

Tacit Choice of Law in International Commercial Contracts– A Turkish Study

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1 *Introduction*

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

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

2 *The law applicable to the contract*

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

As Lord Diplock put it:

“My Lords, contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a court of justice for failure to perform any of those obligations.”²

However, ascertaining the applicable law in an international commercial contract would be more of a challenge than almost any other topic in private international law,³ for the simple reason that the contract may carry with it a multiplicity of connecting factors each pointing to different legal systems.⁴ In these cases, a court would have to determine which system of law would govern the creation, validity and effect of the contractual obligation.⁵

3 *Autonomy in international commercial contracts*

In most jurisdictions, the first rule is to have regard to the parties' choice of law.⁶ When parties choose the law applicable to their contract, they are understood to have made a choice regarding the substantive applicable law, also referred to as the proper law of the contract.⁷ Although there is no one correct determinate of the proper law, the general principle is that the contract is governed by the law which the parties intended should govern the contract.⁸ To determine the proper law of the contract, one must first examine whether an express choice of law was made. The most obvious manner in which parties'

² *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* 1984 AC 50 at 65.

³ North and Fawcett *Cheshire and North's Private International Law* (1987) at 444.

⁴ North and Fawcett (n 3) at 448.

⁵ Nygh *Conflict of Laws in Australia* (1991) at 271.

⁶ Schwenzer, Hachem and Kee *Global Sales and Contract Law* (2012) at 52.

⁷ Schwenzer, Hachem and Kee (n 6) at 52. The proper law of the contract is also referred to as the “governing law” and under the Regulation (EC) on the Law Applicable to Contractual Obligations [Rome I] (2008) as the “applicable law”.

⁸ Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2011) at 59-60. Legal systems have offered different solutions to the ascertainment of the proper law. See for example, North and Fawcett (n 3) at 449.

can express their choice is by explicitly stating, at the time of contracting,⁹ the law by which the contract shall be governed.¹⁰

In the modern era, most legal systems adopt some form of autonomy under which parties are free to choose the law with which to govern the contract.¹¹ There are sound reasons for allowing parties the right to choose the applicable law.¹² These include, the freedom to contract,¹³ and secondly, certainty and economic efficiency.¹⁴ Here the question that arises is, do the parties have an unfettered discretion as to their choice? The ability to choose the applicable law is not absolute.¹⁵ Certain limitations that may come into play in this regard include mandatory provisions of the *lex fori* and perhaps the law of third states and also public policy considerations.¹⁶

4 *Tacit choice of law*

Given the vast problems that could occur in international transactions, and assuming that parties are capable of selecting the proper law, parties are advised to express their intention in this regard.¹⁷ However, this is not always the case in practice. Every so often, individuals fail to take the necessary precaution in selecting the law with which to govern their contract.¹⁸ Where parties have not expressed a choice of law, it is left to

⁹ Nygh (n 5) at 272-273. See also, North and Fawcett (n 3) at 451: it has been recognised that at the time of making the contract the parties may expressly select the law by which it is to be governed.

¹⁰ Nygh (n 5) at 272. See also, North and Fawcett (n 3) at 452: the parties may declare their intention by a single statement in the contract that it be governed by the law of a particular state.

¹¹ North and Fawcett (n 3) at 449; Nygh *Autonomy in International Contracts* (1999) at 13: today the freedom of the parties to choose the applicable law is almost universally recognised. See also, Schwnezer, Hachem and Kee (n 6) at 52: almost all jurisdictions recognize merchants to choose the law applicable to their contracts.

¹² Nygh (n 11) at 2.

¹³ Nygh (n 11) at 2. The freedom to contract is of the utmost importance in the market economy. The parties to the contract must be free to regulate its terms and conditions.

¹⁴ Nygh (n 11) at 2-3. An international contract requires certainty. Where there are several potentially applicable laws, parties should be able to avert such uncertainties by choosing the applicable law.

¹⁵ See for example, North and Fawcett (n 3) at 453: it has been admitted that certain limitations must be placed upon the freedom to choose the applicable law. See also, Schwnezer, Hachem and Kee (n 6) at 53: even in jurisdictions which fervently support the parties' ability to choose the law, the circumstances of that choice are not unrestricted.

¹⁶ See for example, Edward, Sykes and Pryles *Australian Private International Law* (1991) 596-598: a choice of law will not be legal if a mandatory provision of the *lex fori* denies the parties the autonomy to choose the governing law. See also, Van Niekerk and Schulze (n 8) at 61: a choice of law may be flawed and not given effect to if it was made to avoid legal prohibitions in the legal system most closely connected to the contract.

¹⁷ Van Niekerk and Schulze (n 8) at 60.

