CHAPTER-6

CONTRACTUAL LIABILITY AND CONFLICT OF LAWS

INTRODUCTION

As conflict of laws may arise in such cases where two parties belonging to two different countries entered into a contract, and they are governed by two different systems of laws. It means there is always a scope for the question of foreign involvement of element in certain kind of contracts. The problem arises generally when both the system of laws are equally competent to deal with the conflict arises between the parties. The two contracting parties may be residing in two different countries, or a contract entered into in one country may have to be performed, in some other country or countries or a corporation entering into a contract in one country may have its place of incorporation, or head office in another country, and so on.

Conflict of laws or Private International Law may be described as physics of the law because it is concerned with the application of the law in space and time. It is that part of private law of a country which deals with cases having a foreign element. It is an alternative name to Private International Law. Conflict of laws is sometimes interchangeable referred to as private international law or international private law. The term “conflict of laws” is mostly used in jurisdictions of the Common Law countries (England, Canada, and Australia, the United States, Kenya etc), while the term “private international law” is generally used in France, Italy, Greece, and in the Spanish and Portuguese-speaking countries. In Germany and German Speaking Countries such as Austria, Liechtenstein and Switzerland as well as in Russia and Scotland the word “international private law” is used. Within the federal systems (e.g. in the United States and Australia) where legal conflicts among federal states require resolution, the term conflict of laws is preferred simply because such cases do not involve an international issue.

Usually, conflict of laws is a set of procedural rules that determines which legal system and which jurisdictions applies to a given dispute. The rules typically apply

---

when a legal dispute has a ‘foreign’ element such as a contract agreed to by parties located in different countries. Hence, conflict of laws is a term which generally refers to the disparities among laws, regardless of whether the relevant legal systems are international or inter-state. This aspect of law gives a very broad knowledge on how to solve international cases or local domestic matter which involve foreign element.

The term conflict of laws itself originates from situations where the ultimate outcome of a legal dispute dependent upon which law applied, and the manner in which the court resolve the conflict between those laws. The term, however, can be misleading when it refers to resolution of conflicts between competing systems rather than “conflict” itself. The three branches of conflict of laws are:-

**JURISDICTION**

The first question that arises in conflict of laws cases is whether the forum or the court has the power to decide the case in hand.

**CHOICE OF LAW**

If the answer to the first question as to the jurisdiction of the court is positive, then the second issue that arises is which law should be applied to decide the dispute?

**ENFORCEMENT OF FOREIGN JUDGEMENT**

The other question related to the ability of the courts to recognize and enforce a judgment from an external forum within the jurisdiction of the adjudicating forum.

**RATIONALE BEHIND THE APPLICATION OF FOREIGN LAWS**

It is necessary to discuss here the reasons for the application of foreign laws. Why should the courts of one country depart from the laws of its own country and apply the laws of other countries? The reasons for this can be summed up as:-

- One of the reason can be: To apply the reasonable and legitimate expectation of parties to the transaction or an occurrence e.g., if two Indians went to another country and got married there, suppose in France and in accordance with the rules prescribed by the French law and not the formalities prescribed by the Indian laws, if Indian laws were to be applied, then the courts in India would have to treat the parties as unmarried and their children as illegitimate;
Another can be considered as: To provide justice and to avoid grave injustices that might occur, e.g., in case of above stated example, it would be possible for the courts in India to refuse to recognize or enforce a foreign judgment determining the issue between the parties, but this would cause great inconvenience and even injustice. Like, if divorce was granted in a foreign country and after that one of the parties remarried, he or she might be guilty of bigamy unless that foreign judgment was recognized in India. In the same way, if a person sued and obtained a judgment in a foreign country, he could find that the judgment debtor has secretly removed all his assets from that country to avoid execution of the judgment, it would cause grave injustice. So, in such situations it is necessary to take the help of foreign laws.

Comity can be the other reason for the application of foreign laws because there was a time when the doctrine of comity was held to be a sufficient basis for the conflict of laws. Here, comity means civility or the need for reciprocity or even the rule of international law as the accepted rule of mutual conduct as between states and therefore more than mere courtesy.

To convene obligations of the treaty between the countries, sometimes it is required to apply foreign laws, as on some occasions, application of foreign laws by a municipal court is required by public international law, e.g. Indian courts may be bound by a treaty that requires national courts to apply foreign law.

These are a few reasons on the basis of which it can be easily understood that application of foreign laws is necessary to provide justice.

A dispute related to contract which comes before any court may have foreign elements: one or both of the parties may be foreign, or the making or performance of the contract, or its terms, may be connected with one or more foreign countries, e.g., a contract is entered into between the two countries by telex; an Indian businessman sells goods to a French businessman, the goods to be delivered and the price to be paid in England. In an action for breach of contract brought by the French buyer in the Indian court, a question arises which country’s law should be the governing law because the laws in India, France and England are different. Which law should the court be applied? The general principle is that every international contract (i.e. a
contract containing one or more foreign elements) has a governing law, called the proper law of the contract, by reference to which issues arising out of it are mainly, though not exclusively, decided. Subject to certain limitations, the parties have the power to choose this proper law of the country with which the contract has its closest and most real connection.

Thus, whenever there arises any dispute, the problem which is generally faced is: which law, or the law of which place, is to be applied in a particular case. This problem is solved by the “proper law of contract”, because the parties are to be governed by the “proper law of contract”, in such a situation. The proper law has been defined as: “The law which is applied by the English or other courts in determining the obligations under a contract”.  

It is very difficult to define what exactly the proper law is, because the law of a single country may not be adequate to deal with the whole of the contract; some of the aspect of the contract may be subjected to allow one country, while the other aspect may be subjected to some other country. Thus in such a situation it is very difficult to decide which country’s law should be considered as the proper law, as the law of both the countries are equally competent to deal with the conflict but not wholly?

**CHOICE OF THE PROPER LAW**

There has remained always a conflict regarding either the place of contracting or the place of performance should be the criteria to determine which law should be applied to the problem related to contract arises between two parties. But under the Indian and English private international law the autonomy of the parties in this matter has been recognized and the parties are deemed to be free to choose any law which can govern their contract. This freedom of choice is also subject to certain restrictions, because sometime such choice may mean the exclusion of the operation of some law, which could be otherwise applicable. It means this choice makes that applicable law, inapplicable in particular circumstances.

Subject to certain limitations, the court will give effect to a choice of law by the parties. Such a choice may be express or implied.

---


4 In Re United Railway of Havana and Raglan Warehouses, (1960) Ch. 52.
Express Choice

The choice is considered express when the contract contains a provision that specifies the law, by which it is to be governed, in the situation of conflict if arises in future. It will be better for the parties to an international contract to include such a clause in their agreement, to avoid the uncertainty which may otherwise arise in ascertaining the proper law. However, normally, they neglect to do so, or are unable to agree on which law shall be the governing law in case of dispute, if there arises any, in future.

