

[HOUSE OF LORDS]

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COMPAGNIE D'ARMEMENT MARITIME S.A. . . . APPELLANTS

AND

COMPAGNIE TUNISIENNE DE NAVIGATION S.A. . . RESPONDENTS

[on appeal from COMPAGNIE TUNISIENNE DE NAVIGATION S.A. v.
COMPAGNIE D'ARMEMENT MARITIME S.A.]

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1970 April 30; May 4, 5, 6; Lord Reid, Lord Morris of Borth-y-Gest,
July 14 Viscount Dilhorne, Lord Wilberforce and Lord Diplock

Conflict of Laws—Contract—Proper law—Curial law distinguished
—Contract negotiated in Paris between French shipowners
and Tunisian company for transport of oil between Tunisian
ports—Printed form in standard English tanker voyage charter
form with additional typed clauses executed—Printed clause
providing "This contract shall be governed by the laws of
the flag of the vessel carrying the goods"—No vessel named
—No flag nominated—Printed clause providing for arbitration
in London—Additional clause that "shipment to be
effected in tonnage owned, controlled or chartered by" French
shipowners—Whether clause purporting to specify proper law
capable of application where no vessel and no flag specified—
Whether clause providing for arbitration in London carrying
inference that proper law English.

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In 1967 the claimants, a Tunisian company, and French
shipowners negotiated a contract through brokers in Paris for
the transport of specified quantities of crude oil from one
Tunisian port to another. The form produced by the brokers'
English agent was a printed tanker voyage charter in standard
English form and language with typed clauses added. The
printed form described the shipowners as "owners of the"
(blank) "vessel" (blank). By clause 13 it was provided that:
"This contract shall be governed by the laws of the flag of
the vessel carrying the goods. . . ." Clause 18 of the printed
clauses provided that disputes were to be settled by arbitrators
in London. The added typed clauses included in clause 28:
"Shipments to be effected in tonnage owned, controlled or
chartered" by the French shipowners "of 16,000/25,000 tons
at owners' option."

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Disputes arose between the parties, and the Tunisian com-
pany claimed damages for repudiation of the contract. The
disputes were referred to arbitrators in London who heard
argument on the preliminary question as to what system of
law was the proper law of the contract and stated their interim
award in the form of a special case in which they found, inter
alia, that the French shipowners had four to five vessels flying
the French flag but none large enough to carry 25,000 tons;
that three days before the contract was made a Liberian vessel
had been nominated for loading; that in the first four months
the six ships chartered were respectively Norwegian, Swedish,
Liberian, French, Liberian and Bulgarian; and that both parties
contemplated, at the time the contract was entered into, that
vessels owned by the French shipowners would be used "at
least primarily" to perform the contract:—

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A.C. Cie. Tunisienne v. Cie. d'Armement (H.L.(E.))

- A** *Held*, that the proper law of the contract was French law.
Per Lord Reid. Clause 13 was not apt to determine the proper law of the contract, while the arbitration clause did not necessarily imply that the proper law was English law. In accordance with the general rule, where there is no express choice, the proper law of the contract is that of the place or system with which it is most closely associated, viz., French law.
- B** *Per Lord Morris of Borth-y-Gest*. Clause 13 sufficiently expresses the intention that the proper law is to be the law of the flag of the owners' ships which it was thought would be primarily used to carry the oil. But, even if clause 13 did not represent an express agreement that the proper law should be French law, its presence in the contract and the other circumstances of the case sufficiently negative any inferences to be drawn from the arbitration clause.
- C** *Per Viscount Dilhorne*. Clause 13, read together with clause 28, was apt to express an agreement that French law should be the proper law of the contract, since the ships were sufficiently identified for the clause to operate.
Per Lord Wilberforce. Clause 13 is not apt to indicate a choice of French law as the proper law of the contract, nor does it indicate an intention to negative the presumption arising from the arbitration clause. There being no express choice of law, the intention of the parties, to be inferred from the terms and nature of the contract and the circumstances of the case, is French law. The arbitration clause is no more than one indication, which may give way to other indications.
- D** *Per Lord Diplock*. Clause 13 sufficiently indicated the choice of French law as the proper law of the contract. But, assuming that the parties had not so exercised their choice, the proper law is the system of law with which the contract has its closest association, viz., French law.
- E** *N.V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co. Ltd.* [1927] A.C. 604, H.L.(E.) and *Tzortzis v. Monark Line A/B* [1968] 1 W.L.R. 406; [1968] 1 All E.R. 949, C.A. explained.
 Decision of the Court of Appeal [1969] 1 W.L.R. 1338; [1969] 3 All E.R. 589 reversed.
- F** The following cases are referred to in their Lordships' opinions.
Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd. [1959] A.C. 133; [1958] 2 W.L.R. 688; [1958] 1 All E.R. 725, H.L.(E.).
Bonython v. Commonwealth of Australia [1951] A.C. 201, P.C.
Dalrymple v. Dalrymple (1811) 2 Hag.Con. 54.
- G** *Hamlyn & Co. v. Talisker Distillery* [1894] A.C. 202, H.L.(Sc.).
Hillas & Co. Ltd. v. Arcos Ltd. (1932) 147 L.T. 503, H.L.(E.).
Jacobs, Marcus & Co. v. Crédit Lyonnais (1884) 12 Q.B.D. 589, C.A.
Kwik Hoo Tong Handel Maatschappij (N.V.) v. James Finlay & Co. Ltd. [1927] A.C. 604, H.L.(E.).
Lloyd v. Guibert (1865) L.R. 1 Q.B. 115.
Maritime Insurance Co. Ltd. v. Assecuranz-Union von 1865 (1935) 52 Ll.L.Rep. 16.
- H** *Naamllooze Vennootschap Handels-en-Transport Maatschappij "Vulcaan" v. A/S J. Ludwig Mowinckels Rederi* [1938] 2 All E.R. 152; 60 Ll.L.Rep. 217, H.L.(E.).

Norske Atlas Insurance Co. Ltd. v. London General Insurance Co. Ltd. (1927) 28 Ll.L.Rep. 104. A

Spurrier v. La Cloche [1902] A.C. 446, P.C.

Tzortzis v. Monark Line A/B [1968] 1 W.L.R. 406; [1968] 1 All E.R. 949, C.A.

United Railways of Havana and Regla Warehouses Ltd., In re [1961] A.C. 1007; [1960] 2 W.L.R. 969; [1960] 2 All E.R. 332, H.L.(E.).

Vita Food Products Inc. v. Unus Shipping Co. Ltd. [1939] A.C. 277; [1939] 1 All E.R. 513, P.C. B

Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd. [1969] 1 W.L.R. 377; [1969] 2 All E.R. 210, C.A.; [1970] A.C. 583; [1970] 2 W.L.R. 728; [1970] 1 All E.R. 796, H.L.(E.).

The following additional cases were cited in argument:

Baumwoll Manufactur von Carl Scheibler v. Furness [1893] A.C. 8, H.L.(E.). C

Chandris v. Isbrandtsen-Moller Co. Inc. [1951] 1 K.B. 240; [1950] 2 All E.R. 618, C.A.

Appeal from the Court of Appeal (Lord Denning M.R., Salmon and Karminski L.JJ.).

This was an appeal from an order of the Court of Appeal dated June 27, 1969, in favour of the respondents, Compagnie Tunisienne de Navigation S.A., allowing their appeal against and setting aside the judgment of Megaw J. dated February 19, 1969, whereby it was adjudged that the interim award in the special case stated by the arbitrators herein dated November 6, 1968, should be upheld and that the proper law of the contract which was the subject-matter of the dispute herein was French law. D E

The appeal to the House of Lords arose out of a dispute under a contract dated February 27, 1967, whereby the appellants, Compagnie d'Armement Maritime S.A., agreed to furnish tonnage controlled or chartered by them of 16,000—25,000 tons, 10 per cent. more or less, to carry a quantity of minimum 300,000 tons, maximum 350,000 long tons, of light crude oil from La Skhirra to Bizerta, both ports in Tunisia between March 1, 1967 and December 31, 1967, shipments to be evenly spread so as to lift approximately 100,000 tons each quarter. The appellants were a French company and the respondents a Tunisian company. F

The respondents alleged in their points of claim that the appellants repudiated their contract by a letter dated July 11, 1969, which repudiation they said they accepted on July 13, 1969, and claimed damages in French francs 1,388,659.91. G

The appellants in their points of defence and counterclaim denied that they had repudiated the contract or that any repudiation had been accepted. They further claimed that the further performance of the contract had been frustrated and/or prevented by force majeure and finally contended that the contract was governed by French law and relied by way of defence on the provisions of French law summarised in their points of defence and counterclaim. H

The principal issues which arose for determination in this appeal were: (1) Whether the Court of Appeal was correct in deciding that the

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- A provisions of clause 13 of the contract (namely: "This contract shall be governed by the laws of the flag of the vessel carrying the goods . . .") were, in the context of this particular contract, meaningless and inapplicable; and (2) whether the Court of Appeal was correct in further deciding that the physical presence in the contract of clause 13 did not operate to displace the inference (namely, that the proper law of the contract was English law) which would otherwise fall to be drawn from the inclusion in the contract of a London arbitration clause (clause 18).

B The facts are stated in their Lordships' opinions.

- C *Michael Kerr Q.C.* and *K. S. Rokison* for the appellants. A contract can be governed by a substantive law different from the procedural law imposed by the arbitration clause. The governing law is to be found from the construction of the contract and the surrounding circumstances at its date.

- D In the present case it is submitted: (1) On the true construction of this contract and on the relevant facts found it is governed by French law as the substantive law. (2) This is in accordance with the intention of the parties to be inferred from the terms of the contract and the surrounding circumstances. These are cumulative: (i) clause 13 of the contract and the finding in paragraph 7 (b) of the interim award that both parties contemplated at the time of the contract that the respondents' ships would "be used at least primarily to perform the contract"; (ii) French law was the system with which both parties had their closest and only connection; (iii) the absence of any factor pointing to English substantive law as being applicable.

- E (1) As to the first submission, the parties expressly chose French law by their contract. The contract form was not designed for this particular transaction; it was a tanker voyage charterparty form adapted to a "tonnage contract." This form is used not only in London but also in other chartering centres. It was clear from the contract, particularly clause 28 under which the tonnage was to be "owned, controlled or chartered" by the appellants, that more than one ship might be used for the carriage and there was no provision that every ship nominated by the appellants should fly the same flag. So clause 13 cannot be literally applied, but where a contract is used for a purpose other than that for which it was originally drawn up it may be necessary to make minor alterations or adjustments to certain clauses to make them literally applicable. The courts have adopted this practice: see *Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd.* [1959] A.C. 133, 153-154, 161-162, 168-169, 178, 183-184. This approach accords with the general principle that the courts should try to give some meaning and effect to every term of the contract: see also *Hillas & Co. Ltd. v. Arcos Ltd.* (1932) 147 L.T. 503, 514. This is especially so where, even though a standard printed contract form is used, deletions and additions show that someone on behalf of the parties has read the contract and considered its terms. Clause 13 was left in the contract when other parts were deleted. Courts should be slow to hold a clause meaningless or inapplicable or of no effect or a nullity or to be ignored. Even if it was not clear that the parties had read and considered the printed terms of a standard form of contract, they must be deemed to have read and understood them. It is not logical or permissible to ignore a clause on the assumption that, while the parties

read and understood it, they did not delete it because they thought it meaningless.

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To give effect to clause 13 in the context of this tonnage contract it should be read: "This contract shall be governed by the law of the flag of" the respondents (i.e., those described throughout the contract as "the owners"), which is French law. In this connection regard may be had to the other clauses, in particular clause 28. Further, it was agreed that the classification standard should be "highest Bureau Veritas or equivalent," referring to the French classification society as opposed, for example, to Lloyd's or Norske Veritas. Clause 13 expressly provides for the proper law of the contract, and the intention of the parties, which it expresses, should be implemented. Its very presence in the contract negatives the inference which might otherwise be drawn from clause 18 providing for arbitration in London.

