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**LA THÈSE A ÉTÉ
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Settlement of Disputes in Technology Transfer Transactions
Between
Private Parties of Developed and Developing States

by

Parimal KASEEKAR

Thesis for the LL.M. degree

University of Ottawa



Parimal Kasbekar, Ottawa, Canada, 1986.

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ABBREVIATIONS

ECE	Economic Commission for Europe
EEC	European Economic Community
UCC	Uniform Commercial Code
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNIDO	United Nations Industrial Development Organization.
UNITAR	United Nations Institute of Training and Research
WIPO	World Intellectual Property Organization

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ABSTRACT

This thesis deals with the transfer of technology between private parties of developed and developing states.

Technology is a key ingredient in the developmental process of any state and technology transfer transactions are increasing in number.

The Introductory Chapter deals with a variety of general topics. The expression 'technology transfer' may have different meanings depending on the parties involved in the transactions. If both the suppliers and the recipients of technology are nationals of developed states, 'technology transfer' may mean an actual transfer of product designs and production processes. However, if the suppliers are from developed states and the recipients are from developing states, then 'technology transfer' may include management and supervision of transferred technology and training of local personnel, besides the transfer of actual production processes.

Technology may be transferred in a number of ways, via foreign direct investment, joint ventures, licensing agreements, technical consultancy agreements, etc.

As opposed to sale of goods transactions, in technology transfer transactions, the states of the suppliers

and the recipients are also affected. Technology transfer has an impact not only on the economic and social development of the recipients' states but also on that of the suppliers' states. There are, on the one hand, the private interests of parties, and on the other, the public interests of states. And, these private interests inter se and the public interests inter se also differ.

Technology transfer transactions differ from sale of goods transactions. Hence, the legal treatment accorded them should also differ.

Technology transfer has received a great deal of attention on both, the national front and the international front, in the last two decades. Developing states, like Mexico, India, Peru, Nigeria, China, have enacted legislation to regulate technology transfer transactions, whereas developed states do not seem to have felt the need to regulate the transactions, except in cases where competition in the market place has been affected. Developing states have increasingly intervened in the settlement of disputes arising from these transactions. Until now, this was left for parties to regulate for themselves. Internationally accepted rules regarding applicable law and settlement of disputes are being negotiated at the United Nations Conference on International Code of Conduct on Transfer of Technology. So far, the developed, and the developing states have not been able to resolve the problem.

The thesis deals with the question whether government regulation of technology transfer transactions which has been on an increase in the developing states is a step in the right direction or whether parties should be allowed to continue choosing the law and the forum in respect to their transactions, i.e. whether the rules of law should be changed in these transactions.

The body of the thesis is divided into two Parts: Part I, Proper Law and Part II, Proper Forum.

Part I consists of three chapters.

Its first chapter deals with the historical evolution of various theories in the field of applicable law. The evolution started with fixed rules of law, e.g. the application of the lex loci contractus, the lex loci solutionis, or the lex fori. This evolution has now culminated in relative flexibility based on a case-by-case approach, according to the principle of party autonomy, the centre-of-gravity theory, the governmental-interest analysis, etc.

The second chapter examines the ways in which the applicable law of contracts, especially that of technology transfer transactions, may be determined. For the purpose of clarification, the ways are divided into two, the subjective and the objective methods. The former comprises an express and an implied choice of law by the parties. The latter consists of various fixed rules of law governing the determination of the applicable law. Various theories/tests

in conflict of laws which have been propounded by jurists/ judges have been examined. Some of the important theories are the 'Centre-of-Gravity' theory, the 'Governmental-Interest Analysis', 'Better Rule of Law', and 'Principles of Preference'. All the above theories/tests seem to lead to the same conclusion, i.e. that the law of the state having the most substantial connection with a transaction should govern it.

Finally, in the third chapter, the advantages of having a fixed rule of law instead of applying the principle of party autonomy are briefly reviewed. Such a fixed rule of law may be established with the help of either national legislation or an international agreement. Some such attempts at the national and the international level are examined.

The legislative jurisdiction of states will not be fully effective in the regulation of technology transfer transactions, unless such jurisdiction is endorsed by an universally accepted rule of law to that effect.

Part II consists of two chapters.

This Part deals mainly with jurisdiction in personam, as actions arising out of contracts are deemed to be actions in personam. The first chapter divides the ways of determining the proper forum into two, viz. the subjective and the objective methods. Reference is made to various authorities discussing the application of the principle of

freedom of choice as to forum in some common law and civil law states. As per the subjective method, the forum chosen by the parties has jurisdiction to decide disputes arising between them. Under the objective method, the state where the contract is concluded, or the state where performance is to be made, etc. has jurisdiction.

In the second and final chapter, the advantages of having a fixed rule of law are mentioned. Such a fixed rule of law may be established by national legislation or by an international agreement. It is found that the supplier's state may not be able to exercise an effective jurisdiction over the parties, i.e. it may not be able to enforce its judgement outside its territory, except in a few cases. The recipient's state will be able to enforce its judgement in a majority of cases.

The thesis concludes that a fixed rule of law should be established. An effort to establish the fixed rule of law may be begun on a bilateral level, then on a regional level and ultimately on a universal level. Also, the fixed rule of law should grant the recipient's state legislative as well as judicial jurisdiction in technology transfer transactions.

As the subject of technology transfer is very wide, a number of its aspects have not been dealt with.