Implied Choice

When the contract contains no express choice of proper law then, according to the leading formulation by Lord Simonds in a case, the proper law is ‘the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection’. The first part of this ‘Bonython Formula’ refers to an implied choice by the parties, which is what we are concerned with now. The second part comes into operation when there is no choice by the parties, express or implied. The system of law by reference to which the contract was made, i.e. an implied or tacit choice of law, may be inferred by the court from the terms or form of the contract or the surrounding circumstances. The most important example of an implied choice of a governing law is a choice of forum clause i.e. a clause by which the parties agree that the courts of a particular country shall have jurisdiction, or a clause providing that any dispute arising from the contract shall be decided by arbitration in a particular country. In commercial contracts, arbitration clauses are common and where the contract is an international one, it may stipulate the country in which arbitration is to take place. An arbitration clause or a choice of forum raises a strong presumption that the parties intended the law of the country in question to govern, on the basis that they are most likely to have had in mind that the court or arbitrators would apply their own law.

Another common example of an implied choice is the use of terminology or concepts peculiar to a particular law, often contained in a standard form drafted against the background of that law. In such a case the inference may be drawn that the parties intended the law in question to govern. In a case, a Kuwaiti insurance company issued a marine insurance policy in Kuwait by the defendants, in respect of a ship

5 Bonython v. Commonwealth of Australia (1951) AC 201.
owned by the plaintiffs, a Liberian company carrying on business in Dubai. The policy was based on a Lloyd’s form set out in a schedule to the English Marine Insurance Act 1906. The House of Lords held that English law rather than Kuwait law was the proper law. In view of the English form of the policy, which could only be interpreted in the light of the English law, the parties must have intended English law to govern. This inference moreover was toughened by the fact that at the time of making the contract Kuwait did not have any law of marine insurance. It means that the parties must have intended to apply English law in case of any dispute would arises in future.

The Validating Law

Where a contract, or a particular provision in a contract, is valid under one law with which the contract is connected but invalid under another law, the court may infer a tacit choice of the validating law, on the basis that the parties must have intended their contract to be valid, not void, e.g., in a case, there was an exemption clause and it was void under the law of Massachusetts but it was valid under English law. It was held that English law was the proper law, for the parties must have intended the provisions of their contract, including the exemption clause, to be valid. The presumption that the parties must have intended the validating law to be the governing is most often considered to be a fiction, because there could be all the possibilities of the fact that the parties did not know that the contract was void under the one law but valid under the other law. It really amounts to a sensible presumption *infavorem validatis* which means in favour of the validity of an international contract. Unless or until there appears anything contrary, the court will consider that the proper law is the law which validates, rather than that invalidates the contract. The connections of the contract with the country may, however, be so close as to require the decision that its law is the governing law, but which invalidates the contract, will not be considered as proper law. On this basis, it would be better to treat the validity of the contract under the one law as relevant, not to the intention of the parties, but to the question which arises in the absence of a choice by the parties: which is the country with which the contract is most closely connected? And certainly a valid contract is more effective than an invalid one. As Langton J said in a case, “if one wants to derive the

---

7 In re Missouri Ss Co. (1889) Ch D 321.
8 In re The Adriatic (1931) P. 241 at. p. 251.
intentions of two businessmen, one may take it as they intended to do what was most convenient”.

The other factors which can be relied upon as the signs of an implied choice include the fact that the contract is linked with another which is governed by a particular law, and the fact that one party to the contract is a government, from which it may be inferred that its law was intended to govern. The fact that both parties reside or carry on business in the same country may be a strong indication of intention, as parties are likely to have their own law in mind when they contract with each other. Inspite of all these factors none can be considered as the conclusive for the courts to take the view that where a contract is obviously most closely connected with one country; the parties are unlikely to have tacitly intended that the law of some other country should govern it.

**Restrictions on the power to choose the proper law**

One of the reasons for the power to choose the proper law is that it gives the parties feeling of certainty regarding the governing law from the very beginning. Another can be termed as in domestic systems of law of contract the parties are largely free to choose the terms of their contract for themselves, from which the power to choose the governing law automatically follows as an apparent and rational expansion. Predominantly, the domestic contract rules are optional, and to fill the gaps in the contract, but giving way to the agreement of the parties to the contrary. Therefore, instead of making express provision for various matters, why should not the parties to an international contract, simply agree on which law shall be applied to fill the gaps?

Although the parties are free to choose the proper law but there are certain limitations on this power of the parties. These limitations can be explained as:-

- Mandatory rules of domestic law;
- The law of the country with which the contract is most closely connected;
- Centre of gravity;
- Convenience and business efficiency.
Mandatory rules of domestic law

One of the limitations on the power of the parties to choose the proper law is the mandatory rules of domestic law. The intricacy is that some domestic contract rules are not optional, but mandatory, i.e. applicable irrespective of any agreement of the parties to the contrary. These rules can be in any form like:

- The rules which render contracts void on grounds of public policy, or
- Invalidate provisions, such as exemption clauses, in order to protect a weaker party.

Here, arises a question, whether a mandatory domestic rule will be applicable to a particular international contract which is dependent on whether the law in question, or some other law, is chosen by the parties, seems contradictory. Moreover, it seems inconsistent with the nature of a mandatory rule that the applicability of these rules should depend upon the choice of the parties. If the unrestricted choice of the governing law by the parties is allowed, then there will be all the chances of evasion of the mandatory rules of the country with which the contract is most closely connected, whose purpose may be to protect the public interest, or to protect the interests of a particular class, such as employees or consumers. This is the main practical objection in respect of unrestricted choice of the governing law. Moreover, there will be a possibility regarding the choice that it may effectively have been that of the stronger party, and it can cause injustice to the weaker party. If one looks at the other side of the coin, then it is also arguably undesirable: the contract is considered void by the law chosen by the parties, whereas it is valid by the law of the country with which the contract is most closely connected. In such a situation, it will not have any logic to use the law chosen by the parties to invalidate their contract, when they could not have intended it to apply to that extent, for most likely they maintain their contract to be valid. In a leading case\(^9\) it has been held by the court that the only general limitation on the choice of the parties regarding the governing law is that it must be made with Bona fide intention and it must be legal. The basic requirement regarding the choice of law is that it must be bona fide. Broadly, it is believed that it

\(^9\) Vita Foods Products Inc. v. Unus Shipping Co. Ltd. (1939) AC 277, (1939) 1 All ER 513.
will not be so if the sole reason for choosing the law in question was to avoid invalidity under the law which would govern in the absence of a choice.\textsuperscript{10}

The law of the country with which the contract is most closely connected

There was a time when the courts were of the opinion that the proper law was always to be accredited to the intention of the parties. And an implied choice was found, in case there was no express choice. Time to time, various presumptions regarding the implied choice had been developed and now basically these have been abandoned. But these days, the previous trend has been changed. Whenever there is no choice either express or implied, then the proper law is the law of the country with which the contract has its closest and most real connection. In this regard, the court considers some important elements like:-

- The place or places of making the contract;
- The place or places of performance of the contract;
- The connection of the parties with the countries;
- The situs of any immovable property which is the subject matter of the contract;
- The country where the ship is registered, on which the goods are to be carried; and
- The currency in which money due under the contract, has been paid.