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The contract was negotiated and made in France. The negotiations were conducted in the French language through French-speaking representatives of the parties and a French firm of shipbrokers. The contract was to be performed off the Tunisian coast. The parties were subject to similar systems of law, the respondents being a company incorporated in Tunisia, of which the civil law is based on the Code Napoléon and the appellants being then incorporated under French law. There was no material difference between the two laws. Payment was to be in French francs in Paris. The appellants owned ships flying the French flag which were then available.

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The dichotomy in this case is between the law of France and Tunisia, on the one hand, pointing to French law, and English law, on the other hand. There was an analogous situation in *In re United Railways of Havana and Regla Warehouses Ltd.* [1961] A.C. 1007, 1035, 1049-1050, 1067-1068, 1081, 1083.

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If the intention of the parties cannot either be ascertained from the express terms of the contract or else be inferred from the terms of the contract in the light of the surrounding circumstances, a putative intention must be inferred by reference to "the system of law with which the contract has its closest and most real connection": *Bonython v. Commonwealth of Australia* [1951] A.C. 201, 209, approved in the *United Railways* case [1961] A.C. 1007, 1068, 1081. Though one must have regard to that system of law rather than the law of the country or state with which the contract has its closest and most real connection, these will normally be the same. The distinction may be important where one state is divided into several federated units which may not have an identical system of law (e.g., the United States) or where, as in this case, the system of one state is for all relevant purposes the same as that of another. The question is not whether the contract has its closest connection with France or Tunisia or England but whether it has its closest connection with French or English law. Factors pointing to France or Tunisia must be weighed against those pointing to England—the nationality of the parties, the place where the contract was negotiated and made, the place of performance, the language used, the currency of payment. The balance weighed entirely in favour of French law. Where the parties to a contract share the same system of law this raises a strong presumption that the system was intended to govern their relations. The presumption is stronger than that raised by the London arbitration clause and must apply

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A in the absence of a clear and bona fide express choice of a different system of law.

Subject to public policy the English court must give effect to the intention of the parties expressed in their contract and demonstrated by the surrounding circumstances. It must not ignore that intention by the application of inflexible rules, especially in the field of conflict of laws where foreigners are involved. If the English courts were to impose English law on foreigners merely because they were engaged in a trade which had its centre in London and so used a standard form of contract which included submission of disputes under the contract to arbitration by merchants or brokers in London, it would be a serious matter. Clause 13 of this contract would not normally involve an inferred choice of English law and it would be unjust and unrealistic to infer such a choice here. Such a decision might dissuade foreigners from including London arbitration clauses in their contracts and damage a business which is a long-standing and important part of the activities of the City of London.

Though this contract is in the English language, English is the shipping lingua franca. The English form envisages various systems of law. On the facts sufficient weight is given to the intention expressed in the London arbitration clause by holding the English procedural law shall apply to the decision of disputes.

D *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1970] A.C. 583, 602–603, 604–605, 605–606, 607–608, 609, 610–611, 612, 614–615, 615–616 gives considerable assistance in the present case in that it shows that the parties by the terms of their contract as a whole read in the light of the surrounding circumstances may agree to submit themselves to the law of country A but to submit disputes to the arbitration of country B. Here such an intention is given effect to by deciding the case under English procedure. Everything but the arbitration clause points to French law as being the proper law of the contract. *Hamlyn & Co. v. Talisker Distillery* [1894] A.C. 202, 206, 211, 212, 215 implies that the presence of a London arbitration clause is not conclusive as to the proper law of the contract; there is no rigid rule. *Spurrier v. La Cloche* [1902] A.C. 446 follows exactly the same lines as that case and adds nothing to it.

F In *Kwik Hoo Tong Handel Maatschappij (N.V.) v. James Finlay & Co. Ltd.* [1927] A.C. 604, 608 Lord Dunedin recognised that an English tribunal might have to concern themselves with a question of foreign law. What was in the minds of the Lords in deciding that case appears from *Dalrymple v. Dalrymple* (1811) 2 Hag.Con. 54, 58–59. *Kwik's* case does not help the respondents' contention that the arbitration clause solves everything. Submission of a dispute to a particular forum does not imply that the substantive law of that forum must apply.

G In *Norske Ailas Insurance Co. Ltd. v. London General Insurance Co. Ltd.* (1927) 28 Ll.L.Rep. 104, 107 too much emphasis was laid on the Norwegian arbitration clause. The decision in *Tzortzis v. Monark Line A/B* [1968] 1 W.L.R. 406 depended on the particular circumstances of the case though too much emphasis was put on the arbitration clause. It is not necessary to contend that it was wrongly decided. Lord Denning M.R. at p. 412 relied on *Dicey and Morris's Conflict of Laws*, 8th ed. (1967), p. 1007 and *Cheshire's Private International Law*, 7th ed. (1965), p. 193. But he

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was not saying that there was an inflexible rule that the choice of the tribunal was an implied choice of the proper law; he was merely dealing with the facts of the case. Salmon L.J. considered what the parties intended. A

The passage from Dicey cited by Lord Denning may be put into perspective by a consideration of rule 127 (p. 691), sub-rule 1 (p. 697), sub-rule 2 (p. 704) and sub-rule 3 (p. 712) and the text relating to them and the observations at pp. 1046-1047 on arbitration agreements. Compare also the corresponding rules in the 1st ed. (1896), pp. 540, 567, 568 and 569-571, the 3rd ed. (1922), p. 592, the 5th ed. (1932), pp. 649 and 667-669 and the 6th ed. (1949), pp. 579, 584, 589-90 and 593-595. B

While there appears to be a growing tendency to say that it may be inferred from a clause providing for arbitration in a given country that the law of that country has been chosen as the proper law of the contract, it is not a rule of law. It is a matter of the intention of the parties or what may fairly be inferred to be their intention. C

As to Cheshire, at the time of the 1st ed. (1935), *Kwik's* case [1927] A.C. 604 had been decided for some years yet it is only cited at p. 61 in relation to R.S.C., Ord. 11, r. 1, whereas the question of the choice of the proper law is given several pages of general discussion (pp. 182 et seq.). *Spurrier's* case [1902] A.C. 446 is cited and it is only in relation to it that an arbitration clause is referred to as having the effect of importing the proper law of the country of the arbitration. See also the 7th ed. (1965), pp. 192-193, including the passage cited in *Tzortzis's* case [1968] 1 W.L.R. 406, 412. At the end of the day the position is that unless there is an absolute or almost absolute rule to that effect, which cannot be established, the proper law in the present case should be held to be French law. D

It is erroneous to say that clause 13 is inapplicable. It was left in advisedly. The parties had the intention to choose a system of law to govern the contract because the parties thought that they were thereby indicating French law. E

K. S. Rokison following. By section 1 of the Arbitration Act 1889 a submission to arbitration has effect as if it had been an order of court. Arbitration originated in 1698 in the statute 9 Will. 3, c. 15, "an Act for determining differences by arbitration." Under it the parties were to agree that the submission should be made a rule of court. It was repealed by the Act of 1889. F

As to the question whether there is a rule of law that an English arbitration clause carried with it English substantive law, the *Kwik* case [1927] A.C. 604 distinguished insufficiently between substantive law and procedural law. When Lord Dunedin at p. 608 speaks of the "underlying law" he is referring to the procedural law. The English tribunal would inquire into the foreign law as a question of fact: see also Lord Phillimore at p. 609. It is not justifiable to read that case as the textbook writers have, as introducing a principle that an English arbitration clause carries with it English substantive law. In the present case the English would ascertain the law of the flag as a question of fact. G

Robert Goff Q.C. and *Basil Eckersley* for the respondents. The respondents are a Tunisian company. Tunisia and France have not a common system of law. H

- A The authorities show that in deciding what is the proper law of a contract the courts have attached overriding importance to arbitration clauses. There has been a development in the law. In the early authorities before *Kwik's* case [1927] A.C. 604, the significance attached to it was not as great as that attached to the general features of the situation. But after that case there was a strengthening of the position, so that it did not matter if neither party to the contract lived or traded in England. Thenceforward it was
- B accepted that the proper law was connoted by the fact that the parties had agreed to arbitration within a certain jurisdiction: see *Vita Food Products Inc. v. Unus Shipping Co. Ltd.* [1939] A.C. 277, 290 where Lord Wright said that it "imports English law." In *Tzortzis's* case [1968] 1 W.L.R. 406, 413 Salmon L.J. spoke of an "irresistible inference." Such statements must be qualified by saying that the inference is made in the absence of any express provision to the contrary. The parties are free to choose any law
- C they care to apply and so, if they expressly choose one, the courts will give effect to their expressed intention. Whenever one is dealing with a question of implied choice of law the general rule is that the implication must give way before an express term and any implication from an arbitration clause must be subject to that qualification.

- D The parties by agreeing to arbitration in a particular place must normally be taken to have expected the arbitrators to apply the law which they habitually applied and with which they were familiar. That expectation is particularly strong in maritime countries. One has to find some strong indication to the contrary to rebut that inference. The situation is different when there is no indication at all and one is weighing all the factors in order to come to a sensible conclusion.

- E What has been established is that one starts with the fact that there is no express choice of the proper law in this contract at all. There is a London arbitration clause giving rise to the inference that the proper law of the contract is English law unless one can find something to contradict that implication. No weight should be given to clause 13.

- F The leading authority is *Kwik's* case [1927] A.C. 604, 607-608 which rested on the fact that there was to be an arbitration by English arbitrators in the City of London conversant with English law. Lord Dunedin in his judgment made no reference to other factors. Lord Phillimore at p. 609 relied only on the presence of the arbitration clause without weighing it against other factors. Reliance is also placed on the judgment of Sargant L.J. which is to be found in the House of Lords Printed Case in that appeal. This is the leading case on this point, its importance being the strength it gives to the implication that an English arbitration clause imports English
- G law. The law is correctly stated in *Dicey's Conflict of Laws*, 5th ed. (1932), pp. 667-669 (sub-rule 1). Since that case the arbitration clause has been treated as conclusive.

- H The *Norske* case (1927) 28 Ll.L.Rep. 104, 107 accords with what Lord Dunedin said in *Kwik's* case and regard was not had to other factors. In *Maritime Insurance Co. Ltd. v. Assecuranz-Union von 1865* (1935) 52 Ll.L.Rep. 16, 19, 20 the finding was simply on the arbitration clause. So too in *Naamlouze Vennootschap Handels-en-Transport Maatschappij "Vulcaan" v. A/S J. Ludwig Mowinckels Rederi* [1938] 2 All E.R. 152, 158. The same applies to what Lord Wright said in the *Vita Food* case

[1939] A.C. 277, 289–290. In the *Tzortzis* case [1968] 1 W.L.R. 406, 410 it was the implication from the arbitration clause that counted.

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In applying these principles to the facts of the present case one asks: Have the parties made an express choice of the proper law of the contract? The form was designed as a tanker voyage charterparty but it was hopelessly inappropriate to the present case. The space in clause 13 left for the vessel's flag remained blank. But it is known from the express terms (clause 28) that the respondents had a complete discretion as to the ships to be used. What the appellants are in effect seeking to do is to rewrite clause 13 so as to make it say something different concerning the laws of the flag from what it actually does say. But on the ordinary principles of construction that cannot be done. The courts have set their face against rewriting contracts on pure speculation. The final result is that a reasonable man reading this contract must conclude that clause 13 has no application to this particular contract. Therefore it must be ignored as having no meaning. To do so is not to rewrite the contract. It is not known why it was left in. It would be pure speculation to suppose that it was meant to indicate a system of law other than that of the arbitration clause. When an inapplicable clause is left in a contract it is wrong to infer from it anything involving speculation as to why it was left in. The *Adamastos* case [1959] A.C. 133 does not justify making a guess what the parties meant and substituting the guess for what they said.

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As to the question whether clause 13 should be treated as superfluous, see *Baumwoll Manufactur von Carl Scheibler v. Furness* [1893] A.C. 8, 15 and *Chandris v. Isbrandtsen-Moller Co. Inc.* [1951] 1 K.B. 240, 245. There is no reason to suppose that clause 13 was not left in by oversight and it is incorrect to say that the parties must have had a reason for doing so. The expression "the laws of the flag" has an ordinary and natural meaning but in this contract it has none. One cannot jump to the conclusion that the parties agreed that the contract should be governed by the laws of the flag of the ships which would eventually perform the contract. Salmon L.J. in the Court of Appeal [1969] 1 W.L.R. 1338, 1345–1346 correctly analysed the position.