Arbitration as a dispute settlement mechanism, and the transfer of technology from the centrally controlled

economy states to the developing states, either market economy or centrally controlled, are outside the purview of this thesis. Also, the provisions on transfer of technology under the recent Law of the Sea Convention, 1982, are not dealt with.

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Chapter I
INTRODUCTORY CHAPTER

"It (transfer of technology) might be understood as a despairing cry for help; as an expression of desire and envy; as a perceived shortcut to survival; as the only means of prospering; or as all of these things."¹

The above statement clearly shows that technology has gained prominence and will continue to do so in the future.

1.1 1. What is Technology and Its Transfer-

Technology is 'the science or body of knowledge applicable to the production of goods'.² It includes patented and non-patented know-how like product designs, design of production processes and facilities and management techniques.³

¹ See Remarks by Mathew W. Perry, Jr., on "U.S. Foreign Policy and Emerging Legal and Policy Issues of Technology Transfer" (1976), 70th Annual Proc. Am. Soc'y. Int'l. L. 1, at 1 (hereinafter cited as U.S. Foreign Policy).

² Greenwald, Douglas and Associates, The McGraw-Hill Dictionary of Modern Economics (2nd ed., 1973), at 586.

³ Walter A. Chudson, "The International Transfer of Commercial Technology to Developing Countries" (1971), UNITAR Research Reports No. 13, at 3.

Technology is also considered as a commodity and is, '... embodied in capital and intermediate goods, in highly skilled manpower and in blueprints, process formulae and other kinds of proprietary (e.g., patents) and non-proprietary information.'⁴

Transfer of technology is, 'the transfer of systematic knowledge for the manufacture of a product, for the application of a process or for the rendering of a service and does not extend to transactions involving the mere sale or mere lease of goods.'⁵

Transfer of technology from developed to developing states may cover the transfer of those elements of technical knowledge which are normally required in setting up and in operating new production facilities or in extending existing ones - and which are characteristically in short supply (and often totally absent) in the developing states.⁶

Technology is one of the factors or elements in the industrialization process. And the technology itself consists of various elements. They may be classified into two stages:

⁴ Guidelines for the study of the transfer of technology to developing countries, UN Doc. TD/B/AC.11/9 (1972), at 5: (hereinafter cited as Guidelines).

⁵ Draft International Code of Conduct on the Transfer of Technology, UN Doc. TD/CODE TOT/41 (4 Nov. 1983), at 2, para 1.2, (hereinafter cited as The Draft Code).

⁶ The channels and mechanisms for the transfer of technology from developed to developing countries, UN Doc. TD/B/AC.11/5 (27 April 1971), at 6, (hereinafter cited as Channels and mechanisms).

"I. In the pre-investment and construction stage-

- A. feasibility studies and market surveys;
- B. determining the range of technologies which may be available to manufacture the product in question, and for choosing the most appropriate technique;
- C. engineering design of new production facilities, involving both plant design and selection of machinery;
- D. plant construction and installation of equipment;
- E. process technology (industrial process);

II. In the operation stage-

- F. management and operation of production facilities;
- G. marketing;
- H. improving the efficiency of established processes by minor innovations."

The Guidelines⁷ have added one more element, viz. training of technical and managerial personnel, to a list similar to the above.⁸ Hence, technology transfer is not limited to the transfer of actual product designs and production processes which are licensed to licensees but it may also entail the actual supervision and building of a plant or a factory, installation of machinery or equipment, and,

⁷ See Channels and mechanisms, id. at 6-7, para 19.

⁸ See Guidelines, supra note 4.

⁹ See Guidelines, id. at 5, para 20.

in some cases, management of the same, and training of local personnel of the host developing state to operate the same.

1.2 2. Mechanisms and Forms of Technology Transfer-

A mechanism for transferring technology is any means for making available to a production enterprise, in a recipient state, those elements of technical knowledge which may be unavailable in the domestic economy, and which may be required to set up or operate production facilities.¹⁰ There are various forms of technology transfer and some mention of the same is warranted at this juncture. Only the ones which are of a commercial nature are dealt with here.¹¹

The above-mentioned elements of technology may be supplied in a packaged form (see Diagram II)¹² via foreign direct-investment or joint ventures,¹³ or in an unpackaged

¹⁰ See Channels and mechanisms, supra note 6, at 12, para 32.

¹¹ See Guidelines, supra note 4, at 8, para 35, which enumerate the various forms, viz., (a) the flow of books, journals and other published information; (b) the movement of persons from country to country; (c) education and training; (d) exchange of information and personnel through technical co-operation programmes; (e) employment of foreign experts and consultancy agreements; (f) import of machinery and equipment and relative literature; (g) license agreements for production processes, use of trade marks and patents, etc.; (h) direct foreign investment. The first four of the above are deemed to be non-commercial in nature and are not dealt with in this thesis.

¹² See infra page 5A.

form (see Diagram I)¹⁵ via licensing or management contracts or outright purchase of machinery.¹⁵ So far as transfers to developing states are concerned, packaged or partially packaged transfers (see Diagram III)¹⁶ are more common than unpackaged transfers. Transfers in unpackaged form may be limited to the more developed of the developing states, in those sectors of industry where the technology required is old and standardized and where skilled local personnel is available.¹⁷

The Guidelines have suggested classification of transfer mechanisms on the basis of the degree of ownership over such transactions, viz., foreign branches; wholly-owned foreign subsidiaries; foreign-controlled joint ventures; locally controlled joint ventures; local ventures with foreign contractual agreements; and local ventures without foreign contractual agreements.¹⁷

In the field of transfer of technology, most developing states, in their developmental infancy, are dependent on foreign direct investment to accelerate their

¹⁵ Foreign direct investment and joint ventures are indirect forms of technology transfer.