Here arise a few questions which the courts have to reply. These questions are as follows:-

- What should be the parameter to decide with which country or law the contract has the closest connection?
- Why that governing law is appropriate to apply?

Although the answers to these questions are not so clear, but sometime the application of the law of the country of closest connection is accepted on the ground that it is the law which reasonable parties would have chosen if they had thought about the dispute earlier. This proves that the governing law is appropriate but the question “why it is

\textsuperscript{10} Golden Acres Ltd. v. Queens land Estates Pty Ltd. (1969) QDLR 378.
appropriate”, is not answered. Any law can be considered as appropriate only for two reasons:-

1. If it is in the interest of the parties to the contract, or

2. If it is in the interest of the country whose law is to be applied.

However, there can be a conflict between the interest of the parties and the interest of the country. Generally, the interest of the parties for their contract is considered to be valid, whereas the interests of the country come into play only when its policy requires the contract, or a part of it, to be invalidated. The question: “Whether the interest of the parties or of the countries will prevail?” No logical answer to this question is to be found in the cases.

**Centre of Gravity**

The elements which connect the contract with two or more countries are considered the basis of the proper law, whenever the interest of the country i.e., to ensure that its policy is applied when appropriate, is emphasised. These elements expediently are called its localising elements. These are found in the country in which they are most closely grouped that constitutes the centre of the contract and furnishes the governing law. This theory is sometime called “hub of gravity” or “centre of gravity” and it can be justified on the ground that it is the country in which the elements of the contract are most closely grouped whose interests and policy are most likely to be affected by the contract. This theory generally involves the record of relationship of the contract with the different countries, but where there is no clear sign of connection with one country, the weight or eminence of the different elements are to be assessed. Therefore, sometimes ‘the place of performance’ is considered as the most important element and it is clear that whenever any single factor carries more weight than others in these matters; it is known as *lex loci solutionis*. The implication of this element is generally seen when the whole performance on both sides is to be in the same country, can be explained on the basis that a contract is most likely to encroach the interests of a country if it is to be performed in that country rather than elsewhere. One more fact is important to be considered here which may also bring the contract within the ambit of its policy, i.e. either one or both the parties should belong to the country or the subject matter should be situated in that country.
Convenience and Business Efficiency

When the interest of the parties is emphasised, rather than the countries, then close connection of the contract is evaluated in the terms of business efficiency and convenience. This is the criterion which also shows the implied choice of the parties. Although these factors are very much talked about, yet the courts have not adopted the approach to provide for any general guidance regarding the question: what connections with the countries are most significant in this respect? Thus, here some factors like: the place of making the contract or the place of performance of the contract have less importance than the relationship of the parties with the countries like: where they carry on business or where they reside are given much more importance than the other elements because generally it is most convenient for a party that the governing law should be his own law. Moreover, in relation to the interest of the parties, the law of that country with whom the party belongs will usually be the accurate law. Thus, it is not easy to answer the question the law of which party is to be preferred, in an international contract. Whereas, it seems that the factors which are discussed above underlie the concept of closest connection and its ascertainment, but these are not expressly found in the judgements. When the connection of contract with one country is clear, there arises no difficulty, but the difficulty is faced by the judges when they are evenly balanced. In such situations a question arises that whether it is a search for the country or for the system of law with which the contract is most closely connected. While the reference in the cases is found in respect of the system of law, but actually both are considered relevant. Therefore, after taking into consideration the connections of the individual, the closeness is with the country or the system of law perhaps depends on whether the court prefers a centre of gravity approach (country) or convenience and efficiency approach (system of law).

Thus, Parties are not free to enter into any such contract which exclude the operation of a ‘authoritative rule’ and which is otherwise applicable to their transaction.\(^\text{11}\) Moreover, parties are not allowed to specify particular foreign law as the governing law to their matter.\(^\text{12}\) If there appears any ambiguity in the agreement regarding the choice of law e.g., if in an agreement a clause is mentioned that the flag of vessel carrying the goods will be the governing law, and the goods are likely to be carried by

\(^{11}\) Mynott v. Barnard, (1939) 62 CLR 68 at.p. 80, (Per Learned Hand, J.). Also see, Supra note 9.
\(^{12}\) Ibid.
different vessels flying different flags, such agreement shall not be given effect to, and shall not be enforced as it is due to the ambiguity in the clause.\textsuperscript{13} As there is no particular test regarding the choice of law (not expressly mentioned in the agreement), in case of any dispute arises between the parties, in such a situation the court has to adopt the objective test or whatever reasonable man would have intended in such an agreement. This was held by Singleton L.J in The Assunzione’s case.\textsuperscript{14} It means, it is the court that has to determine for the parties what is the proper law, but as per the view of an ordinary prudence person, if he had himself entered into the contract and might have intended the same at the time of making the contract. Moreover, it is believed that all the terms of the contract must be regarded whenever this question is to be determined by the court like the intention of the parties, and the surrounding facts etc.

An ordinary prudence person would like to solve the dispute if there is any, in a most convenient way and in accordance to the business rules and ethics. Such persons make their choices to opt for system of law with which the transaction has the closest and most real connection.\textsuperscript{15} But it is not necessary that all the facts of a particular case must have a close and real connection with only one system of law, there can be some facts which may have a close connection with one system of law, while there may be certain other facts which may have the real connection with another system of law, and in such a conflicting situation the court has to see both the systems of law in totality, so that it can reach to the right conclusion. The Supreme Court in one of its decision\textsuperscript{16} has made it very clear that the proper law is “the law of the country in which its elements were most densely grouped and with which the facts of the contract has most closest and real connection.

This decision of the Supreme Court is further followed by other high courts of India, like Calcutta High Court in a case\textsuperscript{17} expressed its views in favour of the application of theory of localization of the contract for the determination of proper law. It was observed by the court that it seems that the law is finally settled.\textsuperscript{18} The localization of the contract is a better way to decide the proper law. Contract must be governed by

\textsuperscript{14} (1954) (C.A) p. 150, at.pp. 175,179. (P. Div’l Ct. 1954).
\textsuperscript{15} Bonython v. Commonwealth of Australia, (1951) AC 2D, at.p. 219.
\textsuperscript{17} Rabindra N. Maitra v. L.I.C. of India, A.I.R. 1964 Cal. 141.
\textsuperscript{18} \textit{Ibid.}
such law that naturally belongs to the contract and can ascertain objectively in the light of all the circumstances. In this case the Calcutta High Court held further observed that in this case the basic elements of the contract has most real connection with Bombay, it means the proper law of contract is the law of Bombay i.e., the Indian law.