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It was alternatively suggested that the presence of clause 13 indicated an intention to choose a system of law and the intention survived in a general sense, displacing any implication to be drawn from clause 18. But such an intention would have to be common to both parties. Their actual intention cannot be known and one must find their presumed common intention. One must assume that the parties read the contract or (what comes to the same thing) the court will read the contract to see what intention it will presume. The whole of the contract must be read, including clause 13. On such a reading it is apparent that the clause did not have the effect of choosing the governing law. Though the clause is physically in the document, it has, on a true construction, no application to the contract at all. Salmon L.J. in the court below correctly analysed the matter at pp. 1346–1347.

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On principle the inference to be drawn from the presence of the arbitration clause is an inference of the choice of the proper law, express or implied. The mere fact that the parties may reside in or carry on business in places which have related systems of law is not enough to rebut that presump-

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A tion: see Lord Dunedin in *Kwik's* case [1927] A.C. 604, 608. Such factors alone cannot rebut the presumption.

B The finding in the interim award that "the civil law of Tunisia . . . is based on the Code Napoléon" is very limited. The concession was made by the respondents and they are bound by it, but it should be taken in the exact terms in which it was made. A connection between the two systems of law is indicated, but one should not read too much into that. Tunisia was a French protectorate from 1881 to 1956. The award uses the word "based" but does not specify the extent to which Tunisian law is based on the Code Napoléon. Possibly other influences may be present. Where there is some reception of a system of foreign law, the influence may not be complete or profound. This cannot have any effect on the implications to be drawn from clause 18. The arbitration clause is not just one fact to be considered among many. It does not merely relate to the procedural law.

C *Michael Kerr Q.C.* in reply. The inference to be drawn from the arbitration clause is not a rule of law. The respondents' argument goes beyond what was said in the Court of Appeal, which fortified itself by suggesting that the conclusion was a fair inference. The authorities relied on merely contain generalised expressions which must be read in the context of the particular facts of each case. *Kwik's* case [1927] A.C. 604 is not an authority for a general rule as to the effect of arbitration clauses. Lord Phillimore at p. 609 expressed himself in terms of the authorities, citing *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115, 120, 123, which must have influenced the basic rule in Dicey. That in effect was what he was applying. Lord Phillimore also cited *Hamlyn's* case [1894] A.C. 202. There Lord Herschell L.C. said at p. 208 that one must consider the *lex loci contractus* and the *lex loci solutionis* to find the intention of the parties. All that is in accordance with principle and there is no separate rule for arbitration clauses. Nothing different appears until the last edition of Cheshire. The thing was never so expressed in Dicey. The arbitration clause raises a strong but rebuttable presumption. One is left with two possible tests: (1) What can one fairly infer to have been the intention of the parties? (2) With which system of law has the contract its closest connection? In the present case the closest connection is with French law.

F The words of clause 13 should be adapted to the contract: the *Adamastos* case [1959] A.C. 133; the *Hillas* case (1932) 147 L.T. 503, 514. No violence is being done to the contract. It is as though clause 13 said: "This contract shall be governed by the law of the flag of the ships of the Compagnie d'Armement Maritime."

G Clause 13 cannot be disregarded if one is asking not what are its legal consequences, but what was the intention of the parties as to the choice of the proper law when it was left in. In this contract there is a filling in of some blanks. There are also some alterations and deletions. The parties intended clause 13 to have some effect. To cross it out would be to rewrite the contract. In *Baumwoll's* case [1893] A.C. 8, 15-16 Lord Herschell did construe the clause in question and did not strike it out. The present case should be approached on the basis that the parties intended to leave clause 13 in and, that being so, they cannot have intended the contract to be governed by English law.

H

The intention of the parties can only be inferred from the words which they have used: the *Adamastos* case [1959] A.C. 133, 169–170. Here no intention that English law should be the proper law can be inferred from the arbitration clause. It was intended that the law of the flag of the ships should govern the contract. A French flag was visualised. The parties intended any dispute to be arbitrated in England because they liked English arbitrations. But, looking at all the circumstances together, it appears that they intended to choose French law. Each case depends on its own terms and the circumstances at the date of the contract and one must look at all the facts. A B

French and Tunisian law have been treated as the same for the relevant purposes of the arbitration. It is not necessary to say that they are identical.

Their Lordships took time for consideration. C

July 14. LORD REID. My Lords, in 1967 the respondents, a Tunisian company, wished to have a quantity of oil shipped from La Skhirra to Bizerta—both ports in Tunisia. They approached a firm of brokers in Paris who put them in touch with the appellants, who are French shipowners. The parties negotiated a contract in Paris and it was left to the brokers to prepare the written contract. They selected an English printed form which appears to be often used abroad. This form was for a tanker voyage charterparty which required considerable adaptation because under the contract there were to be a number of shipments spread over nine months in vessels supplied as required by the appellants. D

After six shipments a dispute arose and the respondents claimed damages. The contract provides that any dispute shall be settled in London, each party appointing a merchant or broker as arbitrator. Arbitrators were duly appointed and the first question which arose was as to the proper law of the contract. On this the arbitrators made an interim award adjudging that the proper law of the contract is French law and stating as a question of law for the decision of the court the question whether the proper law is French or English law. E

One of the printed clauses in the form deals with the proper law. Clause 13 reads: "This contract shall be governed by the laws of the flag of the vessel carrying the goods, except in the cases of average or general average, when same to be settled according to the York-Antwerp Rules, 1950." This clause remains unaltered in the signed contract. The printed form, being for a charterparty, had blanks at the beginning for the insertion of the name of the shipowner's tanker and its flag. These were left blank. Clause 28 provides: "Shipments to be effected in tonnage owned, controlled or chartered by the Compagnie d'Armement Maritime S.A. of 16,000/25,000 tons 10 per cent. more or less at owners' option." F G

The first question is whether it is possible to give any meaning to clause 13. The printed form, including clause 13, obviously contemplates that there is to be one vessel and one flag and that the law of that flag shall be the proper law. But under clause 28 there could be a variety of vessels with a variety of flags. Which is to be selected as determining the proper law? Even if one could hold that with regard to a dispute concerning a particular voyage the law of the flag of the vessel making that voyage should prevail, H

- A that would not provide for the dispute in this case which does not relate to any particular voyage.

We do not know and cannot inquire as to why clause 13 was left unaltered. We have to construe it as we find it. Normally where a clause was drafted by the parties or their agents we can assume that they must have intended it to mean something. But we cannot make that assumption here. The broker, relying on the form having proved useful in the past, may never even have read clause 13 and the strong probability is that the parties, being faced with a form in a foreign language which they assumed, or were assured by the broker, embodied their previous agreement, would not scrutinise the printed matter. Indeed one can say with some confidence that if any of them had scrutinised clause 13 he would have seen that it required adaptation. But whether they read clause 13 or not, the parties are bound by what they signed.

- C Even if it were relevant, it would be useless to ask in this case what the parties in fact intended as to the proper law, because it is found as a fact in the interim award that there was no discussion at any time of the law by which the transaction was to be governed. But clause 13, like any other provision in a contract, must be construed in light of the facts known to both parties at the time when it was agreed. They knew that the appellants owned a number of tankers flying the French flag and it is found in the interim award that it was contemplated by both parties that vessels owned by the appellants would be used "at least primarily" to perform the contract.

- E If the parties had contemplated that the appellants' vessels would always be used, except in some unforeseen circumstances, I would have held that clause 13 could be held to mean that the contract was to be governed by the law of the flag of those vessels, that is, the law of France. But, in my opinion, this finding is too indefinite to justify such a gloss. "Primarily" might mean "in the first instance" or it might mean "in the majority of cases." The parties must have known that many other tankers not owned by the appellants would be available on this route, and that, as the dates of shipment were to be determined by the respondents, vessels other than those belonging to the appellants might well have to be used. In my judgment, clause 13 must in the circumstances be regarded as having failed in its purpose to determine the proper law of the contract.

- G If that is so, then we are no longer concerned with the parties' intention. In the absence of any positive indication of intention in the contract the law will determine the proper law by deciding with what country or system of law the contract has the closest connection. Here three countries are involved. The contract was negotiated and signed in France and the freight was payable in Paris in French francs. The contract was to be performed in Tunisia. The only connection with England was that any dispute was to be settled by arbitration in London. The contract is in the English language and in English form, but it was not argued, in my view rightly, that any great importance should be given to this.

- H Until this case reached this House it appears to have been assumed that France and Tunisia could be treated as one country or as having the same system of law. It is stated in the interim award that: "The civil law of Tunisia (which until 1956 was a French colony) is based on the Code

Napoléon ” and that “ neither side contended for any other system of law ” than French or English law. On that basis when one comes to weigh the various factors which tell in favour of French or of English law being regarded as the proper law, the fact that Tunisia was to be the place of performance of the contract would be put in the scale for French law. Then it is clear that the balance comes down heavily in favour of French law. On the one hand, there are the place where the contract was negotiated and signed, the place of performance, the place where and the currency in which the freight was to be paid, and the place where the parties resided and carried on business: on the other hand, there is only the place where disputes were to be settled by arbitration. But I wish to reserve my opinion as to how far in a case of this kind it is proper to disregard the fact that two countries are separate and independent countries, each with its own system of law, on the ground that those countries are or have recently been closely associated, or that their systems of law are very similar but both very different from English law.

The respondents do not deny that, if we are free to apply the general rule that the proper law is the law of the place with which the contract is most closely associated, then the proper law would be French law. Their case is that that general rule does not apply where there is an arbitration clause requiring disputes to be settled by arbitration in England. They admit that such a clause does not prevent the parties from agreeing that some other law shall be the proper law, but they maintain that if such an agreement cannot be deduced from the terms of the contract, then the arbitration clause is decisive as to the proper law and requires an English court to hold that the proper law is the law of England.

Of course the fact that the parties have agreed that arbitration shall take place in England is an important factor and in many cases it may be the decisive factor. But it would, in my view, be highly anomalous if our law required the mere fact that arbitration is to take place in England to be decisive as to the proper law of the contract. For the reasons given by others of your Lordships I agree that this is not the law of England.

I would therefore allow this appeal.

LORD MORRIS OF BORTH-Y-GEST. My Lords, the parties to a contract for the carriage of a certain number of tons of light crude oil agreed that any dispute between them should be settled in arbitration proceedings in London. Disputes did arise. Arbitrators in London were duly appointed. They entered upon the reference. Both parties wished first to have the question settled as to which system of law fell to be regarded as the proper law of the contract. The arguments before the arbitrators dealt exclusively with the question as to whether the proper law of the contract was French law or English law. Neither side contended for any other system of law. Both parties asked the arbitrators to state their decision as an interim award in the form of a special case. The arbitrators awarded and adjudged that the proper law of the contract is French law. They set out that the question of law for the decision of the court, as agreed between counsel for the parties, was whether upon the facts found and upon the true construction of the contract the proper law is French or English law. The learned judge

A (Megaw J.) upheld the award and decision of the arbitrators. The Court of Appeal took the contrary view.

It is first necessary to consider whether the parties themselves made an agreement as to which system of law should govern the contract. If they did it is not suggested that any reason exists why their agreement should not determine the matter. So the contract has to be considered. It is a contract between a French company (a company of tanker owners) and a Tunisian company dated February 27, 1967. It is a contract for the carriage of "minimum 300,000/maximum 350,000 long tons of light crude oil" from La Skhirra to Bizerta upon terms and conditions set out in the contract. Both those ports are in Tunisia. The history of the matter is that brokers in Paris were instructed to secure tonnage for the transport of the oil, and oral negotiations took place in Paris in the French language between the respective presidents of the parties, though there was no discussion as to the law by which the transaction was to be governed. The contract that was signed was prepared by the brokers, and for convenience a printed standard charter-party form (in the English language) was used. It is a form which is widely used for tanker fixtures not only in London but in other chartering centres.