¹⁶ See infra page 5A.

¹⁵ Licensing agreements, management contracts, etc. are direct forms of technology transfer.

¹⁶ See infra page 5A.

¹⁷ See Guidelines, supra note 4, at 11, para 54. The last-mentioned ventures are out of the scope of this thesis because such agreements are not international transactions.

MECHANISMS OF TECHNOLOGY TRANSFER

DIAGRAM I: DIRECT TRANSFERS

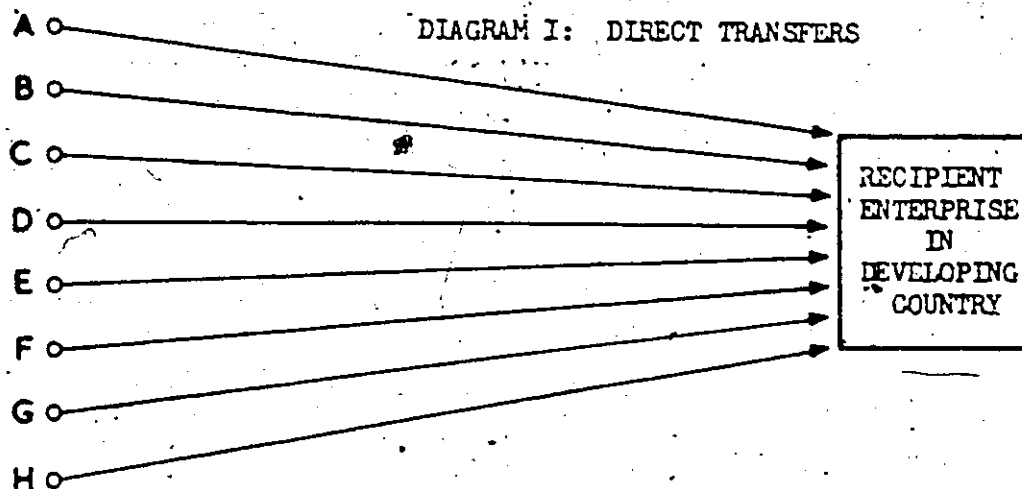


DIAGRAM II: INDIRECT TRANSFER

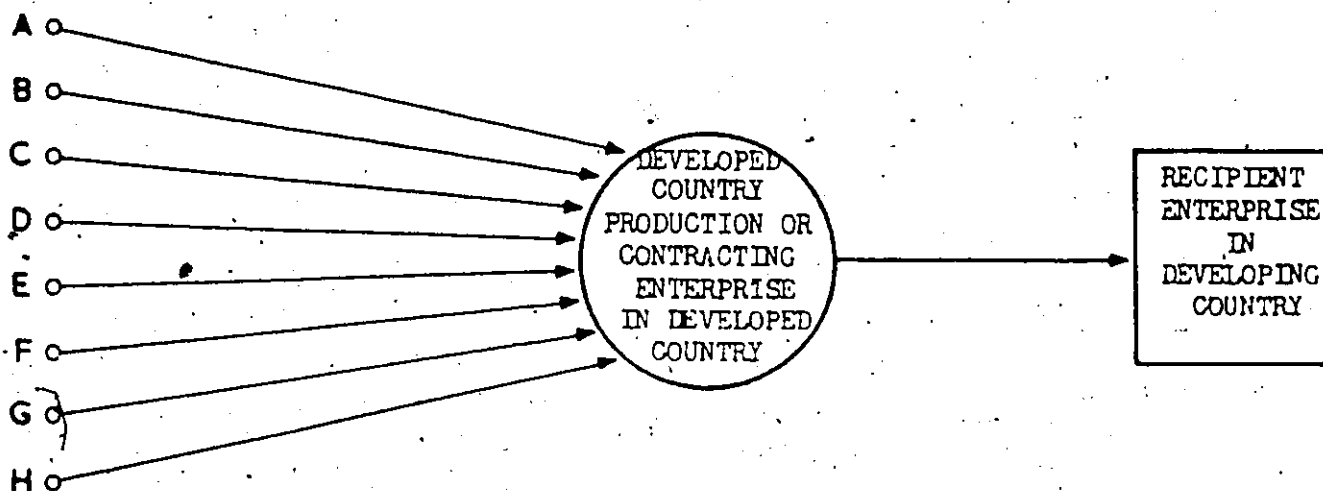
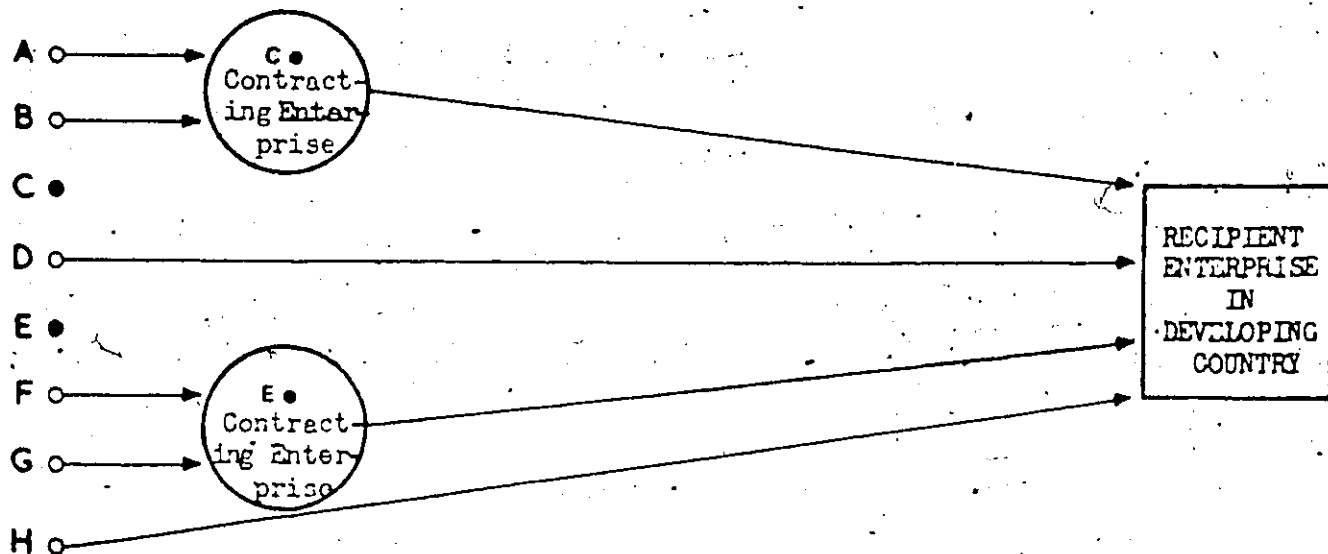


