111), 761.
115 (n 38).
116 Ibid, 376.
117 *Enka Insaat* (n 20), [113–17].
118 *Chan Chi Keung* (n 38), [46].
119 *York* (n 20), [32].
120 Castel (n 9), 556.
121 Approved in *Richardson* (n 35), [33–4]; *Eastern Power Ltd v Azienda Comunale Energia & Ambiente* 1999 CarswellOnt 2807 [30].

In one of these (two) cases, a Canadian judge identified the significance of an arbitration clause in implying a choice of law as '[t]he most compelling of all factors',[122] while, in another Canadian case, the court held that 'even where an arbitration clause only selects the forum of the arbitration, British and Canadian courts normally take this clause as indicative of the proper law of the contract'.[123]

Likewise, in Australia, the position is that '[a] submission to the exclusive jurisdiction of the tribunals of a particular country is an indicium of the parties' intention the law of that country is to be the proper law of their contract'.[124] In another case, an Australian court regarded an exclusive choice of court agreement as the 'determining factor' in implying a choice of law.[125] More recently, an Australian court held that '[t]here appears to be no logical reason why the parties would intend that disputes would be litigated in the courts of one of those places but upon the law of some other place'.[126]

In India, although the position is not settled, the Supreme Court once held in a leading case that:

> [w]here there is no expressed intention [in respect of the applicable law], then the rule to apply is to infer the intention from the terms and nature of the contract and from the general circumstances of the case. In the present case, two such circumstances are decisive. The first is that the parties have agreed that in the case of a dispute the Bombay High Court would have jurisdiction, and an old proverb says, '*Qui eligit judicem eligit jus*'. If Courts of a particular country are chosen, it is expected, unless there be either expressed intention or evidence that they would apply their own law to the case. The second circumstance is that the arbitration clause indicated an arbitration in India. Of such arbitration clauses in agreements, it has been said on more than one occasion that they lead to an inference that the parties have adopted the law of the country in which arbitration is to be made.[127]

Meanwhile, in Singapore, it has been held *obiter* that while an arbitration or jurisdiction clause should be distinguished from a choice-of-law clause, 'where a contract specifies a particular forum, the parties can be assumed to have intended that forum to apply the *lex fori* in the absence of any indication to the contrary'.[128]

Prior to the Rome Convention, EU civil law countries like France,[129] Germany,[130] and some Italian courts[131] gave significant weight to forum selection agreements in implying a choice of law. Under the Rome Convention, the Giuliano–Lagarde Report stated, *inter alia*, that a forum selection agreement may 'in no uncertain manner' be an indicator of an

122 *Richardson* (ibid), [32–6].

123 *JP Morgan Chase Bank v Lanner (The)* [2005] 305 DLR (4th) 442 [31].

124 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197. Approved in *RCD Holdings Ltd v LT Game International (Australia) Ltd* [2020] QSC 318 [25]. See also, *Akai Pty Ltd* (n 76), 442, 436–7; *Fabricmaker* (n 76); *Lewis Construction Co Pty Ltd v Tichauer Société anonyme* [1966] VR 341 (VSC).

125 *Lewis Construction Co Pty Ltd* (ibid), 346.

126 *RCD Holdings* (n 124), [26].

127 *Dhanrajamal Gobindram v Shamji Kalidas and Co* (1961) 3 SCR 1020 [29]. See also, *British India Steam Navigation Co Ltd v Shanmughavilas Cashew Industries* (1990) 3 SCC 481 [17]; *Modi Entertainment Network v WSG Cricket PTE Ltd* (2003) 4 SCC 341 [16]; *Shin-Etsu Chemical Co Ltd v Aksh Optifibre Ltd* (2005) 7 SCC 234 [80]; *Reliance Industries Limited v Union of India* Civil Appeal 5765 of 2014; *Shreejee Traco (I) Pvt Ltd v Paperline International Inc* (2003) 9 SCC 79 [7]. Noted in Neels (n 3), 358.

128 *Pacific Recreation* (n 9), [40].

129 Cass civ 28 June 1937, (1938) Rev crit DIP, 62; Cass civ, 1 July 1964, (1966) Rev crit DIP, 47 (cited in McParland (n 54), para 9.84, footnote 143); Cour d'appel de Paris, 21 juillet 1950, *Rev, Crit, DIP*, 1952, n° 1 (cited in Scherer (n 3), 260, footnote 16).

130 BGH 5 December 1966, (1967) AWD, p 108, IPRspr (1966/67 No 41b); KG D Dec 1955, IPRspr, 1954/55, No 186; OGHBZ 4 May 1950, IPRspr, 1950/51, No 18. Cited in McParland (ibid), para 9.84, footnote 144.

131 Trib Genova, 13 May 1964. Dir Maritt 1965, 473. Cited in McParland (ibid), para 9.104, footnote 191.

implied choice of law.[132] The English[133] and German[134] courts gave great weight to forum selection agreements in this regard under the Rome Convention. In Article 3 of Rome I, the European Commission initially proposed that 'if the parties have agreed to confer jurisdiction on one or more courts or tribunals of a Member State to hear and determine disputes that have arisen or may arise out of a contract, they shall also be presumed to have chosen the law of that Member State'.[135] However, this proposal was rejected by most representatives of EU Member States,[136] although it had the support of England[137] and some common law scholars.[138]

Similarly, in Albania, 'if the parties have chosen the jurisdiction for resolution of disputes arising out of the contract, it is presumed that they have chosen the law of that State to be applicable to the contract'.[139] Meanwhile, in Bahrain case law, a forum selection agreement is very likely to imply a choice of law,[140] and in other jurisdictions, like Nigeria[141] and Indonesia,[142] case law would suggest that some of their judges do not appreciate the distinction between jurisdiction and the choice of law. Therefore, they usually treat a forum selection agreement as decisive in implying a choice of law. Nevertheless, it is open to question whether the doctrine of an implied choice of law is recognized in Indonesia and Nigeria.

The disadvantage of treating a forum selection agreement as decisive or one of strong presumption is that it could be interpreted as confusing jurisdiction with the choice of law. Parties have the freedom to provide for both a forum selection agreement and the choice of law. If the parties have provided for a forum selection agreement, they may also have provided for an express choice of law. The absence of an express choice of law agreement could suggest that the parties did not intend the law of the chosen forum to apply. Conversely, it could mean that the parties were ignorant about making a choice of law. In other words, in the absence of an express choice of law, where there is an express forum selection agreement, it could negate the implied choice of the law of the chosen forum.[143]

A person who submits to a foreign forum does not necessarily intend that the forum will abandon its choice-of-law process and mechanically apply the *lex fori*.[144] This ignores the

132 (n 22), 17.

133 *Egon Oldendorff* (n 38); *Marubeni* (n 16), [42–4].

134 Judgment of the Bundesgerichtshof of 13 June 1996, [1998] IPrax 108 (cited in R Plender and M Wilderspin, *European Private International Law of Obligations* (5th edition, London: Sweet and Maxwell 2019), para 6-038, footnote 99); BGH 26.10.1989 – VII ZR 153/88 – NJW-RR 1990, 183–4; BGH, 13.9.2004 – II ZR 276/02 – NJW 2004, 3706, 3708 (cited in W Wurmnest, 'Comment on "Tacit Choice of Law in International Commercial Contracts"' in C Hugo and TMJ Möllers (eds), *Transnational Impacts on Law: Perspectives from South Africa and Germany* (Baden-Baden: Nomos; Johannesburg: Juta 2017) 89, 95.

135 Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), 15 December 2005, COM (2005) 650 final, art 3.

136 See McParland (n 54), paras 9.83–9.88.

137 See McParland (ibid), para 9.88.

138 Plender and Wilderspin (n 134), para 6-032; Beaumont and PE McEleavy (n 54), para 10.94.

139 Art 45 of the Private International Act of Albania 2011. Cited in D Querimi, 'Western Balkans: Western Balkans Perspectives on the Hague Principles' in Girsberger *et al* (n 1) para 52.22.