The form is called a tanker voyage charterparty. The contract that was made was not of that description. Yet neither party has suggested or has wished to suggest that effect cannot be given to the contract that was made. Both parties agree that they made a contract and that they put it into operation. The printed form was in some places adapted and to it were added many typewritten clauses. Though appropriate additional alterations to the printed form clearly ought in many places to have been made, yet they were not. In very many of the clauses the reference is to a single vessel. The parties well understood that the contract did not relate to a single vessel. They both understood, and by one of the additional clauses agreed, that many vessels and many voyages would be needed for the transport of the stipulated quantity of oil. The form of document was appropriate for use between the owner of one vessel and the charterers of it. The first clause begins with the words: "That the said vessel being tight, staunch and strong, and every way fitted for the voyage." The respondents (Compagnie Tunisienne de Navigation) were described as "charterers." Further instances need not be given to demonstrate that on the assumption, which is common ground, that the parties made a contract which they could and did operate on terms which they could and did mutually understand, a great deal of editing and of altering would have been necessary to make the written word accord accurately and neatly with the understood word. Yet neither party has wished that the law should be a destroyer of their bargain.

G The arbitration clause which is being operated is one which comes into play if there is (under clause 18) "any dispute arising during execution of this charterparty." The contract is not invalidated because the parties chose to call their contract a charterparty when they or those acting for them knew that that was not an apt description. They were business men to whose arrangements the words of Lord Wright, in *Hillas & Co. Ltd. v. Arcos Ltd.* (1932) 147 L.T. 503, 514 seem applicable:

"But it is clear that the parties both intended to make a contract and thought they had done so. Business men often record the most

important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*.”

A similar approach is mirrored in the speeches in *Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd.* [1959] A.C. 133 where it was recognised that the words “this bill of lading” should be treated as a misnomer for “this charterparty.”

The contract signed by the parties contains (in clause 13) the words:

“This contract shall be governed by the laws of the flag of the vessel carrying the goods, except in cases of average or general average, when same to be settled according to the York-Antwerp Rules, 1950.”

If it is common ground that other clauses in the contract are to receive a measure of rehabilitation so that they are in accord with the intention of the parties—is this clause alone to be excluded from such treatment? Is it to suffer total or partial extinction? I see no reason for such discrimination. The clause remained in the contract and formed a part of it. It is a clause which makes express provision as to the law which is to govern the contract. It expressly provides that the contract is to be governed by the “laws of the flag of the vessel carrying the goods.” The only problem, therefore, is as to the meaning in the context of the contract of the words “flag of the vessel.” Though in so many clauses the word “vessel” is used as though the printed form which was used was one in relation to a voyage charter, the adaptations clearly showed that many ships and many voyages were involved. Thus the printed provision (clause 21) that lay days were not to commence before a certain date was amended so as to be a provision relating to lay days “for 1st voyage.” The opening words of the contract as adapted read:

“It is this day mutually agreed between Cie. d'Armement Maritime S.A. owners of the tank steamer/motor vessel called the flag of tons nett register having a capacity of of oil, or thereabouts, and classed highest Bureau Veritas or equivalent now see clause 28 and Compagnie Tunisienne de Navigation charterers of Tunis.”

When clause 28 is looked at it is seen that the “charterers” were to arrange for shipments to be evenly spread so that they would be of the order of 100,000 tons each quarter: they were to be between March 1, 1967, and December 31, 1967. As to the shipments by the “owners,” they were to be in tonnage owned, controlled or chartered by them of 16,000/25,000 tons 10 per cent. more or less at owners’ option, as the arbitrators have held. Both parties contemplated, at the time when the contract was entered into, that vessels owned by Compagnie d'Armement Maritime S.A. (described in the contract as “owners”) would be used at least primarily to perform

A the contract. At the time the contract was entered into the "owners" owned certain tank vessels which were within the 16,000/25,000-ton range and which were normally traded mainly in the Mediterranean and with North Africa (four of them being then in the Mediterranean in ballast) and which all flew the French flag. On these facts (which have been found by the arbitrators) I consider that by clause 13 the parties provided that the contract was to be governed by the laws of the flag of the "owners" vessels, those being the vessels which as both parties thought would be the vessels which would primarily be the vessels carrying the oil. It follows, therefore, that by clause 13 the parties agreed that the contract was to be governed by French law. It is true that the "owners" were given an option to use vessels chartered by them. In fact (though this can have no bearing on any question of construction) in the period between March and July of 1967 the owners did furnish chartered vessels for the six liftings which were carried out. Those vessels which they chartered flew (between them) five different flags. It has not been contended that the law applicable in the case of any one voyage was to differ from that applicable in the case of any other voyage. The opening words of clause 13, that is, "This contract shall be governed by the laws of . . ." clearly indicate that the intention was that one law was to govern the whole operation of the contract.

D As a matter of construction, therefore, and in agreement with the learned judge I consider that the decision of the arbitrators was correct and that their award should stand.

If, however, the view is held that the parties did not by clause 13 expressly agree that French law was to govern their contract I would still conclude that that law was the proper law of the contract. The general rule is that the proper law of a contract is that law by which the parties intended that their rights should be determined: see *In re United Railways of Havana and Regla Warehouses Ltd.* [1961] A.C. 1007. Parties may agree, either in express terms or in terms which can be inferred, to submit themselves to a particular system of law. If they have not done this, then the governing law will be that "by reference to which the contract was made or that with which the transaction has its closest and most real connection": see *Bonython v. Commonwealth of Australia* [1951] A.C. 201, 219. It is contended by the respondents in the present case that clause 13 achieves nothing and should be disregarded and that there remains an implication, to be drawn from the agreement to settle disputes by arbitration in London, that English law was to govern: it is contended that in default of an express indication of some other system of law as the proper law of the contract, the choice by the parties of London as the arbitration forum necessarily carries with it an implied choice of English law. I cannot accept these contentions. Even if, contrary to my view, clause 13 should not be interpreted as an express agreement that French law was to govern, it should at least be regarded as having been designed to state what law was to govern. If it has failed to be clear and explicit it remains to negative any implication that might arise from the agreement to refer disputes to arbitration in London. While agreeing to such arbitration the parties set out to make express provision as to what law should apply: by so doing they showed that the governing law was not to be assumed to be the law of the place where arbitration was to be held. Any suggestion that by agreeing

upon arbitration in London they were by implication agreeing that English law was to govern their contract is therefore neutralised.

A

An agreement to refer disputes to arbitration in a particular country may carry with it, and is capable of carrying with it, an implication or inference that the parties have further agreed that the law governing the contract (as well as the law governing the arbitration procedure) is to be the law of that country. But I cannot agree that this is a necessary or irresistible inference or implication: there is no inflexible or conclusive rule to the effect that an agreement to refer disputes to arbitration in a particular country carries with it the additional agreement or necessarily indicates a clear intention that the law governing the matters in dispute is to be the law of that country. There might be such additional agreement or there might not. In many cases there might be. In many cases it will be reasonable to infer that the parties so agreed. In other cases the conclusion may well be that the parties placed confidence in the arbitrament of chosen commercial men in a particular country and in their methods and system, while remembering that arbitrators may be accustomed to and competent to deal with disputes by the application of some system of law other than that of their own country.

B

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In *Hamlyn & Co. v. Talisker Distillery* [1894] A.C. 202 it was said that the provision for London arbitration was a clear indication of the intention of the parties in that case that their contract was to be governed by English law. But it was pointed out that all indications must be considered in deciding as to the intention of the parties. Lord Herschell L.C. said, at pp. 207-208:

D

"Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. In the present case the place of the contract was different from the place of its performance. It is not necessary to enter upon the inquiry, which was a good deal discussed at the bar, to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made, or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract."

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In delivering the judgment of the Privy Council in *Spurrier v. La Cloche* [1902] A.C. 446 Lord Lindley indicated various circumstances which in that case pointed to the conclusion that the intention of the parties was that their contract was to be governed by English law. He said, at p. 450:

H

- A "The first question which arises is whether this is to be regarded as an English contract or as a Jersey contract. Their Lordships are of opinion that, although this policy was made in Jersey, and any money payable under it would have to be paid to the assured in Jersey, the nature of the transaction, the language in which the policy is expressed, and the terms of the agreement and of the conditions, all show that the contract between the parties is an English contract, and that wherever sued upon its interpretation and effect ought, as a matter of law, to be governed by English and not by Jersey law. The intention of the parties is too plain to be mistaken; the contract to pay out of the funds of the company is of itself very significant; and the reference to the English Arbitration Acts shows that the arbitration proceedings were to be conducted according to English law and no other."
- B
- C The case of *N.V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co. Ltd.* [1927] A.C. 604 related to contracts made between Glasgow merchants with a branch house in Bombay and merchants in Hong Kong whereby the former were to purchase parcels of sugar from the latter. The contracts, three in number, were made through brokers in Java. The sugar was sugar which was to be shipped from Java to Bombay. The buyers were to open a confirmed credit in London. Any dispute was
- D to be settled "by arbitration of London brokers in the usual manner": and it was provided that "this submission may be made a rule of the High Court of Justice or any Division thereof." The question that arose in an interlocutory appeal in respect of one of the contracts was whether the contract was "by its terms or by implication to be governed by English law." In the Court of Appeal, dismissing an appeal from the judge, Bankes L.J.
- E said (House of Lords Printed Case, Appendix, p. 12) that an arbitration clause was "as capable as any other clause of providing by implication for the law which is to be applied." He said:
- "In my opinion, having provided for a confirmed credit in London and for a reference to arbitration before brokers in London, the contract is by implication to be governed by English law."
- F This view was upheld on appeal. Lord Dunedin said, at p. 607, that the sole question was whether the words of the arbitration clause "lead by implication to suppose that the contract is to be regulated by English law." Lord Phillimore, at p. 609, referred to the fact that what should be the law governing a contract was a matter to be regulated by the intention of the parties.
- G I do not read that case as providing support for the contention that an agreement for arbitration in a particular country carries with it a conclusive implication that the law of that country is to be the substantive law governing the contract.
- H In *Vita Food Products Inc. v. Unus Shipping Co. Ltd.* [1939] A.C. 277 there was an express clause which provided that the contracts should be governed by English law. Lord Wright pointed out, at pp. 289 and 290, that it was well settled that by English law the proper law of the contract is the law which the parties intended to apply. He said, at p. 290:
- "But where the English rule that intention is the test applies, and where

there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy."

A

He then examined the reasons why it might have been said that in that case the choice of English law was not valid. He considered whether it could be said that the transaction in issue in that case contained nothing to connect it with English law. In pointing out that connection with English law is not, as a matter of principle, essential, he said, at p. 290:

B

"The provision in a contract (e.g., of sale) for English arbitration imports English law as the law governing the transaction, and those familiar with international business are aware how frequent such a provision is even where the parties are not English and the transactions are carried on completely outside England."

C

When read in their context and in their place in the reasoning which Lord Wright was developing I do not consider that the words "English arbitration imports English law" should be taken as laying down that from an agreement for an English arbitration there arises a conclusive presumption that English law is to apply.

D

The case of *Tzortzis v. Monark Line A/B* [1968] 1 W.L.R. 406 arose out of a contract which was made in Stockholm for the sale of a ship. The sellers were Swedish. The buyers were Greek. Delivery was to be in Sweden. There was to be a deposit at a Stockholm bank—where payment (in sterling transferable to Swedish kroner) was to be made. The contract provided that any dispute in connection with its interpretation and fulfilment should be decided by arbitration in the City of London. Arbitrators were appointed. They stated an interim award in the form of a special case as to which system of law was to be regarded as the proper law of the contract. They held that it was English law. Donaldson J. took the same view and his decision was upheld by the Court of Appeal. There being no express clause providing what the proper law was to be, that question fell to be decided as a matter of inference from all the circumstances of the case. The conclusion that English law was the proper law of the contract may well have been a reasonable one (though no occasion now arises to form any opinion as to this) but some of the statements concerning the inferences to be drawn from an arbitration provision are, in my view, expressed much too positively. The circumstance that parties agree that any differences are to be settled by arbitration in a certain country may and very likely will lead to an inference that they intend the law of that country to apply. But it is not a necessary inference or an inevitable one though it will often be the reasonable and sensible one. Before drawing it, all the relevant circumstances are to be considered.