It is pertinent to discuss the Assunzione’s case here, for the better understanding of the concept of ‘proper law’, and for this one must go through the facts of this case which are as follows: “An Italian vessel, Assunzione, had been chartered by French shippers for the carriage of grain from Dunkirk to Venice. The charter-part indicated in English, followed by a supplement in French language, “Paris, 7th October 1949”, indicating that the same had been concluded in France. The question was, by which law, Italian or French, the said charter-party was to be governed. The main points indicating connection with the French law were: the place of the execution of the charter-party was Paris; the supplement to the charter party (in English) was in French language; the bills of lading were written in French language, and were in French standard form; the charterers were French brokers and were acting on behalf of the French Government. The pointers to the Italian Law were: the ship was having the Italian ownership and flew Italian flag; 80% of the freight was to be paid in Italy in Italian currency; any demurrage or damages for detention at both loading and discharging ports was also to be paid for in Italy, and in Italian currency; the place of performance, i.e., delivery place was Venice, in Italy; and the bills of lading had been endorsed in favour of the consigners, who were of Italy. The decision was in favour of application of the Italian Law. The main fact which weighed in favour of the Italian law was that the payment of the freight and the demurrage was in Italian currency, coupled with the fact that it was an Italian ship with the destination at an Italian port.

**CHOICE OF THE FORUM**

In some countries, parties are at liberty to make a choice of judge or arbitrator to decide the dispute arising between them. Moreover the parties may also make a choice of the law which the tribunal shall apply at that particular place. In case the parties do not express the specific law which the tribunal has to follow, then the

---


20 *Supra* note 10. See also, Sayers v. International Drilling Co., (1971) 3 All ER 163; Coast Lines Ltd v. Hudig and Vendor Chartering N.V., (1972) 1 All. ER 451.
English Private International Law is there to solve this problem. As there is a rule which is recognised in the English Private International Law i.e., *elegit judicem elegit Jus*, which means the implied choice of law can be inferred from the express choice of the tribunal.\(^{21}\) The Latin term “*lex-fori*” has its relevance here that means law of the forum. Basically, it means that once the parties have chosen a particular tribunal, then the law of that forum should be the governing law to the dispute of the parties.

In Hamlyn’s case,\(^{22}\) the question was that in view of the arbitration clause, could an action under the contract be brought in Scotland? Thus, while answering to this question the House of Lords held that a contract was governed by English law, according to which the arbitration clause was valid, and the courts of Scotland had no jurisdiction to decide upon the merits of the case until unless the arbitration proved abortive. The observation of Lord Herschel, L.C. in this case was as: “the present case solved the conflicting situation in a very good manner. He further stated that it appears to me that the language of the arbitration clause very clearly indicated that the parties intended that the rights under that clause should be determined according to the law of England”.\(^{23}\)

In James Miller case\(^ {24}\), again it was observed by the House of Lords that the contract with reference to arbitration would have been absolutely null and void if it were to be governed by the law of the country which didn’t have any real and close connection with the contract. It is unreasonable to attribute that intention on the parties which was not actually their intention. Thus there is no difficulty in construing the contract in the language which could be used as an indication that the contract or that term of the contract was to be governed by the law of a particular country.

In one more case\(^ {25}\) it was held by the Court of Appeal that from the choice of English arbitration the natural inference was also about the choice of English law as it was provided that the matters of dispute between the parties were to be decided by arbitration in London, and this choice raises an irresistible inference which overrides all the other factors. But the freedom of choice of law which was provided was subject to certain conditions like by selecting such jurisdictions the parties could not

---

\(^{21}\) Hemlyn and Co. v. Talisker Distillery, (1894) AZ (HL); Tzortzis v. Monark Line A/B, (1968)

\(^{22}\) Ibid.

\(^{23}\) Ibid.

\(^{24}\) James Miller and Partners Ltd. v. Whitworth Stree Zsa (Manchester) Ltd. (1970) 1 All ER 796 ; (1894) AC 202 (HL).

\(^{25}\) Tzortzis v. Monark Line (1968) 1 WLR 406.
escape from the obligation, which would otherwise had normally arisen under the law, with which the contract has the most real and closest connection.

This may be explained by the decision of the Court of Appeal in The Torni’s case. It was held in this case that, the parties could not avoid the peremptory rule affecting the creation of contractual obligation, and, therefore, the bills of lading were governed by the English law, subject to the assumption that The Hague Rules were applicable to them.

**FORMATION OF CONTRACT**

Formation of a valid contract depends upon various elements like: there must be an offer which is accepted by the other party with his free consent it means the consent should not be vitiated by the elements like fraud, misrepresentation, undue influence, coercion or mistake, lawful consideration, and the capacity of the parties to make the contract. It is not necessary that the law of different countries on any of these elements may be the same. The rules and regulations of different countries regarding the formation of a valid contract may differ from each other and here arises the conflict of laws on this aspect also. Basically, the problem which arises in this connection is regarding the governing law i.e., whether it should be the law as intended by the parties, *or loci contractus*, or some other law, is to be the governing law in such cases.

It is necessary here to discuss all these elements in brief, so that the conflictual problem related to these elements can be concluded easily.

**Offer and Acceptance**

The elements which are necessary for the formation of a valid contract are offer and acceptance, but there are different rules in this regard in different countries. For example, as in English law and Indian law, when the contract between the parties is made through post, the communication of acceptance, and thus the contract, is completed when the letter of acceptance is posted. The contract is considered as binding even in a situation when the letter of acceptance is delayed, or even lost in transit.

---

26 (1932) at.p.27 (Can. C.A.).
But in some countries like Sweden, Norway, Denmark and Germany the contract is not considered as completed until or unless the offeror has received the letter of acceptance. Whenever there is any question regarding the enforceability of any agreement between the parties subject to different system of laws, the conflict of laws would lead to conflicts in the conclusion. As e.g., if a letter of offer is posted from Delhi to Germany and letter of acceptance is also posted from Germany but the letter is lost in transit, then as per Indian law a valid contract is created but as per the law of Germany no contract is considered to be concluded. If the parties to contract are from the same place, it means from the same country then there is no difficulty regarding the enforceability of the contract and *lex- loci- contractus* will be the governing law. *Lex- loci- contractus* means law of the place where the contract takes place.

The parties who are from different places having different legal systems entered into a contract, then the question whether the contract that has been reached should be submitted to the proper law, i.e., the law that would be the proper law in the objective sense assuming that the contract had been effectively formulated. Similar view has also been expressed by Paras Diwan, Dicey and Morris and by some other judicial authorities also.

**Capacity to Contract**

There are certain governing rules which are proved to be helpful in deciding the law which should be applicable to determine the capacity of a contracting party. There is lack of judicial precedents in favour of any of these rules, as such.

One of these principles, is the *lex loci contractus*, should be the governing law to determine the capacity of the parties to contract. This principle was applied in some old English decisions and also accepted by some eminent jurists and writers in their works. But O.Kahn-Fruend has expressed his views as: “it would not be reasonable in all matters concerning mercantile contracts to apply the principle “*lex loci contractus*” that means law of the place where the contract is made especially in

case, it is made by correspondence or over the telephone."^33 There are some other reasons also for the failure of this test, like if a person does not have a capacity to contract at one place, he may choose another place for entering into the contract, where such incapacity does not exist.