140 BCC, Appeal No 507/2008 of 27 April 2009. Cited in Elbalti and Shaaban (n 31), para 20.31, footnote 83.

141 *MV Panormos Bay v Olam(Nig) Plc* (2004) 5 NWLR 1, 14–15 (Galadima JCA); *First Bank of Nigeria Plc v Kayode Abraham* (2003) 2 NWLR 31, 37–8 (Oguntade JCA, as he then was); *LAC v AAN Ltd* (2006) 2 NWLR 49, 81 (Ogunbiyi JCA as she then was); *First Bank of Nigeria Plc v Kayode Abraham* (2008) 18 NWLR 172 (with the exception of IT Mohammed JSC (as he then was), at 200–1); Adekeye JSC in *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR 495, 531. See also, *Dairo v UBN* (2007) 16 NWLR (Pt 1059) 99, 143–4 (IT Muhammed JSC); *Capital Bancorp Ltd v Shelter Savings and Loans Ltd* (2007) 2 NWLR (Pt 1020) 148, 164–6 (Mukhtar JSC as she then was) in the context of inter-State jurisdiction.

142 J Lumbantobing and BS Hardjowahono, 'Indonesia: Indonesian Perspectives on the Hague Principles' in Girsberger et al (n 1), para 25.10, footnote 32; PP Penasthika, *Unravelling Choice of Law in International Commercial Contracts: Indonesia as an Illustrative Case Study* (The Hague: Eleven Publishers 2022), 152–6, 175–6.

143 P Lagarde, 'Remarques sur la proposition de Règlement de la Commission Européene sur la Loi Applicable aux Obligations Contractuelles' (2006) 95 *Revue Critique de Droit International Privé* 331, 338; Briggs, (n 66), 448.

144 C Forsyth, *Private International Law – The Modern Roman Dutch Law, Including Jurisdiction of the High Courts* (5th edition, Cape Town: Juta & Co Ltd 2012), 328.

global reality that modern private international law enables the application of foreign law in another country.[145] The parties' choice of forum may be for procedural reasons, expertise, and neutrality,[146] whereas the choice of law may depend on issues of 'foreseeability, uniformity of the operations, convenience of the chosen law with respect to their rights and obligations under the contract, as well as the proper economic operation of the contract'.[147] In addition, it unfairly shifts the burden of proof. A party who can rely on a forum selection agreement is almost relieved of the burden of demonstrating an implied choice of law, unlike the strict approach that is advocated in this article. This could be a strategy adopted by an experienced and relatively stronger commercial party to provide for an express forum selection agreement in their favour, while omitting choice of law during negotiations since the chosen forum is likely be matched with the *lex fori*.[148] However, it can be a dangerous strategy for the party who is relatively weaker in the case of standard *pro forma* contracts.[149]

The key advantages of giving significant weight to a forum selection agreement as an indicator of an implied choice of law lies in pragmatism, simplification of the judicial task, and sound administration of justice, in the sense of the forum and *lex fori* coinciding. Thus, in the UKSC, Lord Mance held that '[i]t is generally preferable, other things being equal, that a case should be tried in the country whose law applies'.[150] Recently, Lord Sumption also held that '[i]t is undoubtedly convenient for the country of the forum to correspond with that of the proper law'.[151]

In fact, most commercial parties will intend that the law of the chosen forum applies.[152] The distinction between jurisdiction and choice of law is an issue that is probably only appreciated by a community of private international law experts. This might explain why, based on empirical evidence, 'a number of international contracts include jurisdiction clauses, including arbitration clauses, but no choice of applicable law'.[153] It is not true that the jurisdictions giving a great deal of weight to a forum selection agreement as a determinant of the implied choice of law fail to appreciate the distinction between jurisdiction and choice of law. For example, there are experienced and competent judges and arbitrators in common law jurisdictions like England, Singapore, and Australia who appreciate this distinction.[154] Nevertheless, the argument may be valid for jurisdictions like Indonesia and Nigeria, where the distinction between jurisdiction and the choice of law is conflated in judicial practice, and the doctrine of an implied choice of law is not established. The point is that giving strong weight to a forum selection clause as an indicator of the implied choice of law does not necessarily mean that this practice fails to appreciate the distinction between jurisdiction and choice of law.

However, giving heavy weight to a forum selection agreement could contribute to certainty and the foreseeability of the law and reduction of costs since the law of the chosen forum will usually be applied.[155] Indeed, it is a good thing for the designated forum to apply

145 Art 4.11 of the Hague Principles Commentary; *Enka Insaat* (n 20), [117].

146 Ibid (all); *Enka Insaat* (ibid), [113].

147 EU Council Document 13035/06 ADD 12 (27 September 2006). Cited in McParland (n 54), para 9.84, footnote 145.

148 H Kenfack, 'Le règlement (CE) n° 593/2008 sur la loi applicable aux obligations contractuelles (Rome I), navire stable aux instruments efficaces de navigation ?', *JDI*, 2009, n° 1. Cited in Scherer (n 3), 281, n 91.

149 EU Council Document 12417/06 (4 September 2006). Cited in McParland (n 54), para 9.84, footnote 143.

150 *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5 [46].

151 *Four Seasons Inc v Brownlie* [2017] UKSC 80 [77].

152 *GDE* (n 38), [152].

153 G Cuniberti, 'The International Market for Contracts: The Most Attractive Contract Laws' (2014) 34 *Northwestern Journal of International and Business* Law 455, 485.

154 For example, the High Court of Australia has emphasised the distinction between issues of jurisdiction and choice of law: *John Pfeiffer Pty Ltd v Rogerson* (2002) 203 CLR 503, 521 [25]; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 498 [7], 499 [10]. In Singaporean practice, see *Pacific Recreation* (n 9), [40].

155 *M/S Bremen v Zapata Off-Shore Co.* (1972), 407 U.S. 1, footnote 15; European Commission's Proposal for Rome I (n 135).

its own law, to the extent that the goals of uniformity, legal certainty, and predictability are not threatened. The designated forum is more familiar with its own law and is in the best position to apply it, compared to a foreign forum. Moreover, there is no language barrier for the decision-makers and counsel. Besides, it is more convenient and efficient for decision-makers and the counsel in the designated forum to apply the law of that forum, and the risk of the designated forum wrongly applying its own law is greatly reduced. Hence, litigation and transaction costs, as well as the delays incurred by researching and applying a foreign law, are greatly reduced since the counsel and designated forum are normally experts in the application of their law. Consequently, there will be no need to consult or pay foreign experts regarding the content of foreign law, which can be very expensive. The parties and the forum will then save substantial resources and devote them to other useful goals in resolving the international commercial transaction.

Moreover, parties who choose a forum do so on the understanding that the forum will apply its procedural rules. A forum's excellent procedural rules will enhance efficiency and speed, reduce costs, and ensure quality in the delivery of justice. It would not make sense for parties to choose a forum without having its procedural rules in mind. Procedural issues are part of the *lex fori*, although they are not the same as *lex causae*. A forum with excellent procedural rules is equally likely to have attractive substantive laws. If the parties were attracted to the key advantages of the procedural rules of a forum, it is only natural that they will be very likely to intend the application of that forum's substantive law, thereby avoiding the problems associated with proving foreign law, such as delays, costs, and inaccurate application.

To conclude here, it is suggested that a forum selection agreement should be one that has significant weight in implying a choice of law. However, this weight should not be decisive or one of strong presumption. In other words, the burden of proof should remain with the party seeking to rely on a choice of law through a forum selection agreement. This approach is also consistent with the strict approach to implying a choice of law, as advocated in this article. At the same time, it recognizes the significance of the forum and *lex fori* coinciding as a commercial reality in implying a choice of law.