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My conclusion, therefore, is that clause 13 should be interpreted as containing an agreement that French law is to govern. If the clause has failed to be positive its existence at least negatives any inference that might otherwise have arisen from the terms of the arbitration clause. On that basis and upon a consideration of all the relevant circumstances it should

H

A be held that French law is the governing law. The transaction had a much closer and more real connection with French law than with English law. The contract was negotiated in France in the French language through a French firm of brokers and was made in France. There was to be payment in France and in French currency. One party was a company incorporated in Tunisia. The other party was a company incorporated under French law which at the time was registered as a French company.

B If I had been of the view that clause 13 ought to be regarded as non-existent, then it would have been a matter for decision as to whether these and the other considerations already noted were not so weighty as to negative and supersede any inference that might be drawn from the terms of the arbitration clause if considered alone.

I would allow the appeal.

C VISCOUNT DILHORNE. My Lords, I too think that this appeal should be allowed. In my opinion, the contract entered into shows, when properly construed, that the parties made a choice of the proper law. The printed form used was intended for use for a tanker voyage charterparty involving the use of one vessel. In this case it was used for a tonnage contract for the carriage of oil between two ports in Tunisia in a number of vessels.

D It contains an arbitration clause, clause 18, which provides that "any dispute arising during execution of this charterparty shall be settled in London, owners and charterers each appointing an arbitrator—merchant or broker" and that if they could not agree, they could appoint an umpire.

Clause 13 reads as follows: "This contract shall be governed by the laws of the flag of the vessel carrying the goods . . ."

E The form thus contemplated that the proper law of the contract should not be English in consequence of the inclusion of clause 18 but that, although any arbitration would be in London, the law governing the contract should depend on the nationality of the ship employed.

The first paragraph of the form reads as follows:

F "It is this day mutually agreed between owners of the tank steamer/motor vessel called the flag, of tons nett register, having a capacity of oil, or thereabouts, and classed now and charterers."

The names of the parties were inserted in the appropriate places but the spaces for the name and description and flag of the vessel were left blank. After the word "now" the words "see clause 28" were inserted in type. G A number of alterations were made to the printed form. In two clauses words were struck out and others inserted. Additions were made to the printed clauses and also some clauses, of which clause 28 was one, were added.

H Reading through the contract as executed by the parties it is apparent that considerable care was taken to adapt it to record properly the agreement reached. If the names of the vessels to be used and their flags had been inserted, it could not be disputed that, if they were of the same nationality, clause 13 operated and that the parties had made an express choice of the proper law to govern the contract.

Clause 28 dealt with a number of matters. So far as material it reads as follows:

"This charterparty covers the transport of minimum 300,000/maximum 350,000 long tons of light crude oil—exact quantity at charterers' option. Shipments to be effected in tonnage owned, controlled or chartered by the Compagnie d'Armement Maritime S.A. of 16,000/25,000 tons 10% more or less at owners' option. . . . Dates of shipment to be in accordance with shippers/receivers' requirements. Charterers to do their utmost to arrange for shipments to be evenly spread and to effect approximately 100,000 tons each quarter and to give minimum 30 days' notice of each shipment. Liftings to take place between March 1, 1967, and December 31, 1967."

At the time of the contract the appellants owned four tankers, the smallest of which was 16,050 tons and the two largest of 22,000 tons. The fourth was 17,500 tons. They also controlled through a subsidiary company a tanker of 17,500 tons. All these vessels flew the French flag.

The arbitrators found as a fact that: "It was contemplated by both parties at the time the contract was entered into that vessels owned by the " appellants "would be used at least primarily to perform the contract." One of the difficulties in this case is to know what the arbitrators meant by the words "at least primarily." It is unfortunate that this finding was not more explicit. When a contract is entered into with a shipowner for the carriage of goods by him, one would expect it to be contemplated that the goods would be carried in his ships. If that was not so, then why enter into a contract of carriage with him?

I interpret the arbitrators' finding as meaning that it was contemplated by both parties that the appellants would use vessels owned or controlled by them if possible—and in that sense, "primarily." If one of their ships was not available, then, by virtue of clause 28, they were at liberty to charter.

What was the object of the inclusion of the words "see clause 28" in this part of the form? The non-insertion of the names and flags of the vessels to be used cannot, I think, have been inadvertent, bearing in mind the care taken to alter or amend other provisions of the agreement. I see no ground for supposing that the person who prepared the agreement failed to appreciate that if the ships to be used were not specified sufficiently for their flags to be known, clause 13 would have no effect. I think that the insertion of "see clause 28" can only have been made with that object. I can see no other reason for the insertion of those words. If clause 28 had merely said that shipment was to be effected in tonnage owned or controlled by the appellants, then as those ships were known and all carried the French flag, I do not think that it could be disputed that the ships and their flags were sufficiently identified for clause 13 to have effect and the effect when read with clause 28 of providing that French law governed the contract.

Is the position different in consequence of the appellants being able to charter ships? It is in this connection that the finding of the arbitrators is of such importance. If under the contract the appellants could use their own ships or chartered ships and were entirely free to choose, then it cannot be said that clause 28 identified the ships and their flags, in which case

A clause 13 had no effect. But it is found as a fact that both parties contemplated that the appellants would use their own ships "at least primarily" and, if my interpretation of that finding is right, that means they were not to charter if one of their ships was available.

B If clause 28 had said that the ships owned or controlled by the appellants were to be used and had then gone on to say that, in the event of their not being available, the appellants could charter, then I think the ships intended to be used would have been sufficiently identified for clause 13 to operate and, operating, to provide that French law governed the contract.

C I think the finding of fact must mean that it was the intention of the parties that this part of clause 28 should be so interpreted and, taking that into account, I have reached the conclusion that giving that meaning to that part of clause 28, the parties to the contract expressly provided that it should be governed by French law.

D Before the alleged repudiation of the contract oil was carried in six vessels, none of which was owned or controlled by the appellants, one Norwegian, one Swedish, one French, two Liberian and one Bulgarian. It cannot possibly have been intended that the law of the contract should vary according to the nationality of the vessel used on each voyage, and the subsequent conduct of the parties cannot be used as an aid to the interpretation of the contract: see *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1970] A.C. 583.

E For the reasons I have given in my opinion the parties, the contract reveals, chose that French law should govern it. I am fortified in this view by the fact that Megaw J., a judge of great experience in these matters, reached the same conclusion though it does not appear that he attached the importance I attach to the insertion of the words "see clause 28."

F The appellants argued that even if the contract properly understood did not specify the vessels sufficiently for clause 13 to operate, nevertheless the retention of this clause in the contract sufficed to negative any inference that the law governing the contract was English arising from the stipulation that any arbitration was to be in London. They further argued that if clause 13 had no effect and if the contract has to be read as if it did not include that clause, such an inference from the arbitration clause was not conclusive, and that the system of law with which the contract had the closest connection was French.

G I have had the advantage of reading the opinion of my noble and learned friend, Lord Wilberforce, on these contentions. I entirely agree with it. I only desire to say in conclusion that it is, in my view, inconceivable that a French company registered in French Somaliland and a Tunisian company where the law is based on the Code Napoléon, having negotiated in French in Paris, could have intended that a contract for the carriage of oil between two Tunisian ports with the freight payable in francs should be governed by English law.

H LORD WILBERFORCE. My Lords, two alternatives are put forward for the proper law of this contract, French law and English. I have no doubt that the decision should be in favour of the former.

Briefly to recapitulate the facts: the contract is between a shipowning

company incorporated under French law with a registered office, at the relevant time, in French Somaliland, whose ships carry the French flag; and a company incorporated in Tunis, until 1956 a French protectorate, whose civil law is based on the Code Napoléon. It was for the carriage of a specified tonnage of oil between two Tunisian ports by ships to be provided by the appellants. Negotiations for the contract were conducted in Paris, in the French language, through Paris-Maritime, a French firm of brokers. Payment under it was to be made in France, in French currency. The contract was made on an English standard form, but one which, it was found, is frequently used for tanker fixtures in chartering centres outside London. It contained an arbitration clause providing for arbitration in London.

Disputes arose and the matter went to arbitration: each side appointed a very experienced London arbitrator. These arbitrators, without resorting to the appointment of an umpire, decided that the proper law was French law. The matter went to the High Court on a special case and was heard by Megaw J., a judge of great experience in these matters. He upheld the arbitrators' decision. One would think that this would be the end of the matter—all the more when it is appreciated what the nature of the dispute was. This was whether the respondents are entitled to damages for breach of contract according to the English law of anticipatory breach, or whether their right to damages is conditioned by certain requirements of French law as to matters to be done before damages in such a case can be claimed, and also whether any damages are to be limited as provided in article 1150 of the French Civil Code. To suppose that contracting parties, in the position of these companies, intended that their rights in this matter should be governed by English law seems a surprising proposition: yet this was so decided by the Court of Appeal. The Appeal Committee of this House thought that this House ought to review the matter.

How, then, was a decision reached in favour of English law? Some reliance was placed on the use in the contract of English expressions, but this can be of little weight since in general they relate to maritime situations well known under all systems and, indeed, referred to in the Hague Rules. The main argument was based on clause 18 of the contract which, as stated, provides for arbitration in London. The existence of such a clause, failing an express choice of any other law, is said to give rise to a conclusive presumption that the parties intended English law to govern, however strongly other factors may point away from it. In so holding, the Court of Appeal was following its earlier decision in *Tzortzis v. Monark Line A/B* [1968] 1 W.L.R. 406 where, though the contract was closely connected with Swedish law, the presumption in favour of English law arising from the arbitration clause was described by Salmon L.J., at p. 413, as "irresistible." There is no doubt that the strength of this so-called presumption has increased both in recent decisions at first instance and in certain, but not all, textbooks. Thus Professor Cheshire in his *Private International Law*, 8th ed. (1970), says that "for better or for worse English law is committed to the view that *qui elegit judicem elegit jus*. An express choice of a tribunal is an implied choice of the proper law." The editors of *Dicey & Morris, The Conflict of Laws* are more circumspect: ("usually permits the infer-

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ence"—8th ed., (1967), p. 705). So, too, Professor Wolff in his *Private International Law*, 2nd ed. (1950), p. 437.

I shall examine this doctrine in the light of authority, but before I do so there is a special argument to be considered, on the terms of the contract. This is based upon clause 13 of the contract (cited by my noble and learned friend, Lord Reid) and takes two alternative forms: (1) that the clause should be interpreted so as to amount to an express choice of law, sc., French law; (2) that even if it is inept to do so, it has sufficient force to negative any implied choice of law through the arbitration clause. I do not deal at any length with either of these arguments. The first must command respect from its acceptance by Megaw J. But I find the required process of adaptation, with the aid of a qualified finding of fact that it was contemplated that the appellants' vessels would be primarily used, to pass beyond legitimate interpretation to a process of rewriting. With the exception of the reliance placed on subsequent actings, which I think inadmissible, I adopt the reasoning of the Court of Appeal, particularly of Salmon L.J., on this point. The second argument seems to me much more dubious. It rests on the fact that this clause, on this hypothesis meaningless and incapable of adaptation, was not struck out of the contract. This shows, it is said, an intention to displace the law of the place of arbitration by some other law of the parties' choice and this neutralising effect remains even though the choice is abortive. This is certainly an ingenious and subtle argument, too subtle and ingenious for me. To attribute a legal effect to a clause which is, on this hypothesis, meaningless, seems to me a remarkable acrobatic. To deny its normal effect to a clause (clause 18) because of the presence of some printed words of no effect—a corpse which the undertakers have not removed—is a stranger adventure than I can embark on. I cannot find in clause 13, either way, the solution to the case: this must be found in a proper evaluation of the arbitration clause.

My Lords, I am still of opinion that it is not necessary to embark on citation of authorities in order to establish how the proper law of a contract is to be arrived at. The law has been more than once in recent times stated in this House and if one desires a summary of the main principles the rules in *Dicey & Morris, The Conflict of Laws*, 8th ed., are convenient. For myself I prefer the formulation in the 7th ed. (1958), p. 731, which I find clearer and simpler. In the absence of an express choice of law, rule 127, sub-rule 2, applies, as follows:

"Where the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract."