Another test to determine the capacity of the parties is *Lex domicilii* that means law of the place of which the parties have domicile. This is also not proved to be so satisfactory. Because this can be a big barrier in the field of trade and commerce, as a person would then carry the incapacity with him, wherever he goes, e.g., it would be unreasonable if a person over eighteen years of age should be able to escape liability for the price of goods sold and delivered to him in a London shop on the ground that he is still an infant by his *lex domicilii*.^34

The application of this principle can be misused by the parties, as it is without justification. One of the reasons is on the pretext of this principle, a person who is incapable of contracting could, confer capacity on himself, by choosing the law of another country, with which the contract may have no substantial connection.^35

The above mentioned tests have got very strong and valid objections to the application of these tests. Ultimately, the proper law of contract is considered to be the law which should be applied for the purpose of determining capacity, has been accepted, because this law has the closest and most real connection with the contract. Moreover, it would provide necessary flexibility and the courts would be able to decide the cases by taking into consideration various relevant factors connected with the contract. Although there are all possibility of one thing i.e., the proper law governing capacity of one party may be different from the one governing the capacity of the other party, or the essential validity of the contract may be subject to one proper law, whereas the question of capacity, subject to another, yet it is considered as just and reasonable test. Cheshire,^36 O.Kahn-Freund,^37 and Diwan^38 have also accepted this test.

---


^34 Supra note 23.

^35 Cooper v. Cooper, (1883), 13 AC 88 at.p. 89.

^36 Supra note 23, at.p. 222.

^37 Supra note 29.
Consideration

The question of consideration is decided by different rules in different systems of law. There are various rules in different systems of law in this regard, like the presence of consideration is needed for the validity of a contract in India, England and U.S.A., while an agreement is valid even without consideration, in some other systems of law, like Scotland, Germany and France. Only an expression to bind oneself in clear words is required in the later systems of law. The distinction between the different systems regarding the doctrine of consideration can be better understood with the help of an example i.e., like in India, consideration by the promisee or any other person is recognized as valid consideration, while in English Law the consideration should be furnished by the promisee and no one else. Since it is a matter connected with the creation of a contract, which, as has been noted above, is governed by section 2(d), the Indian Contract Act, 1872, will be the proper law applicable to the creation of contract. In Bonacine’s case the property of the promisor in the respect of which the action was brought was situated in England, whereas all other material facts connected with the contract were exclusively connected with Italy and therefore, the contract was governed by the law of Italy, and inspite of the fact that there was no consideration, the contract was held to be valid and enforceable.

Matters affecting contractual obligations

With respect to the contractual obligations, it is considered that if a contract has been lawfully entered into, then the law of a particular place is the proper law, but there are certain problems in this regard. One of them is: what should be considered as the proper performance of the contract so that the promisor can be discharged from his contractual obligations by such performance. There can be all the possibilities that in the matter of performance of any particular contract the proper law may not be the same. In such situation, which law will be applicable is to be determined by the courts. In the same way, in the matter of discharge of contract also an identical problem can arise such as: discharge by impossibility, illegality, novation, outbreak of war and insolvency etc. There is another matter of grave concern here i.e.
the *lex loci contractus*, or *lex loci solutionis*, or the proper law may not be the same, and in such a situation the question may arise regarding the legality of the contract, it means according to which law the legality of a contract can be tested. Thus, the courts while deciding a case, has to take into account various matters connected with a contract, and in that situation in order to make out as to what exactly was intended by the parties when they entered into the contract, should be interpreted by the contract itself. That is why; it becomes essential, firstly to decide as to which law should be applied for such interpretation and then the interpretations to be made on that basis. Most importantly, in case of breach of contract, there arises always a question of determination of damages. In such cases, two other questions also arise which the court has to decide:-

- Whether the consequences of breach of contract are remote or not?
- To what extent or how much compensation should be paid for the same?
- Which law should be the governing law for the above questions?

All the above matters, which are relevant in the context of contractual obligations, can be discussed as under:-

- Interpretation of contract.
- Illegality.
- Performance of contract.
- Discharge of contract.
- Determination of damages.

**Interpretation of Contract**

When the parties have entered into a lawful contract, there may be a dispute regarding the law of the place, which is to interpret the contract. In such matters parties are free to make their choice of law which would govern the interpretation of their contract. Because the interpretation of the contract can better explain the intention of the parties, so it is considered just and reasonable to give the option to the parties to make a choice regarding the governing law for the purposes of interpretation. But when it is not expressly mentioned in the contract that which law will govern the interpretation of the contract, then it is presumed that the proper law should be the governing law
regarding the interpretation of the contract. In a famous case\textsuperscript{43} this position was explained by the Court of Appeal, when a suit is filed in London on a contract which is a Chilean contract, to be interpreted by Chilean law, the Chilean law in relation to matters which may be taken into account in interpreting the contract applies just as much as law of London would apply if it were to be determined in Chile. Unless or until the parties have expressly mentioned their choice of law, they are to be governed by proper law. It is a rule of presumption which could be rebutted, in case the true interpretation of the contract so warrants, like: if the parties have used certain technical expressions whose meaning is unintelligible under proper law though intelligible by the law of another country, then it is reasonable to infer that when the parties used those expressions, their minds were directed to the law of that country.\textsuperscript{44} Certain other factors may be taken into account in this regard like:

- Expressly mention about the currency of a particular country\textsuperscript{45}; or
- Expressly mention the place of incorporation of an insurance company.\textsuperscript{46}

These factors may give indication of the fact that the place of such currency, or the place of domicile of the insurance company, will be the governing law in the matter of interpretation of such contracts.

**Illegality**

There are certain situations in which a contract may be valid according to the law of one country but it may be invalid or illegal according to the law of another country, like in case of *Lex Loci contractus*, or *Lex Loci solutionis*, the question arises i.e. up to what extent illegality at one place affects the validity of the contract at another place? One thing must be remembered here i.e. illegality at the place of contract does not affect the validity of the contract unless that also happens to be the place of proper law of contract.\textsuperscript{47} In a very famous case,\textsuperscript{48} the situation was explained. There was a clause in the agreement between the parties which exempted the ship owners from liability for the negligence of the master or the crew. Such a stipulation was valid in

\textsuperscript{43} St. Pierre v. South American Store Ltd. (1937) 3 All ER 349 at.p. 351.
\textsuperscript{44} Paras Diwan, “Indian and English Private International Law”, ed.1\textsuperscript{st}, (1977) at.p.516.
\textsuperscript{45} Ottoman Bank v. Chakarian, (1938) AC 260.
\textsuperscript{46} Equitable Trust Co. of New York v. Henderson, (1930) 47 TLR 90.
\textsuperscript{47} Saxby v. Fulton, (1909) KB 208; In re The Torni, (1932), at.p.78.
\textsuperscript{48} In re Missouri Steamship Co., (1889) 42 Ch D 321. See also supra note 9.
England (the place of proper law), but void in Massachusetts (*lex loci contractus*), as being against public policy. Due to the negligence of the ship owners the cattle were lost. It was held that since English law, which was proper law, allowed such an exclusion clause, the same was held to be effective. If the agreement is illegal according to the *lex loci solutionis* the same would not be enforced.