2. Neither a decisive factor, nor a strong presumption?

A forum selection agreement as an indicator for implying a choice of law could be regarded as a factor that is neither decisive nor of strong presumption. The key purpose of this is to stress the distinction between jurisdiction and a choice of law. In other words, the confusion arising from conflating jurisdiction and choice of law will be avoided. This is particularly true of Article 4 of the Hague Principles, which provides that '[a]n 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'.[156] Article 4.11 of the Hague Principles Commentary provides that:

> [t]he choice of law applicable to a contract and choice of forum for dispute resolution should be distinguished. According to the sentence of Article 4, an agreement between the parties to confer jurisdiction on a court to determine disputes under the contract (a choice of court agreement) is not in itself equivalent to a choice of law (see Art 7(2) Mexico City Convention). For example, the parties may have chosen a particular forum because of its neutrality or experience. The fact that the chosen court, under the applicable private international law rules, may apply a foreign law also demonstrates the distinction between a choice of law and choice of court. Nevertheless, a choice of court agreement between the

[156] See also, art 3(3)(2) Asian Principles on Private International Law 2018; Part 8 of Guide of the Organization of American States on the Applicable Law to International Commercial Contracts 2019; art 6 of Paraguayan Law 5953 on the Law Regarding the Applicable Law to International Contracts 2015; art 5(3)&(4) of the draft of the envisaged African Principles on the Law Applicable to International Commercial Contracts.

> parties to confer jurisdiction on a court may be one of the factors to be taken into account in determining whether the parties intended the contract to be governed by the law of the forum.

Article 4.12 of the Hague Principles Commentary also adopts the same approach for the choice of arbitration agreements. This position that a forum selection agreement should not be accorded decisive weight or one of strong presumption is established in the case law or statutes of civil law countries like Russia,[157] Switzerland,[158] Argentina,[159] Uruguay,[160] and Paraguay.[161] Conversely, recent case law even from a common law country like England suggests that it no longer treats a forum selection agreement as decisive, or as one of strong presumption in implying a choice of law.[162] A similar view was also taken by the Indian Supreme Court in one case when it held that:

> [t]he mere selection of a particular place for submission to the jurisdiction of the courts or for the conduct of arbitration will not, in the absence of any other relevant connecting factor with that place, be sufficient to draw an inference as to the intention of the parties to be governed by the system of law prevalent in that place. This is specially so in the case of arbitration, for the selection of the place of arbitration may have little significance where it is chosen, as is often the case, without regard to any relevant or significant link with the place. This is particularly true when the place of arbitration is not chosen by the parties themselves, but by the arbitrators or by an outside body, and that too for reasons unconnected with the contract. Choice of place for submission to jurisdiction of courts or for arbitration may thus prove to have little relevance for drawing an inference as to the governing law of the contract, unless supported in that respect by the rest of the contract and the surrounding circumstances. Any such clause must necessarily give way to stronger indications in regard to the intention of the parties.[163]

In one South African case, the court put it even stronger when it held that:

> [i]n the international commercial world it has almost become a universal practice to select London as the seat for arbitration proceedings, not because parties to an international mercantile transaction necessarily have confidence in English law, but for purposes of convenience, because London is an important commercial centre and because of the expertise of London arbitrators. And if they do so they do not, unless there is an express indication in the contract or other circumstances which point in that direction, submit to the jurisdiction of the English Courts. Not only do the parties not submit to the jurisdiction of the English law but, unless a clear inference is to be drawn to the contrary, they do not even accept English law as the proper law of the contract except for procedural purposes.[164]

[157] Presidium of the Supreme Arbitrazh Court, Information Letter dated 9 July 2013 No 158, 'Obzor sudebnoĭ praktiki po nekotorym voprosam, sviazannym s rassmotreniem Arbitrazhnymi sudami del s uchastiem inostrannykh lits' (Review of Court Practice on Certain Matters Related to the Consideration by Arbitrazh Courts of Proceedings Involving Foreign Persons) Letter no 158. Cited in M Karayanidi, 'Russia: Russian Perspectives on the Hague Principles' in Girsberger et al (n1), para 47.34.

[158] Federal Court, 19.01.2001-4C.54/2000 (n 32).

[159] Art 2651(g) of the Civil and Commercial Code of Argentina 2015. See Cámara Nacional de Apelaciones en lo Comercial, Sala A, Golub, *Gustavo v International Vendome Rome-IVR s/ordinario*, judgment of 23 February 2010. See *La Ley*, Cita [Internet]: AR/JUR/4505/2010, available at: <http://fallos.diprargentina.com/2010/06/golub-gustavo-c-international-vendome_16.html> accessed 13 January 2023.

[160] Art 46 of Uruguayan General Act on Private International Law 2020.

[161] Art of Paraguayan Law 5953, regarding the Applicable Law to International Contracts 2015.

[162] *Enka Insaat* (n 20), [117].

[163] *National Thermal* (n 80), [15].

[164] *Benidai Trading Co Ltd v Gouws & Gouws (Pty) Ltd* 1977 (3) SA 1020, 1028–9.

Indeed, some courts in the USA have even gone so far as holding that 'because the selection of a forum does not operate as a choice of law clause, the Court will not imply a choice of law provision where the parties did not expressly agree to it'.[165]

The problem with the approach where a forum selection agreement is not treated as a decisive factor or strong presumption is that it does not offer sufficient guidance to the decision-maker, which can lead to uncertainty and unpredictability in practice. It is an approach that could be open to at least three interpretations in implying a choice of law. First, a forum selection agreement is a highly significant factor; second, a forum selection agreement is not a significant factor; and, third, a forum selection agreement requires the corroboration of other factors. Two examples can be given, comparing Article 7(2) of the Mexico City Convention and Recital 12 to the Rome I Regulation. Article 7(2) of the Mexico City Convention provides that the '[s]election of a certain forum by the parties does not necessarily entail selection of the applicable law'. Friedrich K. Juenger interprets this provision to mean that 'though phrased negatively, this provision incorporates the English presumption *qui elegit judicem ius*, which allows the forum to apply its own law'.[166] Jan Neels and Eesa Fredericks also submit that '[a]ccording to the Convention, forum selection on its own may therefore, depending on the particular circumstances, indicate a tacit or an implied choice of law'.[167]

Countering this, however, Laura Gaisman's view is that 'the reason for inserting this provision in the Mexico Convention was the intention to avoid the problem of the Anglo-Saxon conception according to which a choice of forum implies a choice of law'.[168] Peter Nygh also opines that Article 7(2) of the Mexico City Convention 'betrays a reluctance to accept a choice of jurisdiction clause as likely to indicate a choice of law'.[169]

Meanwhile, Recital 12 to the Rome I Regulation provides that '[a]n agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated'. The legislative history of this provision was to downgrade the strong presumption approach proposed by the European Commission in implying a choice of law.[170] Nevertheless, many scholars have been very critical of this Recital, describing it as 'unclear'[171] and claiming that it 'does not offer any great clarification',[172] being 'surprisingly unhelpful',[173] 'not very illuminating',[174] 'ambiguous',[175] 'unfortunate',[176] and one that 'leaves room for divergent practice'.[177]

Michael McParland argues, based on the legislative history and development of Recital 12, that a choice-of-court agreement is one of the factors to be considered in implying a

[165] *In Re Real* Networks, *Inc*., *Privacy Litigation* United States District Court, N.D. Illinois, Eastern Division, 2000 WL 631341, page 5. See also *Maljack Productions, Inc. v Survival Anglia Ltd*., No. 97 C 789, 1999 WL 182154 (N.D.Ill.) Mar. 24, 1999.

