The first concern that arises during the formation of a transnational agreement is the forum to be chosen to resolve the disputes between the two or more contracting parties. The second concern is to determine that if the validity, interpretation and performance of the law governing. Pre-selection of the forum and the law enables the parties to know the law that is to be applied in case of any dispute among them. Today, the contracting parties, particularly the ones entering into transnational contracts, make their agreements in written forms that specifically explain the rights and obligations of each party under that particular agreement. However, it does not mean the clause concerning the choice of law is dispensed primarily due to the fact that the rights and obligations, no matter how explanatory they are in their written form, cannot be interpreted in isolation. The chosen law will responsibly explain to the parties the effect and validity of these rights and regulations, and the forum, such as courts or arbitral tribunals, opted by the contracting parties exhibits the fact that the clause is applied and upheld.

Choice of law clause can vary depending upon that if the contract is being made between enterprises or if it is a government contract. The government contracts raise the questions of service of process and sovereign immunity. It also precludes the submission to a particular court or tribunal system as well as the choice of a particular law. In this regard, government or public trade agreements are not much messy when it comes to the point of dispute between the contracting parties. However, the private contracts being made between two international companies or enterprises are rather difficult to handle. Private trade agreements include business contracts for construction work, for services, for the acquisition of business enterprises, for the technology transfer, and for the use or sale of goods.

**The Anglo-American Approach**

The precedent in the U.K cases points towards the free choice of law governing the transactions of the contracting parties. In a case in 1939,[[1]](#footnote-1) went so far in deciding the free choice of law clause for the contracting parties that a law of a particular state can be chosen even when it is not connected with the agreement. As per the facts of the case, the goods were to be transferred from Newfoundland to New York. The payment was to be made, via bill of lading in the Newfoundland but it was decided in the agreement that the English law will be applicable on the contract. The issue in the case was that if an exception clause in the bill was valid or not. This clause exempts the carrier from the law. The Hague Rules have been enacted into the U.S. Carriage of Goods by Sea Act 1936 and the Newfoundland Carriage of Goods by Sea Act 1932, which are a codification of rules and regulations applied on the bill. According to the Hague Rules, minimum standards of liability are to be imposed on the goods being carried through the sea. However, all those clauses are void that exempt the carrier from any liability beyond the minimum standards. As a matter of fact, every legal system in the world has embraced the Hague Rules.

Therefore, as per the U.S. Act 1936 and Newfoundland Act 1932, the exemption clause concerning the bill would be void. However, the English law was to govern, as held by the Judicial Committee of the Privy Council. Thus, the U.S. Act of 1936 was applied. It was applicable to the shipping made to the U.K. only. For this, the court declared the exception clause valid. However, this decision put to an interesting situation where it was clear that a state that has adopted Hague Rules could escape its application while sending a shipment to another state also adopting them. It was a regrettable decision and exhibited the extreme taken by the court on choice of law. Moreover, English law followed the precedent despite the fact that the decision of the Judicial Committee of the Privy Council is not binding.

Under the American law, the situation is not that extreme. Unlike English law, the American law has not favored the idea the implied or expressed intention of the parties play any role in context of the choice of law.[[2]](#footnote-2) As per the most recent advancements in the law, i.e., the Restatement (Second) of the Conflict of Laws s.187 (1971) and the Uniform Commercial Code s1-105 (1), it has been cleared that the parties must choose the legal system of the state possessing reasonable association with the transaction to govern their contractual obligations. The Restatement applies to the interstate contracts but it will be applied on the transnational contracts as well. The Conflict of Laws, on the other hand, states rules covering both interstate and transnational contracts. [[3]](#footnote-3) For this reason, the United States law has been finding a reasonable connection between the contracting parties, the contractual obligations, and the state law to govern the transaction. For most of the part, the difference is not must significant but in a few particular cases, submitting to arbitration or a jurisdiction connects the transaction to a legal system.[[4]](#footnote-4) However, the contracting parties of the East-West trade submit their disputes to the Sweden arbitration and the Sweden law is applied despite the fact that there is no connection between the state and the transaction.

More importantly, the question concerning that if a connection must prevail among the contracting parties, the contractual obligations, and the governing law is academic in context. As a general matter of facts, most of the parties choose a law that is associated with the contracting parties, the contract and/or the court system chosen for handling the disputes in the future. It gives rise to another question that how substantial this association must be. For instance, is the fact that the financing or insuring of a transaction has been done in a particular state causes a significant connection? In the 1939 case of *Vita Food,[[5]](#footnote-5)* it was cleared that underwriters making the insurance were more likely to be English therefore it developed a connection.

The United States has evolved with a proper law of contract favoring the fact that implied or expressed intentions of the parties determine the answer to the question of choice of law for their connection with the contractual obligations the English law has been a little flexible to the law to which the transaction is most significantly associated. For this reason, this has not been made cleared that the parties, with expressed clauses, cannot escape the mandatory provisions of the legal system with which the transaction has a significant association.[[6]](#footnote-6) However, it does not mean that the English law is to be surrendering to the objective proper law, which is to an extent so-called. In this regard, the decision of the 1968 case titled *Tzortzis vs Monark Line, A/B,[[7]](#footnote-7)* is of considerable importance. In this case, it was held that contract for sale of a ship that had provided for arbitration in London was to be governed by the English Law despite the fact that they had clearly chose the Sweden law to govern their transaction. The Draft United Kingdom-United States Convention on Reciprocal and Enforcement of Judgments in Civil Matters also supports the application of law to which the transaction is most closely related despite having an expressed choice of law, in case of evasion of its mandatory provisions.