DIAGRAM III: HYPOTHETICAL EXAMPLE



development. When they become more developed and acquire some technical knowledge and skills, they may require more joint ventures and/or licensing agreements, etc. than foreign direct investment. And as they develop further, they may require their nationals/residents to enter into management contracts, technical consultancy agreements, or contracts for purchase of machinery, etc. Thus, they may start on their development ladder with the crutches of foreign direct investment, abandon them on the way, and end up with management contracts, technical consultancy agreements or outright purchases of machinery and equipment.

The organizational set-up in developing states may change from wholly-owned foreign subsidiaries to minority-owned foreign subsidiaries to wholly-owned local enterprises, as these states advance in their development. That is, in the beginning of their development, they may encourage the entry of wholly-owned foreign subsidiaries as they may not have the necessary capital, skills and other factor-inputs to start a locally-owned enterprise. When they gain some economic growth, they may require the entry of companies with minority-ownership by foreigners and majority ownership by local businessmen.¹⁸ They may also require that the already existing wholly-owned/majority-owned foreign subsidiaries reduce their foreign ownership to less than 50%. When they become advanced enough to generate indige-

¹⁸ This is similar to joint ventures with equity participation by the foreign supplier.

nously, the required capital and skills in some sectors of industry, they may insist on wholly locally-owned enterprises in those sectors.

Thus, classification according to degree of ownership¹⁹ indicates various stages in the development of any state. In the early stages of its development, there may be foreign branches and, when it becomes highly developed, there may be wholly local ventures.

Let us now look at these various mechanisms of technology transfer.

1.2.1 (1) Foreign Direct Investment-

The multinational corporations of developed states, the chief vehicles of technology transfer, make transfers via foreign direct investment. They establish either a wholly-owned or a majority-owned subsidiary in the host developing state, and transfer a complete package of capital, services, and know-how, i.e. technology to the subsidiary. A transfer is frequently initiated by a corporation of a developed state, especially in a case where the transfer is accomplished by a corporation of a developed state setting up a wholly-owned subsidiary in the developing state.²⁰ Such establishment is often a consequence of

¹⁹ See Guidelines, supra note 4, at 11, para 54; See also, supra page 5.

²⁰ See Channels and mechanisms, supra note 6, at 25, para

import substitution policies of the developing state. Such initiation may also take place for a variety of other reasons, viz., to capture the domestic market of the developing state, to make use of the raw materials available there, to take advantage of cheap labour. Foreign direct investment generally occurs in those sectors where technology is highly sophisticated and changes rapidly.²¹

One of the motives of a developing state for importing technology is to accelerate its developmental process and to increase its technological capacity. This goal may not be achieved through foreign direct investment. A subsidiary is an extended arm of a multinational organization. In the case of foreign direct investment, technology which is transferred to such subsidiary may remain within the organization and may not be diffused outside it. This practice of multinational corporations leads a developing state to make its laws more stringent²² and reduce foreign direct investment.

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²¹ See Channels and mechanisms, ibid., para 61.

²² For example, India has reduced foreign equity participation to 40 per cent, as a general rule, though it may be increased depending on the special circumstances of the case.

1.2.2 (2) Joint Ventures-

As an alternative to foreign direct investment, joint ventures between suppliers of technology and local enterprises, either with or without equity participation by the former, have gained prominence.

A joint venture is defined as, "an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge."²³

The establishment of joint ventures in a host state is an indication of a relatively advanced level of the host state's development, which results in a better bargaining position for its nationals/residents vis-a-vis multinational corporations.

In a joint venture transaction, the local enterprises of the host state have some control over the imported technology and, hence, they can use it to set up their own wholly-owned local enterprises, unless the multinational corporation restrains them from doing so.²⁴

²³ Black's Law Dictionary (Rev. 4th ed. 1968), at 73; See also, Negotiation of an International Code of Conduct on the Transfer of Technology: Glossary of Selected Items, UN Doc. TD/CODE TOT/3 (26 Sept. 1978), at 6 (hereinafter cited as Glossary).