[166] FK Juenger, 'The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons' (1994) 42 American Journal of Comparative Law 381, 388. See also JG Pimentel, *El contrato internacional* (Editorial Jurídica Venezolana 1999) 171.

[167] Neels and Fredericks (n 2), 107.

[168] LT Gaisman, 'La Convención interamericana sobre derecho aplicable a los contratos internacionales' (1994) 28 (Sept–Dec) *Alegatos* 383, 388. See also CM Martinez, 'Venezuela: Venezulan Perspectives on the Hague Principles' in Girsberger et al (n 1) wherein the author submits that Article 7(2) of the Mexico City Convention rejects the rule of *quid eligit iudicem*.

[169] PE Nygh, *Autonomy in International Contracts* (Oxford: Oxford University Press 1999), 117.

[170] (n 135). See generally, McParland (n 54), paras 9.75–9.103.

[171] A Mills, *Party Autonomy in Private International Law* (Cambridge: Cambridge University Press 2018), 339.

[172] Ibid.

[173] McParland (n 54), para 9.77, citing others.

[174] A Briggs, *Conflict of Laws* (4th edition, Oxford: Oxford University Press 2019), 216–17.

[175] Bouwers (n 2), 46.

[176] Neels (n 3), 365.

[177] Plender and Wilderspin (n 134), 6-040. See also, Briggs (n 174), 216–17.

choice of law.[178] In other words, it is not one of strong presumption or decisive weight. On the contrary, Peter Mankowski is of the view that '[t]he main inference to be drawn from Recital (12) is that exclusive jurisdiction clauses rank very high as indications for a tacit choice of law. They are the only factor that is expressly mentioned, and at least this elevates them above the rest of the bunch'.[179] Mankowski even goes further to submit that '[a]n exclusive choice of forum carries a tacit choice even if there is nothing else to support it'.[180] Paul Beaumont and Peter McEleavy also submit that a choice-of-court agreement 'should usually be determinative of the choice of law unless there is evidence from the negotiating history between the parties that they considered linking a choice of law clause with the choice of court clause but in the end rejected it'.[181] Richard Plender and Michael Wilderspin express a similar view, submitting that Recital 12 'corresponds closely to the practice of the courts in England which may thus be said to have been endorsed by the Union legislature'.[182]

The proper weight to attach to a choice-of-court agreement in the context of Recital 12 to Rome I has yet to be decided upon by the Court of Justice of the European Union (CJEU), although in this connection, a Dutch court has held that a choice of forum is not sufficient in itself to imply a choice of law for contracts.[183] It would therefore be desirable for the CJEU to provide uniform criteria on this issue for the EU.

From a global perspective, the view here is that a forum selection agreement should be of significant weight in implying a choice of law, particularly for the reasons advanced in the preceding section on the advantages of this approach. However, this does not mean that a forum selection agreement should be of decisive weight or one of strong presumption in implying a choice of law. Instead, the burden of proof must remain with the party who relies on this factor to imply a choice of law, meaning that corroboration with at least one other significant factor should be a general requirement. This is consistent with the strict criteria advocated in this article for implying a choice of law and is a point that is addressed in the next section.

3. Corroboration required?

It is suggested here that the global practice should be one where there is a general requirement for the corroboration of at least one other significant factor to support the use of a forum selection agreement in implying a choice of law for contracts. The general requirement of corroboration with at least one other factor of significance ensures that the implied choice of law process is based on a comprehensive analysis of the relevant factors. A 'significant factor' is one that provides a strong inference in implying a choice of law. However, this corroboration requirement would represent the general rule, as there could be exceptions, such as the neutrality of the forum factor, as discussed in the next section.

Some of the case law of national courts supports the general requirement of corroboration for a forum selection agreement to imply a choice of law. In a recent case, the UKSC held that a forum selection agreement 'does not by itself give rise to an implied choice of law'.[184] In some US courts, a forum selection clause is required to be corroborated with other factors, before a court may conclude there is an implied choice of law.[185] Similarly, a South African court decided that the choice of a localized arbitral tribunal does not indicate an implied choice of law 'unless a clear inference is to be drawn to the contrary.'[186] Moreover,

178 (n 54), para 9.100. See also, Scherer (n 3); Fons (n 8), 115–41.
179 (n 45), para 117.
180 Ibid, para 123.
181 (n 54), para 10.95.
182 (n 134), 6-040.
183 Hof Amsterdam 28 November 2017, ECLI:NL:GHAMS:2017:4959 [3.8]. See also, *Khalifeh v Blom Bank SAL* [2021] EWHC 3399 (QB) [60]; *Hardy Exploration & Production (India) Inc v Government of India* [2018] EWHC 1916 (Comm) [84]; Judgment 2020.3.72.a, 31 October 2019 [18] (Hungarian Supreme Court).
184 *Enka Insaat* (n 20), [117].
185 Restatement (Second), § 187, cmt a; *Kress Corp v Edw C Levy Co*, 430 N.E.2d 593, 595 (1981).
186 *Benidai* (n 164), 1028–9.

the Indian Supreme Court held in one case that the use of forum selection agreements to imply a choice of law should be 'supported in that respect by the rest of the contract and the surrounding circumstances'.[187] Meanwhile, in Switzerland, a court held, *inter alia*, that a choice-of-court agreement may not be decisive on its own, but its combined effect with other factors pointed to an implied choice of law.[188] Similarly, French jurisprudence has interpreted Article 3 of the Rome Convention to the effect that 'a jurisdiction clause was certainly taken into account as a pointer to the applicable law but was unlikely to be determinative in the absence of other indications'.[189] Likewise, a Luxembourg court, in interpreting Article 3 of the Rome Convention, held that a choice-of-court agreement 'could be a pointer towards the choice of the applicable law but could not be relied on, in the absence of any other indicator, to infer the intention of the parties'.[190] This is reflected in the Dutch practice of interpreting Article 3 of Rome I, wherein neither a choice of court nor arbitral agreement is sufficient on its own to imply a choice of law.[191]

This issue of corroboration as a requirement for using a forum selection agreement to imply a choice of law is a contested issue among scholars, with regard to the EU choice of law rules for contracts. For example, in an early article, Paul Lagarde suggested that a forum selection agreement, in the absence of other factors pointing in that direction, should not be sufficient to imply a choice of law.[192] This position has been endorsed by certain other European scholars.[193] Interestingly, the Green Paper to the Rome I Regulation states that the CJEU would likely hold that 'the mere fact of designating the courts of a country does not constitute a choice of law if this choice is not corroborated by other factors'.[194]

Nevertheless, some European scholars have been critical of this view.[195] Plender and Wilderspin vehemently responded that this argument was a 'scarcely credible claim' and 'very weak' in the context of both Article 3 of the Rome Convention and the Rome I Regulation.[196] They justify their view on the basis that, under Recital 12 to the Rome I Regulation:

> once it is admitted that the jurisdiction agreement may be a pointer towards the applicable law there can be no a priori objection to allowing it to be determinative when there are no other factors or all other factors are neutral. This argument gives a partial interpretation of the recital, and undermines its clear purpose, which is to give a court the green light to take such an agreement into account. Lastly, even if such an interpretation could conceivably be borne by the recital, it would be open to objection that such an interpretation would effectively attribute a normative force to the recital, which would thereby constitute a derogation from the second sentence of art 3(1) which merely requires that the choice be . . . clearly demonstrated . . . the circumstances of the case.[197]

187 *National Thermal* (n 80), [15].
188 Federal Court, 19.01.2001-4C.54/2000 (n 32).
189 Plender and Wilderspin (ibid) citing others. See, for example, Com' 8 juin 2010, JurisData n° 2010-008941.
190 *Winters Arnhem BV v SA Coedeux Rivista di diritto internazionale private e processuale* 1991, 1092. Cited in Plender and Wilderspin (n 134), para 6-038, footnote 99. See also, para 6-35.
191 Rb Den Haag 28 May 2014 (n 33), [4.4]; Hof Amsterdam 28 November 2017 (n 183) [3.8].
192 P Lagarde, 'Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980' (1991) 80 *Revue critique de droit international privé* 287, 303.
193 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 (Rome I) and Article 15 of Regulation 44/2001 (Brussels I)' in M Fallon et al (eds), *Le droit international privé européen en construction. Vingt ans de travaux du GEDIP. Building European Private International Law. Twenty Years' Work by GEDIP* (Intersentia 2011), 425–6; Graziano et al (n 33), para 43.47; Scherer (n 3).
194 (n 8), 654.
195 Plender and Wilderspin (n 134), para 6-035; Mankowski (n 45), para 117, 123; Beaumont and McEleavy (n 54), para 10.95.
196 Ibid, para 6-040, footnote 107.
197 Ibid.