There is a very good authority on this point. The facts of this case are needed to be discussed here in brief for the clarity on the subject. The facts are as follows: An English firm chartered a Spanish ship belonging to a Spanish firm, for carrying jute cargo from Calcutta to Barcelona, in July 1918. The freight agreed to be paid was £50 per ton. 50% of the freight was to be paid to the owners in London, when the ship sailed from Calcutta, and the other 50% was to be paid on the arrival of the ship at Barcelona. The charter party was in English language and form, and was made in London. English law was thus the proper law in this case. Before the ship arrived at its destination in September 1918, the maximum freight rate on the jute to be imported into Spain was fixed at 875 pesetas per ton, and the violation of the rule was subject to penalty. The freight thus fixed by the Spanish law was much less than £50 per ton, and the receivers of the cargo at Barcelona refused to pay more than the amount permitted by the Spanish law. Spanish ship owners brought an action to recover the balance of the amount of the freight from the charterers in England. In this case, Acrutton L.J. observed: “When one of the requirement of the contract is that an act need to be done in a foreign country, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country, will be there, unless or until special circumstances prevail there. In his opinion, a country should not assist or sanction the breach of the laws of other independent countries.”

In another case, however, a distinction is drawn between acts which are illegal at the place of performance and the acts which are merely void, but not illegal. If certain obligations have already arisen as per the proper law, same cannot be varied by the change in law at the place of performance, when such performance is not rendered illegal.

---

49 Rallis Bros. v. Campania Naviera Sota Y Azner, (1920) 2 KB 287.
50 Ibid.
Performance of Contract

There are certain situations, where there may be difference between *lex loci solutionis* and the proper law in the matter of performance of the contract. In such situations the problem arises as to which law should be the governing law on the question of performance. Thus, in such matters it is considered reasonable that the law of the place of performance should be the governing law on the question of performance of the contract. But if this rule is followed, this can lead to confusion in those cases where both the proper law and the law of the place of performance are different. When as per the *lex loci solutionis* the promisor’s contractual liability gets reduced, it means that the extent of obligation that has already arisen is affected. It may be considered that the proper law determines the substance of the contract including the question “what type of performance will discharge the promise from his contractual obligation”. But now it is well settled rule of law that the proper law controls the performance of the obligations and such obligation cannot be varied by the *lex loci solutionis*. In a very famous case the position has been explained. There was a legislation, whereby the interest rates were reduced in Victoria. It was held that the obligation to pay the agreed rate of interest, according to the proper law of contract, could not be varied by the legislation at the place of performance of contract. It has also been mentioned that according to the Victorian law the payment of lower rate of interest was not made illegal. If that so happens, the things would have been different because the performance of that contract is not possible which is illegal, even though the same is valid as per the proper law of the contract. One can take another example of another case for the rule that essential obligations cannot be varied by application of *lex loci solutionis*. If there is an exemption clause available under French law, but the contract is subject to English proper law and the goods were to be delivered in Algiers, then the promisor could not be excused from non-performance of contract on the ground of exemption clause under French law. Thus, the position was more effectively explained by Bowen, L.J. in this case as: “In the matter of performance of the contract the rule that the proper law controls the performance of

---

53 *Supra* note 49.
54 Jacob v. Credit Lyonnais, (1884), 12 Q. B. D. 589.
the contract, rather than the place of performance has been well recognized. This rule is considered as just and reasonable.”

**Discharge of Contract:**

There are various modes of discharging a contract such as:

- Performance of the contract; or
- Impossibility of performance; or
- Subsequent impossibility or illegality; or
- Novation; or
- Outbreak of war; or
- Insolvency.

It has already been discussed above that as the performance of the contract is a matter of essential obligation arising under the contract, so the discharge by performance is possible only if that satisfied the requirement of proper law, rather than the *lex loci solutionis*. The same principle is followed while discharging a contract (it doesn’t matter which mode is this), and therefore the question of discharge is finally decided by the proper law of the contract.

There is a need to mention the mode of discharge by novation specifically, because it is totally different from the other modes of discharge of contract. As novation means substitution of a new contract in place of the existing one, so in case of debt, when there is novation by the substitution of the parties, it amounts to the discharge of the liability of the original debtor under the existing contract, and subsequently the new debtor in place of the original debtor, is liable under the new contract. The proper law of contract, in such a situation comes into play to decide a case which involves the question of extinguishing the liability of the original debtor. Without the help of proper law of contract, it would not be effective.

Whether a debt liability has been discharged by novation: the issue of whether the obligator is discharged, is governed by the law applicable to the contract under which

---


the obligation arises, e.g., this rule will apply to bank novation under loan transfer clauses in syndicated bank credits.58

In fact, the case of substitution of a debtor has to be distinguished from the assignment of the debt by one creditor in the favour of another, which amounts to discharge. The basic difference between the two, in a contract is that in case of change of debtors the contractual liability is altered, while in case of change of creditors the contractual obligation has been preserved but transferred. In the case of assignment of the debt by the creditor, the governing law is the law relating to the assignment of the debt.

Here, it is very important to discuss the decision given by the Court of Appeal in a case59 which substantiates the above rule. Without discussing the facts of this case, it is not possible to understand the above rule. Thus, the brief facts of this case are as follows: A contract was entered into between the plaintiff and the defendant in London on 6th oct. 1880, according to that contract the defendants agreed to sell to the plaintiffs 20,000 tons of Algerian esparto, to be shipped from Algeria during 1881 by monthly deliveries on board, the ships or steamers, to be provided by the plaintiffs. But the payment was to be made in cash on arrival of the vessel at her port of destination. The defendants delivered a portion of the esparto, and in respect of the remainder they contended that due to the insurrection in Algeria and the military operations connected with it the performance of the contract had become impossible, and this was a valid excuse for the non-performance according to the French Civil Code, which was prevailing throughout Algeria. The plaintiffs, on the other hand, contended that the contracts were governed by the English law, which was the proper law of contract, and not the law of Algeria. It was held that since the discharge was not valid according to the proper law, that is English law, the defendants could not be excused from the performance of the contract. It was further observed60: “The contract being an English contract, only such portions of the French Civil Code can be applied to its provisions as to performance in Algeria are not inconsistent with the express language of the contract as interpreted according to English law. Moreover, If the parties had wished, in addition to this, to incorporate a provisions of French law which in the event of vis-major would operate to excuse the contracting parties for

59 Supra note 54.
60 Ibid.
non-performance, and thus to vary the natural construction of the instrument according to English law, they should have done so in express terms.”

**Determination of Damages**

The traditional view is that questions relating to the nature of the remedy to be granted for a breach of contract are a procedural matter that determined by English law, as the *lex-fori*, even if the contract is governed by a foreign law.\(^{61}\) According to this approach in deciding whether or not to grant specific performance or an injunction the court refers exclusively to the principles of English law. Similarly, it is used to be thought that the quantification of damages is a question of processes governed solely by the *lex-fori*, rather than a substantive matter for the applicable law.\(^{62}\) Basically, it is stated that procedure and evidence are not included within the scope of regulation. Further, it could be argued on the basis of this provision, that the traditional difference between questions of liability (substance) and questions relating to remedies and damages (procedure) are not affected by the regulation. In a situation, where a particular type of loss is recoverable according to the applicable law, if it was accepted, it would be for English law, as the law of the forum, to determine how damages for that loss are to be quantified.