²⁴ This is a restrictive trade practice abhorred by most of the states, both, developed and developing. Also, some states have enacted laws in order to prevent such a practice, e.g. Brazil, India, Mexico, Nigeria, Venezuela; For detailed information, see Compilation of legal material dealing with transfer and development of technology, UN Doc. TD/B/C.6/81 (4 Aug. 1982) (hereinafter cited as Com-

Recently, third state joint ventures have started becoming popular. Two parties with different factor-inputs and, from two different states, enter into a joint venture agreement to transfer technology to a third developing state. For example, Corporation A of State X and Corporation B of State Y enter into a joint venture agreement whereby Corporation A agrees to supply finances and technical know-how, and Corporation B agrees to supply raw materials and skilled and unskilled personnel, in order to build a steel plant in State Z.

1.2.3 (3) Licensing Agreements-

Licensing is yet another mode of technology transfer whereby patented and non-patented technology, which is largely owned by multinational corporations, is licensed to licensees in a host developing state in return for some royalties.²⁵ The owner of the patented technology has a legally valid monopolistic right over it and this results in a seller's market where the seller or the supplier of technology is in a very strong bargaining position. The non-patented technology which mainly comprises know-how and trade secrets also make the suppliers, the exclusive owners

pilation).

²⁵ The royalty to be paid for the license of technology may be a lump-sum amount or a certain percentage of the sales.

of that particular technology. In such transactions, the buyers or recipients are forced to agree to some restrictive conditions in order to acquire the much-coveted technology.²⁶

A patent is, normally, valid for a fixed number of years. However, sometimes, suppliers extorted royalties for patents which had already expired, and which had become part of the public domain. Other times, they did not allow licensees to use the licensed technology to produce for the purpose of exports. This, undoubtedly, resulted in an adverse balance-of-payments situation for the host developing state. These and other restrictive business practices have now been counteracted by the legislation of various states.²⁷

In the case of transfer of technology between parties of two developed states, there may be a bare licensing agreement, whereby only a copy of the patent is transferred, to the licensee, with the agreement, without any additional services being rendered by the supplier. But in the case of technology transfer between parties of developed and developing states, bare licensing is not enough. The licensee is ill-equipped with skilled technical personnel, and so the

²⁶ The Possibility and Feasibility of an International Code of Conduct on Transfer of Technology, UN Doc. TD/B/AC.11/22 (6 June 1974), at 6, para 24 (hereinafter cited as Possibility and feasibility).

²⁷ See Possibility and feasibility; id. at 15-18. Its Table 2 lists the states which deal with abusive or restrictive practices under their laws. Table 2 is Annex I herein; See also, Compilation, supra note 24.

licensor is required to supply technical services and assistance in building the plant, in return for technical fees.

At present, a combination of a joint venture, licensing of technology and rendering of services is frequently adopted by the parties, whereby the supplier gets an equity participation for the capital brought by it into the venture, a royalty for the technology licensed to the venture, and technical fees for the services rendered.

1.2.4 (4) Other Forms-

Other forms of transfer are turn-key projects, management contracts, technical consultancy agreements, outright sales or purchases of machinery or equipment.

1.2.4.1 (i) Turn-key Projects-

A turn-key agreement has been defined as a transaction in which the client's contracting party - sometimes referred to as the "contractor" - assumes vis-a-vis the client responsibility for construction of the industrial works and takes the client's place vis-a-vis the other participants in the project.²⁸ Thus, in the case of a turn-key project, the supplier of the technology conducts feasibility

²⁸ Guide on drawing up contracts for large industrial works, UN Doc. ECE/TRADE/117 (1973), at 15; See also, Glossary, supra note 28, at 11.

studies, designs the plant, builds it, and then hands it over to the recipient, i.e. the local enterprise.

One supplier provides all the 'elements of technical knowledge needed to bring new production facilities to the point of operation'.²⁹

Turn-key projects may be varied in form, e.g., a supplier may undertake to train local personnel and/or it may undertake to manage the plant for a certain period of time before handing it over to the recipient.

1.2.4.2 (ii) Management Contracts-

A management contract is an 'arrangement whereby operational control of the enterprise is vested in an individual or an enterprise which performs the necessary managerial functions in return for a fee'.³⁰

In some cases, suppliers may manage the plant for a certain period of time to see that it operates properly, before handing it over to the local enterprise. Here, a turn-key project may be accompanied by a management contract. Thus, a management contract would go a step further than a turn-key project.

²⁹ See Channels and mechanisms, supra note 6, at 38, para 100.

³⁰ See Glossary, supra note 23, at 7.

1.2.4.3 (iii) Technical Consultancy Agreements-

When parties enter into a bare licensing agreement or an agreement for purchase of machinery or technology, they may also enter into a technical consultancy agreement with the supplier of technology. Such consultancy agreement involves supervision of the building of a plant or a factory, etc.

When local enterprises of developing states acquire knowledge and technical skills required to evaluate the various technologies available in the international market, then that developing state may insist on the unpackaging of a technology package and may require its local enterprises to shop around for better deals, e.g. to buy or lease technology from a multinational corporation, to contract for technical consultancy with some independent firm of engineers and/or consultants, to purchase spare parts and intermediate or ancillary goods from another party. But such cases are strictly limited to the more developed of the developing states.¹¹

A recipient may also enter into a technical consultancy agreement with the supplier itself under a separate contract.

¹¹ See Guidelines, supra note 4.