Interestingly, in a recent case, an English judge (Dias QC) considered the academic debate between Lagarde and Plender and Wilderspin, adopting the position that Lagarde's view is 'difficult to dismiss'.[198] Indeed, Lagarde's view of the corroboration requirement may have influenced Dias QC, who held in the final analysis and based on the facts of the case that a choice-of-court agreement alone, not corroborated by at least one other significant factor, was insufficient to imply a choice of law under Article 3 of the Rome Convention.[199] The uncertainty of the corroboration requirement in the context of a choice-of-court agreement to imply a choice of law under EU choice-of-law rules has prompted some scholars to suggest that this issue should be resolved by the CJEU.[200]

The Commentary on the Hague Principles supports the requirement of corroboration for both the jurisdiction and an arbitration agreement to imply a choice of law in contracts. It therefore provides:

> Party A and Party B conclude a contract and include a choice of court agreement designating the courts of State X. In the absence of other relevant provisions in the contract or particular circumstances suggesting otherwise, this will be insufficient to indicate a tacit choice of the law of State X.[201]

> Party A and Party B conclude a contract under which they agree that all disputes arising out of, or in connection with, the contract are to be submitted exclusively to arbitration in State X under the rules of the ABC Chamber of Commerce. In the absence of other relevant provisions in the contract or particular circumstances suggesting otherwise, this will be insufficient to indicate a tacit choice of the law of State X.[202]

From a global perspective, the requirement for corroboration in a forum selection agreement to imply a choice of law is also a contested issue among scholars. For example, Marshall proposes that an exclusive forum selection agreement should be '*a probative indicator when corroborated by other indicators*'.[203] This view is subscribed to by Girsberger and Cohen in the context of Article 4 of the Hague Principles, whereupon they submit that 'a choice of the law of a State as the governing law of a contract will not be inferred solely from an agreement between the parties agreeing to confer jurisdiction on a court or arbitral tribunal in that State'.[204]

However, there are scholars who do not subscribe to this approach. Bouwers argues that:

> any combination of certain factors (or 'plurality of these factors') should also not lead to a presumption as to the existence of a tacit choice of law. Instead, the determination of a tacit choice of law should be made on a case-by-case basis, avoiding fixed criteria and considering all relevant factors in the particular contract and those surrounding the agreement. This is particularly relevant when issues arise as to whether a choice of forum constitutes a choice of law.[205]

Nygh also opines that in order to:

> insist that a majority or plurality of these factors point in a particular direction, although in some circumstances that may be helpful. If we insisted on a plurality of factors, we

198 *GDE* (n 38), [151].
199 Ibid, [155].
200 McParland (n 54), para 9.101, citing others; Scherer (n 3), 280–2.
201 Para 4.11 of the Commentary to the Hague Principles (Illustration 4-6).
202 Ibid, para 4.12 (Illustration 4-7).
203 Marshall (n 52), 521 (emphasis in the original).
204 D Girsberger and NB Cohen, 'Key Features of the Hague Principles on Choice of Law in International Commercial Contracts' (2017) 22 Uniform Law Review 316, 323.
205 (n 2), 237, 247.

would in effect be applying the objective default rule. In other words, the tacit intention of the parties should . . . be capable of pointing to an otherwise unconnected system'.[206]

It is the view here that the absence of a general requirement of corroboration over using a forum selection agreement to imply a choice of law is like the presumption of *qui eligit judicem eligit jus*, which was rejected by the EU legislator in Rome I and the drafters of the Hague Principles and Mexico City Convention. This approach therefore presents a low threshold for implying a choice of law.

In contrast, the position advocated in this article is that, globally, there should generally be a corroboration with at least one other significant factor before a forum selection agreement can be used as an indicator to imply a choice of law. This would make the threshold for implying a choice of law strict but would not substantially diminish the significance of a forum selection agreement as an indicator of an implied choice of law. The burden would rest on the party who wishes the court to imply a choice of law through a forum selection agreement as a means of presenting corroborating elements. The greater the existence of significant corroborating factors for an implied choice of law, the more likely it is that an implied choice of law should be held. However, the emphasis is on factors that are 'significant' so that less weight is attached to factors that are not strong, despite their numerical advantage. Nevertheless, this should not be a mere numerical count of factors. Some of the significant corroborating factors that may indicate that the parties have made an implied choice of law include a standard form contract, such as Lloyds Marine Insurance in England, a previous course of dealings between the parties to indicate that a particular law applies to the contract, an express choice of law in a related transaction, or a reference to particular rules in a statute.[207] However, this list of factors is not exhaustive.

Conversely, it is suggested that objective connecting factors, like the place of performance, place of concluding the contract, the parties' place of residence, and payment currency should generally be accorded no weight in implying a choice of law, as they are not concerned with the parties' intentions.[208] Instead, these factors are more appropriate for determining the applicable law in the absence of choice.

3. Is neutrality of the forum a strong indicator?

Parties are normally more inclined towards adjudication taking place in a forum that they are more familiar with.[209] This provides the advantage of reducing transaction costs and ensuring a higher chance of success. However, parties may also submit to a forum that is foreign to them, whereby the forum is neutral to both parties. Examples of this neutrality factor may be noted where the parties have different nationalities or different places of habitual residence and submit to a third country.

It is submitted that where the parties designate a forum as a neutral zone for resolving their dispute, it should be a strong indicator for an implied choice of law, whereupon the requirement for corroboration should be dispensed with. The choice of a neutral forum may be a particularly strong indicator for implying a choice of law of that forum where the parties sought an impartial court or arbitral tribunal to resolve their disputes, or there were significant differences in the laws of each party's home State. In this context, this proposition counters the view that a forum chosen on a neutral basis may only be for convenience of the

206 (n 169), 114.

207 Giuliano–Lagarde Report (n 22), 17. See, for example, *Hardy* (n 183) [84]; *Emeraldian* (n 16), [170]; *Khalifeh* (n 183), [62–7]; *Mahmood v Big Bus* (n 18), [67]; *FR Lurssen* (n 16), [492]; *Egon Oldendorff* (n 38); *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 482 (Comm) [367]; *Golden Ocean* (n 16), [45]; BGH, 13.9.2004 – II ZR 276/02 – NJW 2004, 3706, 3708 (n 134). *Cf GDE* (n 38), [156].

208 GDE (ibid). Presidium of the Supreme *Arbitrazh* Court, Information Letter dated 9 July 2013 No 158 (n). *Cf Richardson* (n 35), [33–4]; Federal Court, 19.01.2001-4C.54/2000 (n 32); BGH 26.10.1989 – VII ZR 153/88 – NJW-RR 1990, 183-184 (n 134).