However, it is also provided that “within the limits of the powers conferred on the court by its procedural law” the applicable law governs “the consequences of a total or a partial breach of obligation, including the assessment of damages in so far as it is governed by rules of law”, but the significance of this provision is not certain.\(^{63}\) It has been suggested by the developments in relation to other areas of private international law that the court should only make a classification of procedural matters which are related to the mode and conduct of proceedings. Because, the question whether a remedy of specific performance or an injunction is available or not, is not a question link with the mode of trial. That is why, it will be better to say that the applicable law should determine the type of remedy to which the claimant is entitled, but subject to certain limitations of the procedural law of the forum.\(^{64}\) Thus, it is made clear

---


\(^{62}\) Ibid.

\(^{63}\) Article 12 (1) (c) of Rome I Regulation (1780), Supra note 61.

regarding damages that these falls under procedural matter and is, therefore, subject to the law of the forum.

However, it is reasonable to think that, to a great extent, quantification of damages should be governed by applicable law. This is because quantification of damages is mainly determined by the operation of legal rules, such as rules relating to:

- Whether tax that would have been payable on lost earning is to be deducted?
- The time at which the losses to be assessed?
- Whether the claimant is entitled to the loss value of damaged property or the cost of repairing it?
- Whether value of the loss is to be assessed in relation to the market value?

All the rules mentioned above should be taken into consideration as rules of law because these have direct impact upon the assessment of damages which are concerned with the extent of the rights of the party, at the time when the contract is broken.

At the time of determination of damages for breach of contract, two factors are to be taken into consideration i.e. the remoteness of damages and the measure of damages. The feature of damage determines as to question of remoteness meaning thereby what kind of loss resulting from the breach of contract is recoverable. First of all, it should be decided that damages in respect of a particular kind of loss are recoverable or not, and if it is ascertained that they are recoverable, then the question of measure of damages arises, the measure of damages simply means the calculation of the amount of compensation payable in respect of those recognised head of damages, e.g., If there is a contract between the parties regarding the sale of certain parts of machinery and the parts of machinery are lost during transit, then the first question which the court has to decide is whether the carrier is liable or not? If the answer to this question is positive, only then the next question: whether the liability is to be in respect of those parts of the machinery which were there in the box, which has been lost, or for the whole machinery, is to be decided. The extent of an obligation, not only the existence should be taken into consideration because it is necessary to know whether it springs from a breach of contract or the commission of a wrong, must be determined by the

---

65 Supra note 61, at.p.256.
system of law from which it derives its source. The nature and content of the rights created by contract are determined by the proper law, thus it is very clear that the type of loss for which damages are recoverable upon breach forms a part of the same content. The question whether certain consequential losses that may arise if the contract is unperformed will be too remote or not in the eyes of the law, is considered to be the basis of the nature and the content of the contractual rights. If a breach is determined by the proper law, then only the proper law should be entitled to determine the consequences of that breach.

In a very famous case, 66 this approach of proper law was considered as valid. It is necessary to mention the brief facts of this case here. The facts are as: the plaintiff and the defendant entered into a contract to sell 500 tons of palm-oil. The plaintiff belonged to Portuguese law, whereas the defendant was a British company carrying on their business in London. The defendant committed a breach of contract and, consequently the plaintiff also committed breach of contract with third-party and had to pay indemnity of £3,500 to the said third party. Thus, in this case the plaintiff sued the defendant for the amount which he had to pay as indemnity to the third-party. It was held by the court that damages in respect of indemnity could only be recovered under proper law i.e. Portuguese law, and not under English law. Further the court had stated that if the question of remoteness was to be determined by the proper law, then the English law would be irrelevant in this context. Pilcher, J. observed 67 that the question whether the plaintiffs are entitled to claim from the defendants the £3,500 which they have paid to the said third party, depends on whether such damage is or is not too remote. He stated in his opinion that the question here is one of remoteness, and therefore falls to be determined in accordance with Portuguese law, not by English law.

One more case 68 is relevant to be discussed here, because a similar question had arisen in the context of commission of a tort in this case. The question before the House of Lords was to determine the point of remoteness. It was held by the court that the question of remoteness was to be determined by the law, which governed the question of right to action. In that case damages under such heads were awarded as were admissible under the English law, i.e., lex causes. Once it has been determined

---

67 Ibid.
by the proper law whether the damages are too remote or not and it is decided that damages are not too remote and moreover recoverable, then the further question of measure of damages should be governed by lex fori.

Cheshire has described the position of English Law in this regard, which is quite clear, and without any controversy and which is as follows: “In narrow sense, a rule as to the measure of damages is a mere rule of calculation that operates only after the injury or loss in question has been found to be free from the doubt of remoteness. Its function is to quantify in terms of money the sum payable by the defendant in respect of the injury, whether it is a tort or a breach of contract, for which his liability has already been determined by the proper law. A plaintiff who seeks to recover compensation in England in respect of an obligation that is governed by a foreign law has already acquired a right, the nature and extent of which have been finally determined. His object is that his right as established shall be converted by the English Court into a right to receive a definite sum of money. He is entitled to be paid in full for the injury suffered and he takes advantage of the English process and machinery in order to extract this payment.”

One of the relevant questions was related to the currency in which a judgment should be expressed, e.g., in case of international contract of sale which is the subject of litigation in England, if the price of goods sold is expressed in US dollars, Can the court give judgment for the amount in US dollars, rather than genuine? Can the court award a sum expressed in a foreign currency as damages for breach of contract? Until the 1970s the rule was that the court could give judgment only in sterling. But it was changed by the House of Lords in a case, where a party is entitled to an amount under a contract which is expressed in a foreign currency the court will give judgment in that currency. Similarly, the court may give judgment for damages for breach of contract in a foreign currency in which the loss was sustained by the claimant. When judgment is given in a foreign currency the defendant may be either in that currency or in the sterling equivalent at the date of actual payment. If the claimant has to

---

70 Ibid.
71 Tomkinson v First Pennsylvania Banking and Trust Co.,(1961) AC 1007.
enforce the judgment, the date of conversion into sterling is the date when the court has ordered enforcement of the judgment.\textsuperscript{74}

Under English law it is the practice to sue for damages for personal injuries arising out of the employment relationship in tort rather than in contract, although an action for the breach of an express or implied term in the contract is also available. In all cases where there is a choice of the cause of action, it is for the plaintiff to select the one he wants.\textsuperscript{75}

\textbf{INDIAN LAW AND CONFLICT OF LAWS}

Often international business and trade involves traders belonging to different countries whose legal systems may differ in many ways to that of the other, presenting complicated and even conflicting features. The law courts of each country have jurisdiction only within the territorial limits of the concerned country. The rules of private international law resolve the issues concerning conflict of laws, which arise because of differences between the law of the country of nationality of a person and that in which that person may reside, or of which he may acquire nationality. These issues most frequently arise in relation to personal matters such as marriage and divorce, custody of children, abduction of children, adoption and succession. These rules are mainly based on court decisions. In case of India, situation is more complicated because in India the applicable law is the personal law relating to these matters is determined by the religion of the individuals concerned, most of countries in which there is substantial presence of Indian nationals do not recognise personal laws based on religion and have a unified civil code which applies to all persons residing there. Now, India is also a member of the Hague Conference on Private International Law. In International trade and commerce, every commercial activity is generally preceded by a contract fixing the obligations of the parties to avoid legal disputes. But in this ever-changing world of trade and commerce, disputes between parties are inevitable. No matter how carefully a contract is drafted, a party to the contract may understand his right and obligations in a different way.