1.2.4.4 - (iv) Sales of Machinery and Equipment-

This type of transfer may be more common between parties of two developed states, where all or most of the skills are available within the recipient's state. But, in the case of parties of developed and developing states, such a sale would also, in most cases, be accompanied by a technical consultancy agreement or a management contract, etc. Only in the case of the more developed of the developing states, would there be purchases of machinery in some sectors of industry.

1.3 3. Actors in a Technology Transfer Transaction-

From the above, one might have gained the impression that a 'supplier of technology' and a 'multinational corporation' are two interchangeable terms. But that, in fact, is not so. It is true that multinational corporations are the major suppliers of technology but they are not the only ones. Small-sized and medium-sized firms also export technology, though it is, in most part, standardized technology. These firms have limited factor inputs like capital, expertise, etc., which are necessary for investing in developing states.¹² The governments of developed states

¹² The small and medium-sized firms as suppliers of technology has gained attention in recent years in the international fora. Research is being undertaken to see their

also export technology, but it is mostly limited to technology which is of strategic importance to them, e.g. defence technology, nuclear technology.

In developing states, the local enterprises, i.e. the recipients, are either small or medium-sized firms,¹¹ and hence, they may not be equipped to import technology on their own strength. They may need some financial, economic and legal assistance or protection from their governments. They are what may be termed 'economically disabled' persons, especially when compared with the economically viable multinational corporations. As a result, with the exception of a few more developed of the developing states whose local enterprises are capable of importing technology on their own account, a sizeable amount of imported technology is imported by the governments themselves. However, this thesis will deal only with transfer of technology between private parties of developed and developing market economy states.

potential as such suppliers. See The role of small and medium-sized enterprises in the international transfer of technology: Issues for research, UN Doc. TD/B/C.6/64 (1980); See also Promotion of transfers of technology by small and medium-sized enterprises to developing countries: Public policy implications and applicable instruments, UN Doc. TD/B/C.6/79 (1982).

¹¹ The giant firms comparable to the multinational corporations of developed states are 'virtually non-existent in developing states; See also, Remarks of Andreas F. Lowenfeld, on "Understanding and Misunderstanding - Technology Transfer, Economic Development, and Restrictive Business Practices" (1977), 71st Annual Proc. Am. Soc'y. Int'l. L., at 224 which states, "... (T)echnology is something the developed countries have and, within them, predominantly the major companies annually listed in the Fortune "500" The fact is that most technology is in the possession of the multinational enterprises."

The vested interests in any typical technology transfer transaction are those of the multinational corporation, i.e. the supplier of technology, the government of the developed state, i.e. the home state, the medium-sized recipient enterprise and the government of the developing state, i.e. the host state. If there are other parties to the transaction like technical consultants or manufacturers of spare parts, intermediate goods, etc., from other states, then these parties and their governments may have a certain limited interest in the transaction. All the above are generally termed 'actors' as opposed to 'parties' who actually enter into the contract.

In the case of third state joint ventures,¹⁴ there are, normally, two interested enterprises from two different states and supplying various factor-inputs, and three governments, viz., the two governments of the two suppliers and the third state where technology is to be physically transferred, e.g. where the plant is to be built.

A degree of priority should be given to all these above-mentioned vested interests. The whole picture relating to these diverse interests should be placed in a proper perspective in order to evolve a sound legal framework for settlement of disputes between them. For this purpose, one has to look behind the scene, to the evolution of the issue of transfer of technology, its impact on developing and developed states and why it has become a bone of contention

¹⁴ See supra page 10.

between these two groups of states.

1.4 4. Historical Background.

The issue of transfer of technology came to the forefront after the World War II when the political scenario changed drastically. New states emerged as colonies wrenched themselves free of the shackles of the imperialistic powers of the West. These former colonies, which had been deprived of any advancement contrary to the imperialists' interests, started legislating economic and social reforms for their overall development.

Prof. Henry Nau has described the economic reforms and development strategies of the developing states thus:

"...(D)evelopment strategies during the past twenty-five years always had a special focus or priority: in the 1950's emphasis was placed on aid, capital transfer, and import substitutions; in the 1960's, the emphasis was on trade and expansion of exports; and in this decade (1970's), technology has become the key variable in development planning."¹⁵

Technology seems to be the key variable even today, i.e. in the 1980s..

Technological equality between developed and developing states is needed if the dream of political sovereignty and equality among states, as envisaged under the UN

¹⁵ See Remarks by Henry R. Nau, on U.S. Foreign Policy, supra note 1, at 4.

Charter¹⁶ and later under the New International Economic Order,¹⁷ is to be realised. Technological advancement can be considered as synonymous with economic and social advancement. The widening gap between the technological capacity of developed and developing states and the resulting dependence of the latter on the former only make the latter, the economic colonies of the former, in contrast to the prior political colonialism.¹⁸ Generally, developing states, especially the lesser developed among them, are in a subordinate position, and hence, they are ready to accept whatever technology is offered to them, though it may turn out to be detrimental to their interests in the long run. For example, a developing state, in its economic and developmental infancy, may accept onerous restrictive clauses in technology transfer agreements in order to get the much needed technology.¹⁹ It may not have much say in the matter of such transfer.

¹⁶ UN Charter, Article 2, inter alia, states, "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles: 1. The Organization is based on the principle of the sovereign equality of all its Members."

¹⁷ See infra note 64.

¹⁸ See also, Less Expensive and More Appropriate Technologies for the Developing Countries, TCDC Case Study No. 5, at 1. It states, "Since the end of the Second World War nearly 80 countries have achieved their political independence while remaining for the most part dependent on economic forces in the industrialized world."