¹⁸ Forsyth "Enforcement of foreign arbitral awards, choice of law in contract, characterization and the new attitude to private international law" 1987 *SALJ* 4 at 14.

the court to determine the proper law of the contract.¹⁹ Here the court will attempt to determine the parties' unexpressed or tacit choice of law by searching not only within the four corners of the contract, but also the circumstances surrounding the contract.²⁰

Although falling short of an express choice by the parties, a tacit choice of the proper law still amounts to a true or real choice of law.²¹ However, the notion of inferring an actual intention is based upon making assumptions which may or may not be correct.²² This may have undesirable consequences for the parties to the contract, as their reasonable expectations may not be portrayed in the inferences drawn by the court. Nevertheless, most legal systems around the world recognise the possibility of a tacit (or implied) choice of law.²³

This paper will focus on the determination of tacit choice of law in Turkey. Attention will be dedicated to the level of strictness of the criterion for inferring a choice of law and the factors that have been relied upon, as well as the weight that has been attached to these factors. The legal position will be compared to that under the Rome Convention,²⁴ which has inspired the new *Turkish Code on Private International Law of 2007*.²⁵

¹⁹ North and Fawcett (n 3) at 457; Nygh (n 5) at 277.

²⁰ Nygh (n 5) at 277. See also, Van Niekerk and Schulze (n 8) at 62. The term "tacit", "implied" and "presumed" have been used interchangeably in private international law.

²¹ Neels and Fredericks "Tacit choice of law in the Hague Principles on Choice of Law in International contracts" 2011 *De Jure* 101 at 104. See also, Nygh (n 11) at 108: tacit choice is a subcategory of "express choice", concerned only with instances where the parties' intention is clear but appears through other means than a choice of law clause.

²² North and Fawcett (n 3) at 461.

²³ Schwenger, Hachem and Kee (n 6) at 55; Nygh (n 11) at 109.

²⁴ The Rome Convention on the Law Applicable to Contractual Obligations (80/934/EEC) (1980) *per* <http://europa.eu/legislation>.

²⁵ (Translation in 2007 *Yearbook of Private International Law* at 583) Hereinafter referred to as the "Turkish Code"; Tekinalp "The 2007 Turkish Code concerning private international law and international civil procedure" 2007 *Yearbook of Private International Law* 313 at 314-320. See also, Tekinalp, Nomer and Odman Botzotun *Private International Law in Turkey* (2012) at 86"; Neels and Fredericks (n 21) at 104-105.

5 TURKEY

5.1 Party autonomy

The freedom to contract that is recognised in Turkish law²⁶ has ensured the development of the notion of choice of law and party autonomy in Turkish private international law.²⁷ It is generally accepted that parties are permitted to agree on the law applicable to their contracts.²⁸ The Turkish Code does, however, make provision for the limitation of the applicable law. The limitations may include public policy considerations,²⁹ mandatory rules of Turkish law³⁰ and also mandatory rules of third countries.³¹ Nonetheless, the general rule governing the applicable law is contained in article 24(1), which states: “Obligations arising from contracts shall be governed by the law explicitly chosen by the parties....” However, where parties fail to make an express choice of law, a Turkish court will have to consider whether there exists a tacit (or implied) choice of law.

5.2 Tacit choice of law

5.2.1 Level of strictness

To give effect to the real or true intentions of the parties, the criteria for identifying a tacit (or implied) choice of law must be articulated clearly and stringently.³² Article 24(1) of the Turkish Code provides: “...Choice of law may be understood with reasonable certainty from the provisions of the contract or the relevant circumstances shall also be valid.” As a result of the influence that the Rome Convention has had in drafting the Turkish Code, the Convention may provide us with valuable guidance in

²⁶ Ansay and Wallace *Introduction to Turkish Law* (2011) at 164.

²⁷ Tekinalp, Nomer and Odman Botztosun (n 25) at 83.

²⁸ Ansay *American-Turkish Private International Law* (1966) at 41. See also, Tekinalp (25) at 329; Tekinalp, Nomer and Odman Botztosun (n 25) at 84; Gungör “The principle of proximity in contractual obligations: the new Turkish Law on Private International Law and International Civil Procedure” 2008 *Ankara Law Review* 1 at 6.

²⁹ Article 5: “Where a provision of foreign law applicable, applied to a specific case, is clearly contrary to Turkish public policy, this provision shall not apply; where deemed necessary, Turkish law shall apply”.

³⁰ Article 6: “Where foreign law is applicable, overriding mandatory rules of Turkish law shall apply in cases within their scope as regards their particular purpose and sphere of application”.

³¹ Article 31: “when the law governing the relationship arising from the contract is being applied, the overriding mandatory rules of a third country may be given effect in the case where these rules are closely connected with the contract. Regarding giving effect to and applying or not applying the rules at issue, the purpose, nature content and consequences of these rules shall be taken into consideration”.