209 *Bremen* (n 155) 11–12.

parties and the expertise of the decision-makers.[210] This is consistent with the English common law views of Lord Wilberforce, who held: 'I fully accept that, especially where the parties are of different nationality, and there is no other relevant factor, a clause providing for arbitration in a third country is a strong indication which, because there is no other, may be called conclusive, in favour of the proper law of that country.'[211]

In one English case, which interpreted Article 3 of the Rome Convention, the parties were Japanese and German, but they chose an arbitral tribunal in London to achieve resolution through English arbitrators. The dispute arose from a well-known English language form of charterparty, which contained standard clauses with well-known meanings in English law. The neutrality criterion was a strong indicator in this case, as was advanced by the counsel. The court held that an arbitration clause was generally intended to operate as the choice of applicable law in a contract, unless there were compelling indications to the contrary in the other contractual terms or the circumstances surrounding the transaction.[212] However, it is suggested that this case must be read in the context of the neutrality criterion that is advocated in this article to justify its correctness. Moreover, the arbitral clause was corroborated by another significant factor of a standard clause, well known to English law. In the words of Clarke J:

> [i]n short, having agreed English arbitration for the determination in London of disputes arising out of a well known English language form of charterparty which contains standard clauses with well known meanings in English law, it is in my judgment to be inferred that the parties intended that law to apply. Having agreed a 'neutral' forum the reasonable inference is that they intended that forum to apply a 'neutral' law, namely English law and not either German or Japanese law.[213]

In another English case, the High Court held that 'it would be very odd if, having ensured that there was an agreed neutral forum [of the English court], the parties had then intended to make Mongolian law the proper law'.[214] Where parties to a contract contemplate performance in many countries and choose to litigate in the court of a country that is foreign to them, the exclusive choice of court agreement as a neutral criterion should be a strong factor, dispensing with the requirement for corroboration.[215] The justification for the neutrality criterion is that the parties who select a neutral forum very likely intend that a neutral law should apply. Fentiman submits that:

> [t]he presence of a jurisdiction clause is likely to be decisive only if the forum is neutral. The inference is a negative one, suggesting that no other law could govern. If both parties originate in a country other than that whose courts are selected it is counterintuitive that either intend their own law to govern in a neutral court. Had they wanted the law of either or both parties to govern, they would have submitted to the courts of the country in question.[216]

In practice, if this position is accepted, it is probable that a forum selection agreement will have more weight in implying a choice of law if the selection of a forum is frequently based on neutrality. This approach is also likely to support the implied choice of law of jurisdictions like England, where the courts and arbitral tribunals are frequently chosen by international commercial parties on a neutral basis.[217] This approach would also encourage

[210] *Benidai* (n 164) 1028–9.
[211] *Co Tunisienne* (n 58), 599 CD.
[212] *Egon Oldendorff* (n 38).
[213] Ibid, 509.
[214] *Marubeni* (n 16), [41].
[215] *RCD Holdings* (n 124), [26].
[216] Fentiman (n 64), 5.71(d). See also Nygh (n 169), 116; Mankowski (n 45) para 125.
[217] Noted as far back as 1972 in the US Case of *Bremen* (n 155) 11–12 & 17.

regulatory competition in other countries to make their forum more attractive for adjudication on a neutral basis, consequently benefiting such countries economically through the revenue generated by applying their law to international commercial contracts.[218]

However, an important counter-argument against using neutrality of the chosen forum as a strong indicator for implied choice of law is that it might not work to the advantage of countries in the global South, whose courts are usually not chosen as a neutral zone by international commercial parties. It is submitted that the issue of party autonomy not usually favouring countries in the global South is beyond the scope of this article. Moreover, an argument for party autonomy to also favour countries in the global South will require a fundamental rethink of the subject.

To conclude here, the neutrality criterion should be the key factor that dispenses with the requirement for a forum selection agreement to be generally corroborated by other significant factors. Although the neutrality criterion may be dispensed with, depending on the terms of the contract and circumstances of the case, it should be a strong indicator. It should also not lift the burden of proof from the party who wants the forum to imply a choice of law. This would be consistent with the strict test that is advocated in this article. Although it is admitted that the neutrality criterion may make it functionally easier for the party seeking to imply a choice of law, the rule is a sound one.

4. Nature of the forum selection agreement

The nature of the forum selection agreement may determine how much weight it has in implying a choice of law. In other words, the nature of a forum selection agreement can provide important context for implying a choice of law for the parties. Five issues will be considered here: the difference between the jurisdiction and the arbitration clause, the exclusivity of the forum selection agreement, a forum selection agreement based on waiver or submission to a court's jurisdiction, internationalization, and the Member State factor in Recital 12 to the Rome I Regulation.

First, in principle, choice of court is not the same thing as an arbitration clause. Recital 12 only gives significance to an exclusive choice of court agreement of a Member State of the EU. However, Article 4 of the Hague Principles, Article 7(2) of the Mexico City Convention, or traditional common law do not create a distinction between the jurisdiction and an arbitration clause in terms of their significance as indicators of an implied choice of law in commercial contracts. The recommended global approach is that, except in cases such as where an arbitral tribunal is delocalized, similar significant weight should be given to both the jurisdiction and an arbitration agreement in implying a choice of law in international contracts. For example, if parties from Kenya and South Africa expressly choose Nigerian arbitration with its seat in Lagos State, composed of a panel of Nigerians versed in Nigerian law, in the absence of an express choice of law, there is a strong inference that the parties have made an implied choice of Nigerian law in their contract.

Second, the weight attached to a forum selection agreement should be stronger where it is exclusive.[219] This is the approach of Recital 12 to Rome I[220] and many common law countries, like England,[221] Australia,[222] and the USA.[223] An exclusive forum selection agreement may even be a much stronger indicator for an implied choice of law where the parties' contract explicitly contains both a jurisdiction and arbitration agreement in favour of one

[218] Fons (n 17).

[219] The global solution should be that the parties have made an exclusive choice of court agreement, except if they indicate otherwise. See art 3(b) of the Hague Choice of Court Convention; art 25(1) of Brussels I Recast.

[220] *GDE* (n 38), [123].

[221] *El Du Pont de Nemours & Co v Agnew* [1987] 2 Lloyd's Rep 585, 592; *King v Brandywine Reinsurance Co (UK) Ltd* [2005] 1 Lloyd's 655.

[222] See n 124 (all).

[223] *Golden v Stein*, United States District Court, S.D. Iowa, Central Division 2019 WL 3991072, page 7: 'Where the purported forum selection clause is only "permissive," it provides no reasonable inference as to applicable law'.

country.[224] However, this is not the approach in Article 4 of the Hague Principles or Article 7(2) of the Mexico City Convention, which do not give special significance to the exclusivity of a forum selection agreement. Rather, the view here is that the global approach should be that, where a forum selection agreement is not exclusive, it should have relatively less weight. The reason for this is that it is unlikely that the parties will intend to submit to more than one law, given that multiple laws may conflict, cause delays, and be more expensive to apply. Where it is unclear if the forum selection agreement is exclusive, it is likely to attract less weight in implying a choice of law.[225] However, an exclusive forum selection agreement may attract less weight where it is unexpressed, invalid, or floating because it questions the clarity of whether there is an implied choice of law.[226]

Third, where the parties submit to a forum, or waive their right to challenge the jurisdiction of a forum or law, and that forum applies a particular law by default (usually the *lex fori*),[227] the parties should be deemed to have at least made an implied (if not explicit) choice of that law. This practice is accepted in common law countries,[228] such as Morocco,[229] China,[230] Japan,[231] and Argentina,[232] and EU countries like France,[233] the Netherlands,[234] Hungary,[235] and Germany.[236] This practice is consistent with party autonomy because the parties, especially in international commercial transactions, can make also make a procedural choice of law. Thus, it should be made a global practice.

However, in countries like Democratic Republic of Congo,[237] Tunisia,[238] and Angola and Mozambique,[239] if both parties base their arguments on the *lex fori*, the courts shall, in the absence of other elements indicating towards a proper choice of law, inform the parties of the potential application of a foreign law indicated by national conflicts rule. This approach

[224] *Hardy* (n 183) [84].