¹⁹ See Possibility and feasibility, supra note 26, at 6, para 24.

As developing states are in the initial stages of development and do not have a reasonable number of technically skilled personnel, their local enterprises are not in a position to evaluate the appropriateness of the technology offered to them, and to ascertain whether a similar technology is available on better terms or a better technology is available on similar terms. They are in a comparatively weaker position. However, as these states develop, they get into a relatively better bargaining position.

As mentioned earlier,⁴⁰ most of the technology is handled on behalf of the developed states, by their multinational corporations. They have, within their organization, vast resources of managerial and technical skills, besides negotiation skills and techniques. They can use these skills to their best advantage against the weaker developing states and their enterprises.

When it is said that developing states are weak in their bargaining position, the situation is being generalised. There are some instances where developing states are in a stronger bargaining position vis-a-vis multinational corporations, e.g. where technology relates to the exploitation of natural resources of these states. And such position may be even stronger when the natural resource, e.g. a mineral, is rare and is vital in the manufacture of a certain product in which the multinational corporation is dealing.

⁴⁰ See supra pages 7 and 15.

Also, in the case of technology related to standardized products, suppliers and recipients may be on a relatively equal level, as recipients can avail themselves of other sources of similar technology. In this sector, a supplier may not be a monopolist or even an oligopolist, and so, the competitive market may provide recipients with better deals.

But in the high technology sector, which is of current concern to the developing states, and which sector includes electronics, pharmaceuticals, and some chemicals, the market is highly imperfect. A seller has a monopoly over the technology and a large number of buyers compete for that particular technology. In such cases, a seller can impose any number of restrictive conditions, though many states, developed as well as developing, have enacted legislation, in recent years, to eliminate such practices.⁴¹ How far such enactments would turn out to be effective is a matter of great apprehension, and we shall examine later, so far as they relate to the restriction of freedom of choice.

This market imperfection and the existence⁴¹ of a seller's market due to their monopoly over a particular technology, is even more accentuated by the 'Paris Convention for the Protection of Industrial Property, 1883'.⁴²

⁴¹ Restructuring the Legal Environment: International Transfer of Technology, Common approaches to laws and regulations on the transfer and acquisitions of technology, UN Doc. TD/B/C.6/91 (7 Oct. 1982)

⁴² Paris Convention for the Protection of Industrial Property (Rev. July 14 1967).

Under this international patent system which is presently administered under the auspices of the World Intellectual Property Organization, technical processes or products can be protected. In other words, the owner of technology establishes a monopoly right for its commercial exploitation."

When these patents are licensed to the licensees, i.e. the recipients of developing states, the owner i.e. the supplier can impose restrictions on sub-licensing. And, if such licensee is a wholly-owned or even a partially-owned subsidiary of a multinational corporation, the technology may never get out of the control and ownership of such multinational corporation. In some instances, recipients of technology could not export goods produced by that technology. This led to an outward flow of foreign exchange, in the form of royalties, etc., from the developing states, without any inward flow of money. This worsened their balance-of-

" Obstacles to North-South Technological Co-operation, Development Issue Papers: Issues for the 1980s, No. 7, at 4-5 (hereinafter cited as Development Issue Paper, No. 7). It states, "The monopoly which Northern TNCs (multinationals) enjoy over technology is also well served by the international patent system..... (Of) the 3.5 million patents currently in existence, only about 6 per cent have been granted by developing countries and of the latter, five out of six are held by foreigners. Only 1 per cent of the world total is held by the nationals of the developing countries. Most of the developing country patents held by the foreigners are held by large firms based in the United States, Federal Republic of Germany, the United Kingdom, Switzerland and France. And about 90-95 per cent of the patents granted by developing countries to foreigners are not actually used in the production processes in those countries, but are used to secure import monopolies."; See also, UNCTAD Statistical Pocket Book (1984), at 81, Table 4.31.

payments situation. Similarly, some clauses relating to grant-back provisions required recipients to hand over, free of charge, to suppliers of technology, any improvements made by them to the imported technology. This dampened the intellectual capacity of the recipient's personnel and led to an increased dependence on developed states.

"As a general rule, these restrictive clauses are beneficial only to the suppliers of technology, so much so that even if there is a law prohibiting the use of such clauses, the supplier may attempt to elicit from the recipient a gentleman's agreement to that effect."⁴⁴ Such clauses can be beneficial to both, the supplier and the recipient, if technology is transferred via foreign direct investment to a subsidiary established in the developing state. For example, a parent company (the supplier) may enter into a contract containing a clause which restricts export of goods produced by that technology, in case it has allocated various domestic markets for its various subsidiaries. As the strategy is developed for the benefit of the whole organization, and as the subsidiary is a part of that organization, it would be sharing in those benefits."⁴⁵ There are various special issues which are exclusive to a parent-subsidiary

⁴⁴ Daniel Chudnovsky, "Regulating Technology Imports in Some Developing Countries" (Winter 1981), 3 Trade and Development- An UNCTAD Review, pp. 133-149.

⁴⁵ See Channels and mechanisms, *supra* note 6, at 31, para 76, which states, "... (T)hese limitations (export and/or supply restrictions) in the commercial success of a particular new enterprise may increase the overall profits of the international operation."

relationship, e.g., whether they can compete with each other or not, etc. These are not dealt with in this thesis.