³² Marshall “Reconsidering the proper law of the contract” 2012 *Melbourne Journal of International Law* 501 510-511.

interpreting the provisions of the Turkish Code. The Rome Convention requires the tacit (or implied) choice to be “demonstrated with reasonable certainty”.³³ While the formulation under the Turkish Code also requires that the tacit (or implied) choice of law be understood with “reasonable certainty”.

It can be argued that the formulation under the Rome Convention and the Turkish Code does not necessarily go far enough in the pursuance of legal determinability.³⁴ If a tacit choice of law only needed to be established with “reasonable certainty”, a court only has to be satisfied that it was more likely than not that the parties to the contract intended a particular legal system to apply.³⁵ To allow readily deduced tacit agreements may leave too much to the discretion of the individual judge, and accordingly, could result in unpredictability of decision.³⁶

5.2.2 Indicators of a tacit (or implied) choice

Similar to the position under article 3(1) the Rome Convention,³⁷ the Turkish Code allows a tacit choice to be inferred by the “terms of the contract or the circumstances of the case...”³⁸ Although some codes refer to the provisions of the contract only,³⁹ there should be no reason to limit the search for a tacit choice to the provisions of the contract without taking note of the surrounding circumstances.⁴⁰ This means that a Turkish court, in deciding whether or not the parties have made a choice of law, is not confined to the written agreement, but may take account of considerations surrounding the contract.⁴¹

³³ Article 3(1): “A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case...”

³⁴ Neels and Fredericks “Revision of the Rome Convention on the Law Applicable to Contractual Obligations (1980): perspectives from international commercial and financial law” 2004 *EUREDIA Revue europeene de droit bancaire et financier / European Banking and Financial Law Journal* 173 179, reprinted in 2006 *Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law* 121 125.

³⁵ Nygh (n 5) 111.

³⁶ Neels and Fredericks (n 21) 106; Neels and Fredericks (n 34) 125.

³⁷ Article 3(1) of the Rome Convention (n 24).

³⁸ Article 24(1) of the Turkish Code (n 25). Neels and Fredericks (n 21) at 107: the word “or” suggests that either the wording of the contract or the circumstances of the case can indicate a tacit choice, or both the wording and the circumstances cumulatively. See also, Neels “Choice of forum and tacit choice of law: the Supreme Court of India and the Hague Principles on Choice of Law in International Commercial Contracts (an appeal for an inclusive comparative approach to private international law)” to be published in *Eppur Si Muove – The Age of Uniform Law*. (Festschrift for Prof MJ Bonell, forthcoming, 2016).

³⁹ Neels and Fredericks (n 21) at 106: Article 2 of the 1955 Hague Convention; Section 7 of the Oregon *Conflicts Law Applicable to Contracts*; article 3111 of the Quebec *Civil Code*.

⁴⁰ Neels and Fredericks (n 21) at 107: the phrase “circumstances” will encompass the conduct of the parties.

⁴¹ Nygh (n 5) at 277; McClean and Beevers (n 1) at 360.

The Turkish Code does not mention the indicators from which a tacit choice of law may be inferred. However, the Giuliano and Lagarde Report,⁴² which accompanied the Rome Convention, lists some of the factors from which a tacit choice of law may be inferred.⁴³ Some noteworthy examples include the use of a standard form which is known to be drafted with reference to a particular system of law,⁴⁴ and the inclusion of specific provisions of a particular legal system in the contract.⁴⁵ Another example given in the Report is the situation where there has been an express choice of law in related transactions between the parties.⁴⁶ Nygh believes this to be a particularly strong pointer to the real intention of the parties:⁴⁷ “[I]n cases where the parties have specifically negotiated the choice of law clause in a related contract, it will be legitimate to infer that they intended the same law to apply to their contracts.”⁴⁸

After providing a list of examples from which a tacit choice of law may be inferred, the Giuliano and Lagarde Report states that article 3 of the Rome Convention does not permit a court to infer a choice of law where there is no clear indication of such choice.⁴⁹ As such, the existence of any of the abovementioned factors alone should not automatically be conclusive. They are mere indicators that a Turkish court should consider to determine whether it is clear that the parties intended to make a choice of law. This is particularly relevant when the question arises whether a choice of forum constitute a choice of law?

⁴² Report on the Convention on the Law Applicable to Contractual Obligations by Mario Giuliano and Paul Lagarde [1980] *Official Journal* C-282/01 15-17 (“Giuliano and Lagarde Report”).

⁴³ Giuliano and Lagarde Report (n 42) 17. See also, Schwenger, Hachem and Kee (n 6) 56: the factors are not conclusive and may be indicative of an intention to apply provisions of a foreign law as contractual terms rather than applicable law.

⁴⁴ Giuliano and Lagarde Report (n 42) 17; Nygh (n 5) 115.

⁴⁵ Giuliano and Lagarde Report (n 42) 17.