Under Indian Law, certain rules related to conflict of laws are mentioned specifically in Civil Procedure Code, 1908. The rules relating to Jurisdiction in action inter parties

\textsuperscript{74} Supra note 72.

\textsuperscript{75} Coupland v. Arabian Gulf Petroleum Co (1983) 2 All ER 434 (Hodgson J); affirmed (1983) 3 All ER 226, CA (Waller, Oliver and Robert Goff LJ).
are laid down in sections 19, 20 of the code. Section 19 is confined to suit for compensation for wrongs to person or movables. Under this section, it is mentioned as: “Suits for compensation for wrongs to person or movable: Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of the said courts.” But this section is confined to torts committed in India and to defendants residing in India. It does not include within its ambit the suits in respect of foreign torts. Such cases are covered by section 20, which overlaps this section. This section deals with inter parties suits. This section can be read as follows:

Subject to the limitations aforesaid, every suit shall be instituted in court within the local limits of whose jurisdiction:

(a) The defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) Any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) The cause of action, wholly or in part, arises.

The explanation to this section says that a corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Actually, the Indian rules of Private International Law are identical to the rules of English Private International Law. Thus, it is submitted that Indian Courts should not construe strictly the requirement of residence in private international law cases, nor should it exercise jurisdiction over persons on whom process has not been served just

---

76 Sec.19 of Civil Procedure Code, 1908.
77 Sec.20 of Civil Procedure Code, 1908.
78 Explanation to Sec.20 of Civil Procedure Code, 1908.
because cause of action arises within jurisdiction. If a person to the court submits to the jurisdiction then the court gets the jurisdiction to try the action and a decree or an order is passed in such action will be valid internationally. Mere appearance in the court is considered to be the submission. A person may submit to the court either impliedly or by way of express stipulation in the contract. If a person is outside the jurisdiction, the court will have the jurisdiction on him only if he submits to the jurisdiction of the court. In case, the foreign defendant does not submit to the jurisdiction of the court, then the judgment delivered in his absence would be null and void.

Choice of law rules for contracts

Most of the issues related to contracts are governed by the proper law of the contract. In this regard three important points are needed to be discussed here:

- Agreement
- No Agreement
- Inference

Agreement

In a case it was held that “the role of intention is crucial and if the parties have agreed on the applicable “proper law of the contract”, then the courts must give effect to that agreement so long as the agreement is bona fide and legal, and not against public policy.”

No Agreement

If there is no agreement between the parties regarding the proper law of the contract, then the court applies the law that has the “closest and most real connection” to the contract.

80 Ibid.
81 Supra note 9.
82 Imperial Life Assurance Co. of Canada v. Colmenares, SCC 1967.
Inference

In another case,\(^83\) it has been held by the court that if the contract allows the court to infer what the intention of the parties in their agreement regarding the proper law of the contract, then the courts must give effect to that agreement.

The court cannot hold someone liable for simply obeying the local law, even if it results in the breach of contract. Certain important points have been analysed by the court in a case\(^84\), in this regard. These are as follows\(^85\):

- Even if contract is valid by its proper law, it will not be enforced to the extent that it causes crimes to be committed under local law of the place of performance.
- Choice of law system must respect the fact that states can regulate conduct.
- Courts will not hold someone liable for obeying local law.

Doctrine of Restitution also needs a brief mention in context of conflict of laws here. Restitutionary claims are governed by the law with the closest and most real connection to the place of unjust enrichment.\(^86\) Actually, if a party is a foreign party, then the party firstly, has to submit to the jurisdiction to the court regarding any matter, whether it is related to breach of contract or for the restitution. And the matter of jurisdiction is decided with the help of certain rules of Private International Law or conflict of laws, which are the connecting rules which help the courts in deciding what law should be applied to decide the case. Then, the foreign party is required to submit to that court which has jurisdiction, which means that the party will accept the decision of that court. Once a decision is given by a court, its enforcement is necessary in the foreign country by the foreign court, then the foreign court need to recognize it and only then it can be enforced. For Recognition and enforcement of foreign decrees and orders every country has its own rules/laws. In this way, it can be concluded that the Indian rules of Private International Law are the similar to the rules of English Private International Law.

\(^{83}\) In re The Star Texas, C.A. 1993.
\(^{85}\) Ibid.
CONCLUSION

There is a conventional difference between public and private international law mainly related to whether the parties involved in legal controversy are governments or individuals. In this stratum, public international law is defined as: “The corpus of rules binding governments in their relations with one another and the processes available for implementing these rules”; whereas private international law is considered as: The law applied by domestic courts whenever a foreign element is relevant to the resolution of a legal controversy. Many specialists in this latest build of law object to the label private international law, suggesting that the law applied by domestic courts— even if it leads to the application of foreign law—is a field of national law. Such a view is especially prevalent in the United States, accounting, in part, for the use of the term “conflict of laws” to describe the subject, although its use also reflects the emphasis among American scholars, perhaps to an excessive degree, upon the conflict of laws as it has evolved from interstate (intra national) transactions. In Europe, even in federal states, the subject, in contrast is dominated by its international aspect, that is, by the study of the rules and processes by which the courts in one country give effect to the law of a foreign country or show respect for a judgment already reached by a foreign court.

In recent years, the basic features of the conflict of laws, its methodology, and its governing ideologies have been seriously questioned. No scholarly or judicial consensus is found on the choice of law rules. Particularly, the conventional ideas of seeking uniformity of result and of establishing equality between domestic and foreign laws have been criticized on the grounds that such ideas are not pragmatic and appropriate, since the domestic courts actually do and in fact, should be inclined to domestic law in a situation where it is one of the applicable legal systems.

To conclude, it can be stated that the stability and fairness of international legal undertakings seem to depend upon the strengthening of this renewed attempt to supranationalize the conflict of laws. Due to the increasing interdependence of human activity, the need for predictable outcomes in the legal disputes is also growing. These outcomes should have a more substantial pace than the national affiliation of the

forum. Given the diversity of contemporary international society, it is not realistic to see this and by reconciling national policies so as to create a single substantive law. There is more reason for hope if the ancient quest for order amid diversity is pursued through a uniform approach to the allocation of legal competence among the national units that compose the global system. One illuminating context within which this allocation can be studied and realised is the application of choice of law rules by domestic courts.