[225] See the Hungarian Supreme Court decision in No. BH2020.9.267 [62–3], and the English High Court decisions in *GDE* (n 38), [123–59] and *Travelers Cas & Sur Co of Europe Ltd v Sun Life Assur Co* [2004] EWHC 1704 (Comm). I am grateful to Dr Richard Schmidt for providing me with the decision of the Hungarian Supreme Court.

[226] Hof Amsterdam 28 November 2017 (n 183), [3.8].

[227] 'In practice, litigants often ignore conflicts rules, opting instead to apply the law of the forum for reasons of familiarity, expediency or ignorance.': *Celle v Fillipino Reporter Enterprises Inc* 209 F 3d 163 (2nd Cir 2000) 163, 175.

[228] *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45 [112] – [158]; *Celle* (*ibid*); *Motorola Credit Corp v Uzan* 338 F 3d 39 (2nd Cir 2004) 61; Oppong (n 12) para 11.15.

[229] Art 13 of the Dahir of 12 August 1913 on the civil status of foreigners in Morocco; and arts 327–44 of the Moroccan Code of Civil Procedure of 2007. Cited in K Zaher, 'Morocco: Moroccan Perspectives on the Hague Principles' in Girsberger et al (n 1), para 16.27.

[230] *Fubon Credit (Hong Kong) Ltd v Ningbo Haixin Knitting Co, Ltd., Zhou Xinggong, Zhang Zengming and Zhou Peiliang*, Judgment of the High People's Court of Zhejiang Province, (2011) *zhe shang wai Zhong zi* No 12. Cited in Q He (n 39) para 21.23. In the Chinese context, this is an express variation of the choice of law from foreign law to the *lex fori*.

[231] Tokyo DC, 15 July 2015; also Tokyo HC, 2 August 1973, 25(4/5) Rominshu 354; Tokyo DC, 22 April 1977, 28 (1–4) Kakyu Minshu 399; Tokyo DC, 30 May 1977. All cited in Nishitani (n 28), para 28.28, footnote 69.

[232] Cámara Nacional en lo Comercial, Sala A, Golub, *Gustavo v International Vendome Rome-IVR s/ordinario*, judgment of 28 December 2012 (La Ley, Cita Online AR/JUR/4505/2010). Available at <http://fallos.diprargentina.com/2013/07/golub-gustavo-c-international-vendome.html> Accessed on 12 April 2023.

[233] Metz Court of Appeal, 26 November 2015, No 15/00561. Cited in Graziano (n 32) para 43.50, footnote 65.

[234] Rb. Rotterdam, 21 March 2018, ECLI:NL:2018:3237; Rb. Den Haag 26 October 2016, ECLI:NL:RBDHA:2016:13161; Rb. Rotterdam 23 October 2013, ECLI:NL:RBROT:2013:8186; Rb. Zutphen 15 August 2012, ECLI:NL:RBZUT:2012:BX4722. Cited in Graziano (ibid) para 43.50, footnote 66.

[235] Judgment 2020.3.72.a, 31 October 2019 (Hungarian Supreme Court), [9], [14–22] .

[236] BGH NJW 1994, 187; BGH NJW1993, 385. *Cf* BGH NJW-RR 2000, 1002; BGH NJW 2009, 1205 [20–1]. All cases cited in M Hook, *The Choice of Law Contract* (Hart, 2016) 139.

[237] Under art 33 of the Democratic Republic of Congo's Decree of 30 July 1888, the judge is compelled to enforce the choice of law made by the parties. See the Cases of Supreme Court of Justice, 3 April 1976, BA 1977, 65; Supreme Court of Justice, 20 January 1982, RJZ 1982, 53; Court of Appeal of Lubumbashi, 21 April 1972, RJZ 1973, 70. All cited in J Monsenepwo, 'Democratic Republic of Congo: Congolese Perspectives on the Hague Principles' in Girsberger et al (n 1), para 12.18.

[238] Art 28 of the Tunisian 1988 Code of Private International Law; TSC No 1875 of 21 September 2004, Bull. civ. 2004-2 159; TSC No 5289 of 23 November 2004 727; TSC No 8611 of 17 March 2014. All cited in B Elbalti, 'Tunisia: Tunisian Perspectives on the Hague Principles' in Girsberger et al (n 1), para 18.35 with accompanying footnote 101.

[239] Art 348(2) of the Portugese Civil Code sets down a court's duty to *ex officio* determine the normative contents of foreign law, even if none of the parties pleaded it. Cited in R Dias and CF Nordmeier (n 50) para 10.21.

is a narrow view of party autonomy as it does not recognize a procedural choice of law through waiver or submission. Thus, it should not be made a global practice in international commercial contracts, although it may be suitable in contracts for the protection of weaker parties, like employees and consumers due to their usual ignorance of choice-of-law rules.

Furthermore, in a more recent case, the Hungarian Supreme Court, in interpreting Article 3 of Rome I and Recital 12 to Rome I, held that the fact that the claimants in that case initiated the lawsuits before an English court, which adjudicated part of the dispute on the merits according to the rules of English substantive law, does not in itself mean that an implied choice of law was made. The Hungarian Supreme Court grounded its decision on the fact that during the proceedings before the English court, the defendants objected to the jurisdiction of the English court. The implication of this was that the defendants merely tolerated the litigation in England, but the procedure and the law applied in it were obviously not based on agreement between the parties. Therefore, the claim before the Hungarian Supreme Court that there was an implied choice of English law because proceedings were previously conducted before an English court under English substantive law was unsuccessful.[240] This decision is correct from a global perspective because even a procedural implied choice of law must be clearly established. Thus, the contest between the parties as to whether the English court had jurisdiction negated an implied choice of law in subsequent proceedings before the Hungarian Court.

Fourth, the internationalization of a chosen forum is also likely to reduce the significance of a forum selection agreement.[241] Delocalized arbitration with the choice of no legal order will be given little or no significance in implying a choice of law, as international arbitrators may be versed in many other laws or even apply non-State law, according to the circumstances of the case. Similarly, the choice of international commercial courts may equally reduce the significance of implying a choice of law in some cases. There has been a recent rise in international commercial courts, and this is used as a basis to attract litigation business.[242] Some of these courts even permit foreign lawyers to represent clients, foreign judges to decide, and the proceedings to be conducted in a foreign language to make them more attractive to international parties.[243] In such cases, it is likely that the counsel and decision-makers may be trained in the laws of multiple jurisdictions, and the argument for the *forum* and *lex fori* to coincide may not be that strong or else be one that depends on the circumstances of the case.

Fifth, Recital 12 to Rome I will only consider an exclusive choice of court agreement of an EU Member State. This has been criticized as 'unfortunate',[244] 'unexpected',[245] 'not warranted',[246] 'very puzzling',[247] 'somewhat arbitrary',[248] and a product of 'sloppy

[240] No. BH2020.9.267 (n 225) [62–3]. An issue that was that was left unaddressed in this case is whether a decision on the applicable law by an EU Member State Court (UK was then a Member State of the EU) is binding on another Member State Court, based on the EU private international law doctrine of mutual trust and confidence? It is submitted that the answer should be in the positive, but this will not necessarily be a finding on procedural implied choice of law by the court of another EU Member State seized of the matter. It will be a recognition of the binding nature of a choice of law decision by another Member State Court based on the doctrine of mutual trust and confidence. By analogy with Brussrels I Recast, see Case C-159/02 *Turner v Grovit* ECLI:EU:C:2004:228, [24–31]; Case C-185/07 *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc* ECLI:EU:C:2009:69. In the alternative, in terms of res judicata, the choice of law decision in the English Court may have been regarded as final before Hungairan Court.