Whether the result is a matter of "inferred intention" or not may be open to jurisprudential discussion; but the advantage of this formulation is that (correctly in my opinion) it requires consideration together of the terms and nature of the contract and the general circumstances of the case. In certain recent judgments, particularly in relation to arbitration clauses, there is a tendency to split this into two stages: first, see if there is an arbitration clause; if so, that is conclusive, and the general circumstances

(place of performance, money of payment etc.) are irrelevant. I think that this is wrong; all should be considered together as elements relevant to intention, inferred or presumed. I see no justification for giving a prerogative effect to one of these elements, to the extent of refusing even to consider others, whether within or outside the contract, which are just as relevant (though not necessarily as weighty) to the parties' intention.

How strong, then, is the inference to be drawn from a (London) arbitration clause? That the selection of a certain place for arbitration and, by inference, of nationals or residents of that place as arbitrators, is an indication that the parties intended the law of that place to govern is a sound general rule. But it should not be treated as giving rise to a conclusive or irresistible inference, as recent pronouncements appear to suggest. One of the reasons commonly given for attributing overwhelming force to the clause is that arbitrators in London are only to be supposed to be conversant with English law (*N.V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co.* [1927] A.C. 604, *per* Viscount Dunedin) but I venture to think that in commercial matters, at the present time, this may give insufficient recognition to the international character of the City of London as a commercial centre—the reason, rather than any preference for English rules, for which arbitration in London is selected. In this case the arbitrators had no difficulty in finding for French law and I do not suppose they would find ascertainment of the French law as to damages any more difficult than the English law of anticipatory breach. So, unless otherwise constrained, I would regard the clause as a weighty indication, but one which may yield to others.

I do not find that the leading cases, when properly understood, suggest a different approach. For practical purposes these start in 1894, and one must approach them with caution—so great have been the changes in English private international law. *Hamlyn & Co. v. Talisker Distillery* [1894] A.C. 202, if carefully read, is a decision on the validity of the arbitration clause and on the law governing that clause. Their Lordships were most careful in their language to limit their decision as to the applicability of English law to the arbitration clause, whose validity was in question, and not to exclude the application of Scottish law, as the *lex loci solutionis*, to the rest of the contract. Thus Lord Herschell, whose language was invariably precise to the utmost says, at p. 208: “. . . they have indicated as clearly as possible their intention that that particular stipulation, which is part of the contract between them, shall be . . . governed” by English law; similarly throughout Lord Watson draws a clear distinction between the “domicile” of a contract, and the curial rules of the forum—archaic language, but the argument is clear; Lord Ashbourne and Lord Shand similarly deal only with the clause. Thus the limitation of the opinions is clear. The case ought not to be cited as more than indirect authority on the proper law of a contract as a whole. It certainly lays down no conclusive rule as to the effect of an arbitration clause.

Spurrier v. La Cloche [1902] A.C. 446 is a decision more in point. It supports Dicey's sub-rule (*supra*). There was an arbitration clause which referred to the English Arbitration Act 1889, but Lord Lindley, in considering whether the policy of assurance was an English contract or a Jersey

A contract, in the clearest manner reviews all the relevant factors, including, but not limited to, the arbitration clause: see p. 450.

I can then pass to *Kwik's* case [1927] A.C. 604 which gives the respondents' argument, for the conclusive effect of the arbitration clause, its strongest support. If it really established this important principle, it did so with surprising imprecision of language. The opinions can in fact hardly be understood, individually or collectively, without regard to the record and what was said in the Court of Appeal.

B The appeal was interlocutory, and it is hardly unfair to the appellant company to say that its procedural demerits were overwhelming: counsel for the respondents were not called on, and two short opinions were given. The question was whether the contract which contained a London arbitration clause was by implication to be governed by English law so that a writ could be served out of the jurisdiction. Both Viscount Dunedin and Lord C Phillimore gave reasons for holding that it was, but it is far from clear on what basis. Viscount Dunedin refers, at p. 605, first to "the law which was to regulate the decision" (that is, in any arbitration) and continues that this "does not mean that everything that would have to be decided would necessarily be decided by English law." English law was the "underlying" law but incidents of the contract might fall to be determined by a foreign law. This language is ambiguous. The "underlying" D law may mean the procedural law of the arbitration to which the parties had committed themselves, or it may mean the basic substantive law. A good deal of light on what he may have meant is provided by the judgment of Bankes L.J. in the Court of Appeal (House of Lords Printed Case, Appendix, p. 12), which contains this passage:

E "It is not often that the question, what system of law is to govern the rights of the parties to a contract, has to be answered by reference to an arbitration clause, but it is clear that an arbitration clause is as capable as any other clause of providing by implication for the law which is to be applied."

F He continues by saying that the arbitration was to be by brokers and that brokers in London decide, according to the custom of the English market, if the contract is to be performed in England but, if it is to be performed abroad, they ascertain the customs of the foreign country. Taking into account the London arbitration clause and the fact that a confirmed credit was provided for in London, he found that the contract was by implication to be governed by English law. A reference to the respondents' printed G case shows that they were contending that the contract was governed by English law because of (a) the arbitration clause, (b) payment in English currency by credits to be opened in London and (c) the absence of any circumstances pointing to any other system of law. It seems reasonable to suppose that Bankes L.J., a judge of great experience in commercial matters, was accepting this line of argument and deciding that English law was the proper law on the basis of all the indications relied on by the respondents H which included, but were not limited to, the arbitration clause. It seems also reasonable to interpret Viscount Dunedin's words as reflecting the same process of thought. If he had intended to go further, and attribute

conclusive effect to the arbitration clause alone, surely he would have made his language more explicit. A

Lord Phillimore's opinion at first sight appears to be more strongly expressed. In his concluding sentence he says, at pp. 609-610 "that the forum provided for the settlement of disputes is English, and that therefore the contract is intended to be governed by English law." But earlier he refers to ascertaining and applying foreign law, and quotes as classic the words of Sir W. Scott in *Dalrymple v. Dalrymple* (1811) 2 Hag.Con. 54, 59. B
But Lord Stowell's judgment, in a matrimonial suit, affords the clearest possible example of English law, as the *lex fori*, applying Scots law as the substantive law. Lord Phillimore continues by referring to the control of the High Court over the arbitration, by virtue of the Arbitration Act 1889, and says that *Hamlyn & Co. v. Talisker Distillery* [1894] A.C. 202 is very much in point. C
It seems very clear from this that he was basing his decision on the arbitration clause itself, which, as in *Hamlyn's* case, was governed by English law and the operation of which would be controlled by the English court, and that he was not committing himself to any view of the proper law of the contract as a whole. Earlier he had quoted *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115 which contains in a judgment of Willes J. an exhaustive comparison of all relevant factors.

I have discussed this case at, I fear, some length because it has, in my opinion, been misunderstood. Apart from the judgment of Bankes L.J. D
it does not contain any direct or precise statement as to the proper law, and it would be a poor reflection on our system of precedent to regard it as authority for the attribution of a conclusive effect, as regards the proper law, to an arbitration clause. Such importance as it retains as an authority lies rather in the foundation it has laid for attribution of a preponderant effect, as regards determination of the proper law, to an arbitration clause. E
But the strength of that preponderance has now to be evaluated.

I can deal more briefly with the modern cases. *Norske Atlas Insurance Co. Ltd. v. London General Insurance Co. Ltd.* (1927) 28 Ll.L.Rep. 104 is a case where MacKinnon J. took into account all relevant indications and, in that context, referred, at p. 107, to the arbitration clause as "the clearest indication in this contract." F

Maritime Insurance Co. Ltd. v. Assecuranz-Union von 1865 (1935) 52 Ll.L.Rep. 16 was concerned with a reinsurance treaty between an English company and a German company. There was a London arbitration clause. If English law was the proper law, the treaty was unenforceable. A dispute went to arbitration and the arbitrators (sensibly one would think) found that the proper law was German. On a case being stated Goddard J. held the arbitrators were wrong, that the proper law was English and, consequently, that the treaty was unenforceable. He referred to the arbitration clause, at p. 19, as "by far the most important and I think conclusive provision." G
This is not a decision which gives much satisfaction either in its result or its reasoning. If the learned judge regarded the arbitration clause alone, to the exclusion of other factors, he was, in my opinion, departing from authority. H
If, on the other hand, as it seems reasonable to suppose, he considered the clause with the other factors, as a matter of commercial intention, his law would be correct but the conclusion of the arbitrators would seem to be more sensible. The case is one of doubtful authority.

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A *Naamlooze Vennootschap Handels-en-Transport Maatschappij "Vulkaan" v. A/S J. Ludwig Mowinckels Rederi* [1938] 2 All E.R. 152, is a decision of this House on the question whether English Statutes of Limitation should be applied in an arbitration held in England, so that the dispute related rather to the application of the *lex fori* than to a question of proper law. However, the speech of Lord Maugham L.C. contains this passage, at p. 156:

B "In this case, the appellants being a Dutch company and the respondents Norwegian shipowners, there was a good reason, if not a necessity, for selecting the law which should apply to any future disputes, and the submissions of such matters to the arbitration of two persons in London and of an umpire who in case of difference was to be nominated by the directors of the Baltic Mercantile and Shipping Exchange showed clearly that English law and procedure were to be applied."

D There is nothing here which requires qualification or explanation. I fully accept that, especially where the parties are of different nationality and there is no other relevant factor, a clause providing for arbitration in a third country is a strong indication which, because there is no other, may be called conclusive, in favour of the proper law of that country.

E Lastly, I must refer to the well-known and important dictum of Lord Wright in the Privy Council case of *Vita Products Inc. v. Unus Shipping Co. Ltd.* [1939] A.C. 277. This is (amongst other things) a leading authority on the question to what extent parties to a contract are free to select for themselves the law which is to govern it. Lord Wright discusses this in an illuminating manner on pp. 289-292, and the passage contains these words, at p. 290: "The provisions in a contract (e.g. of sale) for English arbitration imports English law as the law governing the transaction." The respondents in the present case are not the first to pick out these words as stating a definite rule. It would be surprising if it did, in view of Lord Wright's observations on the same page that "questions relating to the conflict of laws rules cannot generally be stated in absolute terms but rather as *prima facie* presumptions" (see also *Wright's Legal Essays and Addresses* (1939), p. 164). If this was his view in relation to a case where parties have expressly chosen the governing law, it would seem unlikely that he regarded an implied choice through an arbitration clause as having stronger effect. But it is clear enough what he is arguing. He is concerned to show that connection of the contract with English law is not essential, and the proposition is designed to illustrate this. The illustration is precisely as effective whether an arbitration clause is regarded as conclusive or strongly presumptive or weakly presumptive: there was no need for Lord Wright to commit himself to any one of these.

G So I come, in conclusion, to the *Tzortzis* case [1968] 1 W.L.R. 406 and the present appeal; cases virtually identical in principle. In each case there were substantial foreign elements. In *Tzortzis* Lord Denning M.R. said, at p. 410:

H "If you read the contract apart from the arbitration clause, it is clear that it has its closest and most real connection with Sweden. Sweden was the place of the contract. It was the place where the contract was

to be performed both as to payment and as to delivery. But then we come to the arbitration clause.”

A

Salmon L.J. uses even stronger language, at p. 412. In the present case, too, Lord Denning M.R. accepts that the system of law with which the contract has the closest and most real connection is French law [1969] 1 W.L.R. 1338, 1344. Similarly Salmon L.J., though he states this as a matter of concession. But in both cases the court held that this was overridden, not outweighed, by the arbitration clause. In *Tzortzis* [1968] 1 W.L.R. 406, 411 Lord Denning M.R. seems to have regarded the arbitration clause as a “very strong indication,” though he later quotes Professor Cheshire who puts the matter more strongly still. Salmon L.J. says, at p. 413, firmly that the choice of an English arbitration “raises an irresistible inference which overrides all the other factors” and this is the approach followed in the present case.