The effect of the provision 8 of the Convention, in this regard, is that any arbitration or court where the judgments is to enforced or recognized, at the defendant’s request, may refuse to enforce or recognize a judgment applying to the chosen law, only under the circumstances which would require application of its own law primarily due to the fact that it has the most significant association with that particular transaction. Thus, an English court that applied the English law on a transaction because the contracting parties had expressly chosen it despite the fact that the English law was most substantially connected to it, and thus, had avoided the application of the mandatory provisions of the Securities Exchange Act 1934, a court in the United States, under the umbrella of the Convention, would be entitled to enforce or recognize the English judgment on request of the defendant.

**The European Community Approach**

For most of the parts, Europe has conventionally accepted the autonomy of the contracting parties choosing the law to govern their transaction. However, this acceptance has not been without a debate in the context that if planned economy influences the choice of law made by the parties. It is a matter of concern primarily due to the fact that the shift towards state ownership from a laissez faire economy in the East with a planned and mixed economy everywhere else, except for the United States, was bound to affect, one way or another, the autonomy of the choice of the contracting parties about the law to govern their transactions. However, the evidence points in the other direction. The United States successfully adopted the law of the state on formation of the contracts. State enterprises in the Soviet Union, and Eastern Europe have been willing to submit their contracts to a law that is not connected to the transaction.

The World Bank consulted the references to decided cases to analyze the existing trends within its resourceful and well informed atmosphere, and came to the conclusion that the autonomy of the parties still exists.[[8]](#footnote-8) The Article 2 of the Hague Convention on the Law Applicable to the Sales of Goods Act 1955 expresses complete party autonomy. Article 3 and 4 of the Draft Convention on the Law Applicable to the Contractual Obligations by the European Community also provide that the contracting parties either expressly or impliedly choose the law applicable to a transaction. The law closely related to the transaction is applicable only one there is a lack of choice by the parties. Moreover, the public policy corrective has extensively been applied to contract cases; it excludes the application of normally governing laws. It is further evident that the influence of *fraude a la loi,* the French concept preventing the evasion of mandatory provisions due to the chosen law, on the application of law on international commercial agreements is considerable, particularly in the context of private international law. Both of the English and French concepts are incomparable and bound to have effect in the United States and Europe. However, it is more difficult to make the impact in the United States due to the fact that the state and federal courts have never wholeheartedly supported the notion of free choice for the contracting parties to choose the law to govern their contractual obligations. The only support if finds vests in the increasing application of international guidelines and international standard of conduct to the transfer of technology and the transnational corporations.[[9]](#footnote-9)

**The Australian Approach to the Choice of Law Clauses**

In the case titled *John Kaldor Fabricmaker Pty Ltd vs. Mithcell Cotts Freight Pty Ltd,[[10]](#footnote-10)* the Supreme Court of the New South Wales was to decide that, while the matter of dispute was arbitrated in England, if it must stay proceedings in the New South Wales. Under s.43 of the Insurance Contract Act 1984, the arbitration clause would have been invalid if the Australian law was to govern the relevant insurance. Moreover, the same provision also requires the Australian courts to ignore the expressed choice of law in an insurance contract specifically if the contracting parties have chosen the English law to govern their transaction. However, the court completed an extensive study of the leading cases and determined that the correct procedure to ascertain the proper law of the contract. The court decided that it is clear that the contracting parties had an inferred intention of choosing the law of England as the governing law. For this reason, the local proceedings stayed and thus the arbitration clause was valid.

Brownie, J., endorsed the ‘three sub-rule’ approach[[11]](#footnote-11) of the proper law of contract as follows:

Rule 180: The term proper law of contract is the system of law that is chosen by the contracting parties to govern their transaction. If their intention for the choice of law is not expressed or implied, the law closest to the transaction must be applied.

Sub-rule 1: the expressed intention of the contracting parties determines the proper law of contract.

Sub-rule 2: if the intention is not expressed, the intention must be inferred from the nature and terms of the contract. The inferred intention will determine the proper law of contract.

Sub-rule 3: if the intention of the contracting parties is neither expressed nor implied in nature, then the law closest to the transaction will be applied as the proper law of contract.

Most of the academic debate has been carried around the sub-rule 2. In the case mentioned above, the Supreme Court of South Wales examined the leading cases and concluded that the proper law of contract must be determined on the subjective view, i.e., via the inferred intention of the parties entering into the contract, where the inference can be drawn. The court further declared that if the situation is otherwise, only then the parties must go to the courts for imputing on them the proper law of contract, i.e., the one that is closest to the transaction in nature. The arbitration itself has to be governed by the English law. For this reason, if a contract has the clause of consulting arbitration of a particular country in the case of a dispute, then it strongly indicates that the law of that country would be the proper law of contract. However, the circumstances of the case must also be considered. Other indicators include the residence of the parties, the subject matter and nature of the contract, a connection with a preceding transaction, the use of a particular language, the currency in which the payment is to be made, the form of documents involved in the transaction, and the legal terminology used in the written agreement.

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