[241] *Enka Insaat* (n 20), [113–17]; *National Thermal* (n 80), [15]; *Benidai* (n 164) 1028-1029; Collins and Harris (eds) (n 56), para 32-098.

[242] G Antonopoulou, 'The "Arbitralization" of Courts: The Role of International Commercial Arbitration in the Establishment and the Procedural Design of International Commercial Courts' (2023) Journal of International Dispute Settlement 1, 10–14, 17; P Ortolani and BV Zelst, 'International Commercial Courts and EU Law: Easing the Tension' (2023) Journal of International Dispute Settlement 1.

[243] Ibid.

[244] Collins and Harris (eds) (n 56), 32-095.

[245] Neels (n 3), 363.

[246] Bouwers (n 2), 46.

[247] Mills (n 169), 340.

[248] F Ragno, 'The CISG and the Choice of Law: Two Worlds Apart?' (2009–2010) Journal of Law and Commerce 245, 269.

drafting',[249] especially as Article 2 of Rome I states that it is universally applicable. This EU approach is therefore a peculiar one. The editors of *Dicey, Morris and Collins* submit that such a limitation 'would be unprincipled and can safely be ignored'.[250] Despite this position being judicially endorsed in England,[251] a CJEU decision will put this issue to rest. The rationale for the EU approach may be because the exclusive choice of court agreements only applies to EU Member States under Article 25 of EU Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) (Brussels I Recast). Moreover, the EU does not have a particular mechanism for staying proceedings in favour of a chosen court of a non-EU Member State[252] or a non-contracting State of the 2005 Hague Convention,[253] unlike the position in common law.[254] Thus, it may be a case of endorsing coherence between Rome I and Brussels I Recast on the issue of an exclusive choice of court agreement,[255] and the likelihood that the forum and *lex fori* will not coincide if a non-EU court is chosen. Thus, it is proposed that the restrictive approach in Recital 12 to Rome I should not be applied globally on the basis of the universality principle in choice of law.

5. Conflicting and negative inferences

A forum selection agreement, even where it is both corroborated by other significant factors and is a neutral criterion, should not be used to imply a choice of law where there are conflicting or negative inferences. The existence of negative and conflicting inference amounts to reasonable doubt. Regarding the issue of negative inference, for example, if the parties make an express choice of law agreement but subsequently delete it, the existence of an implied choice of law is negated.[256] A draft choice of law agreement will also negate the existence of an implied choice of law because it demonstrates that the parties have not specifically reached an agreement on a choice of law.[257] In one English case,[258] a contract of guarantee designated England as the neutral forum. There was evidence that English law was present in early drafts of the contract, but this was subsequently omitted during negotiations. It was held that English law implicitly governed the above-mentioned contract. This was a decision justified by Fentiman as 'requiring an imaginative response'[259] from the English Court on the following grounds:

> First, there was no evidence that the omission of an English governing law clause was a deliberate choice. Second, there was evidence that one of the parties objected to Mongolian law (the alternative) as the contractual law, because it was insufficiently evolved to regulate the guarantee. This defeated the argument that the parties had implicitly chosen Mongolian law. It led inevitably to the conclusion that they had chosen English law.[260]

[249] Mankowski (n 45), para 121; Plender and Wilderspin (n 134), para 6-039.
[250] Collins and Harris (eds) (n 56), 32-098.
[251] *Khalifeh* (n 183), [58]. See also, Judgment of the Bundesarbeitsgericht of 10 April 2014 in Case 2 AZR 741/13 (cited in Plender and Wilderspin (n 134), 163, footnote 105).
[252] Beaumont and McEleavy (n 54), para 10.95, footnote 137. See also, Plender and Wilderspin (ibid) para 6-039, footnote 103.
[253] 2005 Hague Convention on Choice of Court Agreements (Hague Convention) (30 June 2005).
[254] *'The Elftheria'* [1969] 1 Lloyd's Rep 237.
[255] See Recital 7 to the Rome I Regulation.
[256] *Samcrete Egypt Engineers v Land Rover Exports Limited* [2001] ECWA 2019.
[257] *Intercontainrer Interfigo v Balkende Oosthuizen* [Hoge Raad (Netherlands), 28 March 2008, C06/318 HR]. Cited in Plender and Wilderspin (n 134), para 6-042. See also, *Carl A Sax v Lev Tchernoy* [2014] EWHC 795 (Comm) [128–9].
[258] *Marubeni* (n 16), [42–4].
[259] (n 64), para 5.76.
[260] Ibid.

It is submitted that this decision is open to question. The preferable view is that, in applying a strict test of implying a choice of law through the contractual terms and circumstances of the case, 'the retention of a choice of jurisdiction clause while deleting a choice of law seems to be consistent with the parties wanting the question of the applicable law to be left open'.[261] In other words, it negates the intention to imply a choice of law.

On the issue of conflicting evidence, for example, the parties may choose a Dutch court to resolve reinsurance disputes, whereas the contract contains a clause that is drafted in the well-known standard form of an English Lloyd's policy, and the main insurance contract is governed by English law. This would constitute a 'stalemate'[262] over an implied choice of law between Dutch and English law. The court would therefore need to determine the applicable law in the absence of choice. However, it is submitted that the factors that constitute conflicting inferences should also be significant, so that objective factors like the currency of the payment, place of performance, residence of the parties, and place of concluding the contract should generally not be utilized as counter-indicators.[263]

To conclude here, legal certainty and a strict approach to implying a choice of law will not permit a forum selection agreement to be used to imply a choice of law, irrespective of either the presence of corroborating factors or the neutrality criterion, where there are significant negative and conflicting inferences.

IV. Conclusion and proposal

A key lesson of this article is that it is essential to make an express choice of forum and choice of law to govern every specific legal relationship in international contracts. This will avoid or at least reduce the problems of uncertainty and increased transaction costs and delays. This will also provide efficiency for the international commercial parties, in the sense that they will be able to devote their time and resources to other goals, having been assured of which court and law govern their specific legal relationship.

This article has likewise comparatively discussed the concept of a forum selection agreement as an indicator of an implied choice of law, due to the lack of uniformity and the uncertainty surrounding this topic in the global community. Based on the preceding discussions, the uniform guide to global criteria on the significance of a forum selection agreement in implying a choice of law is proposed as follows:

> A choice of law must be express or appear very clearly from the terms of the contract and circumstances of the case.
>
> An exclusive forum selection agreement is, inter alia, a significant factor to consider as an indicator of an implied choice of law. However, except in such cases as where a forum is chosen on a neutral basis, there should be a general requirement of corroboration with at least one other factor of significance.

This proposal is intended as a guide, formulated with the purpose of providing greater certainty, predictability, and uniformity on the global stage, regarding the significance of a forum selection agreement as an indicator of an implied choice of law. It is also a compromise between the school of thought that insists on the requirement for the corroboration of a plurality of factors, and the other, which rejects this corroboration requirement. Therefore, the present proposal should not be difficult to sell as a global approach.

[261] Beaumont and McEleavy (n 54), para 10.89, footnote 129.
[262] *Dornoch Limited and Others v Mauritius Union Assurance Company Ltd* [2005] EWHC 1887 (Comm) [68] (Aikens J) (sustained by the Court of Appeal on appeal [2006] EWCA Civ 389).
[263] *Egon Oldendorff* (n 38); *Hellenic* (n 38) 376. *Cf* Rb. Den Haag 28 May 2014 (n 33), [4.4].

However, this draft instrument does not include the discussion on negative and conflicting inferences, or the nature of the forum selection agreement. Thus, it is not verbose. However, these are issues that should be considered as a form of background or commentary. It is suggested that this proposal should be taken up by judges, legislators, and supranational, regional, and international instruments (like the Hague Principles). It is also suggested that more studies should be devoted to determining why global uniform criteria are necessary for this subject or whether diverse approaches to this subject must continue to be the norm.