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My Lords, for the reasons given I am of opinion that this language is too strong, too absolute. Neither authority nor commercial reality supports the necessity for so rigid a rule. An arbitration clause must be treated as an indication, to be considered together with the rest of the contract and relevant surrounding facts. Always it will be a strong indication; often, especially where there are parties of different nationality or a variety of transactions which may arise under the contract, it will be the only clear indication. But in some cases it must give way where other indications are clear. It is not necessary to express an opinion as to the correctness of the result in the *Tzortzis* case; it is the process with which it is necessary to disagree. The right result was to be arrived at by weighing the important indications in favour of Swedish law against the indication from the arbitration clause and the different nationality of the parties. It is necessary to disagree with the result in the present case, where every indication points so strongly to French law, that this law must govern unless the inference from London arbitration is irresistible or conclusive.

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One further observation. It is surely regrettable that, after a choice of English arbitrators, these foreign parties should have been subjected to litigation in three courts on top of the arbitration and that on a preliminary point. I venture to think that a question of the proper law of a commercial contract ought to be regarded as primarily a matter to be found by arbitrators: for, after all, the question is one of estimating competing factors in the light of commercial intention. As was said long ago, “the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract” (*Jacobs, Marcus & Co. v. Crédit Lyonnais* (1884) 12 Q.B.D. 589, 601). The expertise of City of London arbitrators (which motivates the use of London arbitration clauses) suggests that these considerations are best left to them and the proposition that this being a “matter of law” is something better left to the courts is one the correctness of which is open on the record. If, for uniformity or otherwise, supervision by the courts is sometimes required, I cannot but think that, otherwise than in exceptional cases by leave, decision by the commercial judge should end the matter.

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I would allow the appeal.

A LORD DIPLOCK. My Lords, this appeal is about a "tonnage contract" for the carriage by sea of 300,000/350,000 tons of light crude oil between two ports in Tunisia in shipments of 16,000/25,000 tons between March and December 1967. Performance of the contract might involve twelve to twenty-two separate voyages. The parties were a French company as carriers and a Tunisian company as shippers. The French company owned four tankers and through a subsidiary company controlled a fifth in the B 16,000/25,000 ton range. All these vessels flew the French flag. The contract was negotiated in Paris at a meeting of the presidents of the two companies arranged by French shipbrokers employed by the Tunisian company. The negotiations were conducted in the French language. The written contract was prepared by the shipbrokers. They used for this purpose a printed form of tanker voyage charterparty in the English language which is widely used for tanker fixtures on the Baltic Exchange in London and in other chartering centres abroad. They adapted it to a "tonnage contract" by adding typed clauses on an attached slip. The only attached C clause which matters for the purposes of this appeal reads as follows:

D "28—This charterparty covers the transport of minimum 300,000/maximum 350,000 long tons of light crude oil—exact quantity at charterers' option. Shipments to be effected in tonnage owned, controlled or chartered by the Compagnie d'Armement Maritime S.A. of 16,000/25,000 tons 10 per cent. more less at owners' option. . . ."

It was found as a fact by the arbitrators that it was contemplated at the time the contract was entered into that vessels owned by the French company would be used at least primarily to perform the contract.

E The printed form of tanker voyage charterparty to which the slip was attached is intended for use for a single voyage charter in a named vessel flying a named flag and contains no provision for a substitute vessel. In it the French company were described as "owners" and the Tunisian company as "charterers" but the space for the name of the vessel and the nationality of the flag was not filled in. Instead there was a reference to clause 28. The other blanks in the printed form were filled in with appropriate typed words and some minor deletions and additions were made to F some of the printed words themselves. Freight was payable in French francs in Paris. Clause 13 (the "proper law clause") and clause 18 (the "London arbitration clause") were left as printed. They read as follows:

"13. This contract shall be governed by the laws of the flag of the vessel carrying the goods, except in cases of average or general average, when same to be settled according to the York-Antwerp Rules, 1950."

G "18. Any dispute arising during execution of this charterparty shall be settled in London, owners and charterers each appointing an arbitrator—merchant or broker—and the two thus chosen, if they cannot agree, shall nominate an umpire—merchant or broker— whose decision shall be final. Should one of the parties neglect or refuse to appoint an arbitrator within 21 days after receipt of request from the other party, the single arbitrator appointed shall have the right to H decide alone, and his decision shall be binding on both parties. For the purpose of enforcing awards this agreement shall be made a rule of court."

The French company did not in fact use for the carriage on the first six voyages under the contract their own vessels or that of their subsidiary company, as had been contemplated at the time the contract was made. They chartered other vessels which flew a number of different flags. Only one was French. After the sixth voyage the Arab-Israeli war broke out and the French company ceased to perform the contract. This gave rise to disputes between the parties which were referred to two arbitrators in London under clause 18.

The rights of the parties in the event of repudiation of a contract are not the same under English law as they are under French law and other similar systems of law based upon the Code Napoléon, such as the system which is in force in Tunisia. So a preliminary question was raised in the arbitration as to whether the substantive law applicable to the contract was English law or French law. Neither party sought at that stage to distinguish between French law and Tunisian law. In my view, this was right. The contract was a shipping contract and no one has been able in these proceedings to point to any relevant difference between the law of those two countries about carriage of goods by sea. For the purposes of a commercial contract of this kind I would be prepared to assume that the parties regarded France and Tunisia as subject to a common system of law.

The very experienced commercial arbitrators appointed by each party were in agreement that the substantive law to be applied was French law. They did not even find it necessary to refer the question to an umpire. They were asked to state their opinion as an award in the form of a special case. Their award was upheld by Megaw J. sitting as judge in charge of the Commercial List. His judgment, however, was reversed by the Court of Appeal. They held unanimously that the proper law of the contract was English law. Leave to appeal from their decision was refused by the Court of Appeal but was subsequently granted by your Lordships' House.

The Court of Appeal treated the case as governed by the principle, which they had recently laid down in *Tzortzis v. Monark Line A/B* [1968] 1 W.L.R. 406, that when a contract contains a London arbitration clause the resulting implication that the parties intended that the substantive law applicable should be English law can only be rebutted by an express provision to the contrary. They considered that clause 13 of the printed form was inapplicable to a "tonnage contract" that permitted performance by chartered vessels which might fly flags of a number of different countries. They accordingly treated clause 13 as non-existent and the contract was left with no express provision to contradict the implication resulting from the inclusion of the London arbitration clause.

In reaching this decision the Court of Appeal were clearly influenced— Lord Denning M.R. and Karminski L.J. avowedly so—by the circumstance that, contrary to what was found to have been contemplated when it was entered into, the contract, up to the date of its repudiation, had in fact been performed with chartered vessels only which flew a variety of different flags. In using the subsequent conduct of the parties as an aid to the construction of the contract the Court of Appeal were following their previous decision in *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1969] 1 W.L.R. 377. This was then under appeal to your Lordships' House, but on the appeal [1970] A.C. 583, your Lordships

A held that a contract cannot be construed by reference to the subsequent conduct of the parties. Its only relevance is to a contention that the parties have agreed upon a variation to the previous contract or have entered into a new contract collateral to it. No such contention has been made by either party in the instant case.

B My Lords, I think that the Court of Appeal erred both in holding that clause 13 was to be ignored, and in the conclusive effect upon the proper law of the contract which they ascribed to the presence of clause 18, the London arbitration clause.

C When parties enter into an agreement which they intend to give rise to legally enforceable rights and liabilities, they must ex necessitate contemplate that there will be some system of law by reference to which their mutual rights and liabilities will be determined, i.e., the substantive or "proper" law of their agreement; and also that the procedure by which disputes about their rights and liabilities will be resolved will also be regulated by some system of law, i.e., the curial law of their agreement.

D By "proper law" in this context is meant the system of law which governs the interpretation and the validity of the contract and the mode of performance and the consequences of breaches of the contract. If English law is the "proper law," the contract will be interpreted, if the language so permits, as requiring the mode of performance of any part of the contract to conform with the law of the country in which that part of the performance is to take place. This does not, however, mean that the English court is applying foreign law. It is applying an English rule of construction to the interpretation of the contract.

E English law accords to the parties to a contract a wide liberty to choose both the proper law and the curial law which is to be applicable to it. If the parties exercise that choice as respects either the proper law or the curial law or both, the English courts will give effect to their choice unless it would be contrary to public policy to do so. But it is a liberty to choose—not a compulsion—and if the parties do not exercise it as respects the proper law applicable to their contract the court itself will determine what is the proper law.

F The first stage, therefore, when any question arises between parties to a contract as to the proper law applicable to it, is to determine whether the parties intended by their contract to exercise any choice at all and, if they did, to determine what was the system of law which they selected. In determining this the English court applies the ordinary rules of English law relating to the construction of contracts.

G If, applying these rules, the court reaches the conclusion that the parties did not intend to exercise any choice of proper law, or is unable to identify what their choice was, it becomes necessary for the court to proceed to the second stage, of determining itself what is the proper law applicable. In doing so, the court applies the English rule of the conflict of laws relating to the proper law of the contract. This is that the proper law is that system of law with which the transaction has its closest and most real connection:

H *Bonython v. Commonwealth of Australia* [1951] A.C. 201, 219.

My Lords, this is applied as a positive rule of English law. It is applied not because it is the choice of the parties themselves but because they never

intended to exercise their liberty to make a choice or, if they did, they have failed to make their choice clear.

A

Similarly with choice of curial law. This generally takes the form of a provision in the contract for submission to arbitration of disputes arising out of it; although parties may, and sometimes do, agree by their contract to submit disputes to the determination of the courts of law of a particular country to the exclusion of all other courts. An express choice of forum by the parties to a contract necessarily implies an intention that their disputes shall be settled in accordance with the procedural law of the selected forum and operates as if it were also an express choice of the curial law of the contract. If the parties have made no choice of forum, an English court can only apply English procedural law in any disputes under the contract in which it is invited to adjudicate.

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My Lords, it is possible for parties to a contract to choose one system of law as the proper law of their contract and a different system of law as the curial law. Although they may want their mutual rights and obligations under the contract to be ascertained by reference to the system of law of a country with which the transaction has some close and real connection, they may nonetheless consider that the arbitral procedure adopted in some other country, or the high reputation and commercial expertise of arbitrators available there, make the curial law of that country preferable to the curial law of the country whose system of law they have chosen as the proper law.

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It is not now open to question that if parties to a commercial contract have agreed expressly upon the system of law of one country as the proper law of their contract and have selected a different curial law by providing expressly that disputes under the contract shall be submitted to arbitration in another country, the arbitrators must apply as the proper law of the contract that system of law upon which the parties have expressly agreed.

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But the cases which have given rise to difficulty are those where the parties have made a choice of curial law by a clause of their contract expressly agreeing to arbitration in a particular country but have made no express provision as to the proper law applicable to the contract. The difficulty has, I think, arisen for two underlying reasons. The first is that after the decision of your Lordships' House in *N.V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co. Ltd.* [1927] A.C. 604 until the very recent decision in *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1970] A.C. 583 the distinction between the proper law and the curial law of a contract was overlooked. The second is failure to distinguish between the first and the second stage in the ascertainment of the proper law of a contract.

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Where the only express choice of law in a contract is that of curial law, resulting from the inclusion in the contract of a provision for arbitration in a particular country, an intention of the parties to exercise their right also to choose the proper law of the contract and, if so, the proper law which they have chosen, can only be deduced by implication from what they have expressly agreed and the circumstances in and in relation to which their agreement was made. The fact that they have expressly chosen to submit their disputes under the contract to a particular arbitral forum of itself gives rise to a strong inference that they intended that their mutual rights and obligations under the contract should be determined by reference to the

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A domestic law of the country in which the arbitration takes place, since this is the law with which arbitrators sitting there may be supposed to be most familiar. But this is an inference only. It may be destroyed by inferences to the contrary to be drawn from other express provisions of the contract or relevant surrounding circumstances, and those inferences may be so compelling as to lead to the identification of another system of law which the parties must have intended to be the proper law of the contract.