⁴⁶ Giuliano and Lagarde Report (n 42) 17: “[A] previous course of dealing between the parties under contracts containing an express choice of law may leave the court in no doubt that the contract in question is to be governed by the law previously chosen where the choice of law clause has been omitted in circumstances which do not indicate a deliberate change of policy by the parties”; Nygh (n 5) 116.

⁴⁷ Nygh (n 5) 116.

⁴⁸ Nygh (n 5) 116.

⁴⁹ Giuliano and Lagarde Report (n 42) 17.

5.2.3 *Choice of forum and tacit choice of law*

The legal systems of the world provide highly divergent views in respect of the relationship between choice of forum and tacit choice of law by the parties.⁵⁰ While the Turkish Code and the Rome Convention is silent on the matter, The Giuliano and Lagarde Report addressed this issue by proving that:

“[T]he choice of a particular forum may show in no uncertain manner that the parties intend the contract to be governed by the law of that forum, but this must always be subject to the other terms of the contract and all the circumstances of the case.”⁵¹

However, Lagarde has since indicated that a jurisdiction clause is merely a factor to be considered, and may not, without more, be interpreted as establishing the unexpressed will of the parties.⁵² The European Group of Private International Law (GEDIP)⁵³ is also of the opinion that the choice of a court of a given state shall not in itself be equivalent to a choice of law of that state.⁵⁴

Although it is generally accepted that choice of forum should be a factor in the determination of a tacit choice of law,⁵⁵ choice of law and choice of forum are, in principle, separate issues and must be distinguished.⁵⁶ A forum may be chosen for its neutrality, experience or expertise and not necessarily for the application of its domestic law.⁵⁷ The role of choice of forum clauses in Turkish private international law is not settled. It may be useful to add a provision addressing the role of forum selection in determining a tacit choice of law.⁵⁸

⁵⁰ Neels (n 38). The traditional common-law position: see for instance, Nygh (n 5) 116: there is a general agreement in Anglo-Commonwealth law that the submission to the exclusive jurisdiction of a foreign court indicates that the parties intended the law of that court to apply; Davies Bell and Brereton *Nygh's Conflict of Laws in Australia* (2010) 398: in Australian law, it has been suggested that the inclusion of a clause stipulating that a particular court or arbitral tribunal shall have jurisdiction, creates a very strong presumption that the parties have chosen the law of that country to govern the contract. See also, Edward, Sykes and Pryles (n 16) 584; North and Fawcett (n 3) 457.

⁵¹ Giuliano and Lagarde Report (n 42) 17.

⁵² As referred to in Nygh (n 5) 117.

⁵³ European Group of Private International Law or *Groupe européen de droit international privé* at <http://www.gedip-egpil.eu/>.

⁵⁴ GEDIP “Third consolidated version of a proposal to amend articles 1, 3, 4, 5, 6, 7, 9, 10bis, 12 and 13 of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, and article 15 of the Regulation 44/2001/EC (Brussels I)” (Vienna 2003) www.gedip-egpil.eu/documents/gedip-documents-20vce.html: “In particular, the choice of a court or the courts of a given State shall not in itself be equivalent to a choice of law of that State.”

⁵⁵ See Neels (n 21) 108; McClean and Beevers (n 1) at 361; Schwenger, Hachem and Kee (n 6) at 56; Neels (n 25).

⁵⁶ Neels and Fredericks (n 21) 107; Neels (n 25).

⁵⁷ Neels and Fredericks (n 21) 107; Sykes and Pryles (n 16) at 116; Neels (n 38).

⁵⁸ Neels and Fredericks (n 21) 107. See the proposed formulations on choice of law provision at 108-109.

6 Conclusion

The level of strictness of the criterion under the Turkish Code requires the tacit choice to be understood with “reasonable certainty”.⁵⁹ The current author suggests that a stricter formulation will ensure a far greater measure of legal certainty and predictability of decision.⁶⁰

Although the Turkish Code does not list the various examples from which a tacit choice of law may be inferred, a Turkish court may refer to the Giuliano and Legarde Report for guidance in this regard.

The Code is not clear on the role of choice of forum clauses. A provision addressing this matter could be added to the Turkish Code. This would curb the possibility of divergent practices in respect of the relationship between choice of forum and tacit choice of law by the parties.

⁵⁹ Article 24(1) of the Turkish Code.

⁶⁰ See for example, Marshall (n 32) note 87: “The revision from the ‘reasonable certainty’ test under the *Rome Convention* to the ‘clearly demonstrated’ test under the *Rome I Regulation* was an attempt by the European Commission to quash the practice of the English and German courts in readily discerning a tacit choice where their French counterparts would not.... The French language version of the test, which requires that the choice of law result ‘de façon certaine des dispositions du contrat ou des circonstances de la cause’, remained unchanged in the transition from the *Rome Convention* to the *Rome I Regulation*.”

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