B That the presence of an arbitration clause, though powerfully persuasive, was not conclusive of an intention to choose the curial law as the proper law of the contract was clearly recognised by your Lordships' House in *Hamlyn & Co. v. Talisker Distillery* [1894] A.C. 202 and was never doubted until after the *Kwik Hoo Tong* case [1927] A.C. 604. That case will, I think, upon analysis be found to have been dealing only with curial law, but as a result of subsequent dicta of Lord Maugham in *Naamlouze Vennootschap Handels-en-Transport Maatschappij "Vulcaan" v. A/S-J Ludwig Mowinckels Rederi* [1938] 2 All E.R. 152, 156 and of Lord Wright in *Vita Food Products Inc. v. Unus Shipping Co. Ltd.* [1939] A.C. 277, 290 it has come to be treated, as it was by the Court of Appeal in *Tzortzis v. Monark Line A/B* [1968] 1 W.L.R. 406, 412 and in the instant case, as laying down a positive rule of English law that: "An express choice of a tribunal is an implied choice of the proper law."

D My Lords, the application of a positive rule of English law as determinative of the proper law of a contract does not arise until the second stage, that is, when the court has been driven to the conclusion that the parties themselves did not intend to exercise any choice of proper law or is unable to identify what their choice was. Yet the significance of an arbitration clause has always been dealt with in the first stage, where its only role is as an indication of a choice of proper law which the parties themselves did intend to make. The language in which it has been referred to has always been that of actual intention. No doubt its significance as an indication of the actual intention of the parties has been greatly enhanced as the decisions and dicta to which I have referred have become familiar to persons engaged in international trade and their legal advisers; since they may well have drafted their contracts on the understanding that a London arbitration clause, which is a common feature of many standard forms of contract used in international trade, is of itself a sufficient manifestation of their intention to choose English law as the proper law of the contract as well as the curial law.

E Nevertheless, strong though the implication may be, it can be negated by the other terms of the contract when the contract, as it must be, is construed as a whole in the light of the surrounding circumstances. It is clearly negated by an express term prescribing some other law than the curial law as the proper law, and it may also be negated by an overwhelming implication from the other terms all pointing to one single other system of law as the proper law of the contract as distinct from the curial law.

G The decision in the *Kwik Hoo Tong* case [1927] A.C. 604 is not, in my view, in conflict with this. It was a short interlocutory appeal which was heard in the Court of Appeal by Bankes and Sargant L.JJ. and in your Lordships' House by Viscount Dunedin, Lord Phillimore and Lord Carson. The contract was for the sale of sugar c.i.f. Java for shipment to Bombay,

payment to be made against presentation of documents in London under a confirmed credit. The sellers were Hong Kong merchants, the buyers a Scots firm with a place of business in Bombay, and the contract was made by brokers in Java. There were thus competing systems of law with which the transaction had connections independently of any provision for arbitration. The contract contained a clause:

"Any dispute arising under this contract is to be settled by arbitration of London brokers in the usual manner, and this submission may be made a rule of the High Court of Justice or any Division thereof."

The dispute between the parties was whether the bills of lading presented against the credit were correctly dated to comply with the contractual requirement of a September shipment. The sellers relied upon a custom of the port of shipment in Java. The only question on the interlocutory appeal was whether the contract was "a contract . . . by its terms or by implication to be governed by English law" within the meaning of Ord. 11, r. 1, so as to authorise service of a writ outside the jurisdiction.

The short judgments of the Court of Appeal are to be found only in the record of the proceedings in your Lordships' House. Bankes L.J. did not regard the arbitration clause as being of itself decisive of the proper law of the contract. He said (House of Lords Printed Case, Appendix, p. 12):

"Brokers in London decide according to the custom of the English market if the contract is to be performed in England, but if it is to be performed abroad they ascertain the customs of the foreign country."

He relied as much upon the requirement that the confirmed credit was to be opened in London and delivery of the documents was to be made there as upon the London arbitration clause to give rise to the implication that the contract was to be governed by English law. He was clearly considering the proper law of the contract. Sargant L.J. treated the effect of the arbitration clause as being the same as if it had said that disputes were "to be settled by the High Court of Justice in England." He appears to have regarded the words "governed by English law" appearing in a rule dealing with the assumption of jurisdiction by an English court as satisfied if the curial law of the contract were English law. And so, I think, did Viscount Dunedin and Lord Phillimore in this House. I find it difficult to explain otherwise Viscount Dunedin's statement [1927] A.C. 604, 608 that the parties' choice of forum

"does not mean that everything that would have to be decided would necessarily be decided by English law. It means that the underlying law was the law of England, but if by appropriate, that is to say relevant, averment, it was alleged that any incident of the contract fell to be determined by a foreign law, then the English tribunal would proceed to inquire into that law as a question of fact and give judgment accordingly."

In this context by "underlying law" he may well have meant no more than what I have called curial law. Lord Phillimore at p. 609 adopted Sargant L.J.'s analogy:

"... if this passage" [sc., the arbitration clause] "had run 'to be

A settled by the High Court of Justice in England,' no one could have doubted that the parties had intended that the contract should be governed by that law which English courts administer, *and administer none the less because in certain matters they have to ascertain and apply foreign law.* The words of Sir W. Scott in *Dalrymple v. Dalrymple* (1811) 2 Hag.Con. 54, 59 upon the subject are classic."

B The words I have italicised and the reference to Lord Stowell's judgment in *Dalrymple v. Dalrymple* strongly suggest that where at the end of his speech he said [1927] A.C. 604, 609-610: "The result is that the forum provided for the settlement of disputes is English, and that therefore the contract is intended to be governed by English law," he meant no more than that the requirement in Ord. 11 that a contract should be "governed by English law" was satisfied if the curial law of the contract were English, irrespective of what the proper law might be.

C The references to the effect of arbitration clauses as implying an intention by parties to choose the law of the forum as the proper law of the contract which are to be found in Lord Maugham's speech in the "*Vulcaan*" case [1938] 2 All E.R. 152 and Lord Wright's opinion in the *Vita Food Products* case [1939] A.C. 277 are dicta only. It was common ground in the former case that the proper law of the contract was English law and in the latter case the contract under consideration had no arbitration clause but did contain an express provision that the contract should be governed by English law.

D My Lords, statements, particularly if they are obiter, as to an implication about the intention of parties which is to be drawn from one of the many terms in a contract must always be read subject to the qualification that the implication may be rebutted by the other terms of the contract, for to hold otherwise would be contrary to the general English law of construction of contracts. So would it be to hold that the implication could never be rebutted except by an *express term* to the contrary in the contract, for to do so would be to abandon the attempt to ascertain the real intention of the parties and instead to apply a positive rule of English law to impose upon them a proper law applicable to them, however clear it was that they themselves intended to choose as the proper law some other system of law than that of the place of arbitration.

F That, in my opinion, was the error into which the Court of Appeal fell in founding themselves on these dicta, in their judgments in *Tzortzis v. Monark Line A/B* [1968] 1 W.L.R. 406, and is one of the errors into which they have fallen in the instant case.

G I turn, then, to the first stage in the resolution of the instant appeal, that is, to determine, by applying ordinary rules of construction of contracts, whether the parties intended to exercise any choice as to the proper law, as distinct from the curial law, of their contract and, if so, what their choice was.

H Although not in all respects apt for the purposes of a "tonnage contract," they selected as appropriate to embody the terms on which they had agreed a printed form which included clauses 13 and 18 providing for one system of law to be the proper law of the contract and another system of law to be curial law; and neither of these clauses did they strike out. Two

things it seems to me are clear. First, that clause 18 was not intended to operate as a choice of the proper law of the contract but only as a choice of the curial law. Secondly, that clause 13, when the form was used for the purpose for which it was primarily designed, namely, a single voyage charter, was intended to operate as a choice for the proper law of the contract of a system of law with which the transaction would have a close and real connection, namely, the law of the flag of the carrying vessel. From this I conclude that the parties did not intend to choose as the proper law of the contract English law with which their transaction had no real connection whatever, apart from the arbitration clause itself; and also that the system of law which they did intend to choose as the proper law was one which would have a close and real connection with their transaction. A B

Whether they succeeded in expressing that choice in words which, when read in the light of the surrounding circumstances, are sufficiently clear to enable the court to identify it must be decided by applying the ordinary rules of construction of commercial contracts. If they have failed, then the court must proceed to the second stage of applying the positive rule of English law that, in the absence of choice by the parties themselves, the proper law of a contract is that system of law with which the transaction has its closest and most real connection. In determining this, the arbitration clause should be taken into consideration merely as indicating some actual connection which the transaction has with English law, and not as an exercise of a choice of English law as the proper law of the contract; for to treat it as that would be contrary to the intention of the parties. C D

My Lords, in commerce business men frequently find it convenient to use printed forms of contract with which they are familiar to record their agreements about transactions for which the printed clauses are not literally apt, as they were drafted for use as contracts about transactions which have somewhat different characteristics. If the law is to give effect to their intentions and not, in the words of Lord Tomlin, to "incur the reproach of being the destroyer of bargains" (see *Hillas & Co. Ltd. v. Arcos Ltd.* (1932) 147 L.T. 503, 512), the court must construe the words of the printed form not exclusively literally but, if necessary, analogistically. If it is possible to identify the characteristic of the actual transaction for which the printed form has been used, which corresponds with the characteristic of the kind of transaction for which the printed form was drafted, it is a legitimate method of construction to treat references in the printed terms to that characteristic as if they were references to the corresponding characteristic of the actual transaction. E F

By clause 13 when used for a single voyage charter the parties clearly intended to choose the system of law with which the contract had its connection through the nationality of the carrying vessel. Had the parties contemplated that the contract would be performed exclusively by vessels owned or controlled by the French company there could be no question but that the parties intended to choose French law as the proper law of their contract. Is the court to treat the clause as meaningless simply because, notwithstanding that they did contemplate that vessels owned by the French company would be used primarily to perform the contract, they also contemplated that there might be exceptional occasions on which chartered vessels might be used? It does not seem to me that from the G H

A business point of view this could make any significant difference so far as choice of proper law was concerned; and I accordingly agree with Megaw J. that in its application to this tonnage contract clause 13 should be construed by analogy as if it read: "This contract shall be governed by the laws of the flag of the vessels of the owners, except," etc.

I recognise that this is a matter upon which different conclusions may be reached, as the division of opinion among your Lordships shows. But, if I am wrong, and the parties by using an inappropriate printed form have failed to make their actual choice of proper law clear, the same result is, in my view, reached by proceeding to the second stage of the inquiry and applying the positive rule of English law that, where the parties have not themselves exercised their choice, the proper law of a contract is the system of law with which it has its closest and most real connection.

As I have already said, for the purposes of this transaction France and Tunisia may be regarded as sharing a common system of law. That was the system of law of the place where each party resided, of the place where the contract was negotiated and made, of the ports of shipment and of discharge, of the place of payment and was the law of the flag of the vessels which the parties contemplated would be used at least primarily for the carriage. The only connection of the transaction with English law was provided by an arbitration clause which was intended to operate only as a choice of curial law. Clearly French law was the system of law with which the contract had its closest and most real connection.

My Lords, in the instant case any implication that the arbitration clause was intended to operate as a choice of proper law as distinct from curial law was negated by the retention in the contract of clause 13. I do not wish to throw any doubt upon the proposition that an arbitration clause is generally intended by the parties to operate as a choice of the proper law of the contract as well as the curial law and should be so construed unless there are compelling indications to the contrary in the other terms of the contract or the surrounding circumstances of the transaction. The mere fact that there are other systems of law with which the transaction has a closer connection is not sufficient to rebut the implication. In international transactions, particularly on commodity markets where the same shipment of goods may be bought and sold many times before delivery of the actual goods to the last buyer, it is of great commercial convenience that all the contracts relating to such sales should be subject to the same proper law irrespective of the place of shipment or discharge, the residence or nationality of the parties, or the place where the contract was made. This is the basis on which commodity markets operate and the choice of arbitral form is understood as being intended as a choice of proper law.

But strong as the implication may be, it can be rebutted as other implications of intention can be rebutted. It is not a positive rule of law which is independent of the intentions of the parties. In the instant case I am satisfied that it has been rebutted, and I would allow the appeal.

Appeal allowed.

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F. C.