In recent years, there has been an increasing degree of state intervention, and the use of contractual clauses dealing with such restrictions has been reduced by legislative enactments. Some degree of limitation has been placed, in some states, on the contractual freedom of parties as far as such restrictions are concerned. The limitation on restrictive clauses has been placed to protect the economic and developmental interest of states. The public interests of states have overridden the private interests of parties. Now, even if a supplier intends and expects to divide the whole international market among different licensees, its hopes and expectations may be curtailed by state regulation of such activity. However, how far such limitation can be placed on the overall freedom of the parties remains to be seen.

1.5 5. Public And Private Interests-

But what are these public and private interests? Before this can be answered, it is important to mention, firstly, that the public interests and the private interests are almost always in conflict and it is always a question of fact, depending on the type of transaction,⁴⁶ and on the

⁴⁶ There will be degrees of conflicts between public and

economic, political and moral beliefs of the states involved, as to which one will prevail. Secondly, the public interests of different interested states, and the private interests of different interested parties may also clash with each other. And it would be difficult for a legislator or an advisor to decide/advise as to which particular vested interest should prevail as the dominant interest entitled to priority in obtaining legal protection.

Public interests relate to the interests of states in their overall economic and social development. They concern a whole nation and its public at large, and are in their benefit. As opposed to this, private interests are the individual interests of parties to a transfer.

But, even when one considers public interests alone, one would be sure to find ideological differences between developing and developed states in respect to such interests.

Prof. Wilner has worded the conflicting interests and ideologies of the developed and the developing states in a precise manner. He states,

Within recent years two disparate philosophical approaches toward the regulation of the transfer of technology have become manifest. The first approach, held by the Western countries,

private interests. If a state has a strong public or social interest in a transaction like technology transfer, then, private interest would be relegated to a subordinate level. But, if public interest is relatively indirect or minor, like sale of textiles, private interest may be given precedence over it. Hence, it may be dealt with on a type of transaction-by-type of transaction basis.

advocates that: (a) the system for the protection of industrial property must remain intact; (b) technology transfer can only be accomplished by arm's-length agreements that should be evaluated solely within the context of commercial law and practice; (c) technology transfer agreements and licensing arrangements should be restrained if they go afoul of behaviour proscribed by anti-trust regulations (i.e. if they impede competition in the private sector; (d) Western governments are helpless, because of the structure of their institutions, to regulate the private sector; and (e) developing countries should be reassured as to Western positions by statements that "best efforts" will be expended on their behalf.

The second approach is the one taken by the developing world (i.e. the Group of 77) and a few Western countries, such as Spain. They argue that industrial property protection and the sanctity of contracts must be balanced with the economic and social needs of society. Thus the results of technology transfer agreements should go beyond the particular interests of the parties to the transaction (including the purchaser or licensee, whether it be local or in reality a subsidiary of a transnational corporation) and contribute to the development of these economies.⁴⁷

On the one hand, developing states, as a group, are fighting for a new international economic order, common heritage of mankind, and sharing of the world resources. They, on a national level, are concerned about their economic policies like raising the productive capacity of their industries and bringing about greater industrialization, import-substitution and export-promotion, and about their social policies like raising the standard of living, reducing poverty and inequalities in income distribution, increasing the literacy rate and the employment rate, etc. They are also interested in having control over imported

⁴⁷ See Remarks of Gabriel Wilner, on U.S. Foreign Policy, supra note 1, at 6-7.

technology, developing their technological capacity and skills, reducing adversity in the balance-of-payments situation, etc., and conserving their scarce foreign exchange reserves.

On the other hand, developed states, as a group, advocate freedom of contract, competition in the marketplace, an increase in international business between various parties, etc. On the national plane, they are interested in retaining some sort of control over the outward flow of technology, in providing guarantees to suppliers, and in requiring their multinational corporations to generate as much income as possible and to remit the same so that they can collect the tax on such remitted income. In some cases, these states are concerned that their employment rate would fall if technology is exported.*

When the term 'developing state' is referred to, it is the state where the technology is ultimately used. There may be cases, like third state joint ventures, where Corporation A of a developed state 'X' enters into a joint venture agreement with Corporation B of a developing state Y to build a steel plant in a developing state Z. Here, though State Y is a developing state, for the purpose of this thesis, it would be considered to have, at least theoretically, interests similar to those of State X, e.g. inward flow of revenue, etc. The real 'developing state' would be State Z, the end-user of that technology, and

* See infra note 53.

hence, its interests are the ones that are considered.

Let us now see what differences may exist in the private interests of the various parties involved. It would be proper to say that suppliers and recipients are on two different economic planes, and hence, they would have greatly diverse priorities.⁴⁹

Suppliers may be concerned about the confidentiality of technological product or process, maximization of its profits through higher royalty rates and technical fees, more control over the operation and the use of the transferred technology, monopoly over its patents, etc.⁵⁰ They may, therefore, prefer, in most cases, foreign direct investment, especially in the high technology sector, and joint ventures and licensing agreements, in other areas. They would be in favour of a free play of market forces⁵¹ as, in most cases, they enjoy a seller's market.

Recipients may be interested in getting some kind of protection from their governments in order to improve their bargaining power in the negotiation of technology transfer transactions. They may have interests diametrically opposed to those of the suppliers. Recipients may be interested in increasing their production levels and in

⁴⁹ However, they may have similar priorities when the supplier is a parent company and the recipient is its subsidiary.

⁵⁰ This is evident from the various restrictive conditions imposed by the suppliers on the recipients.

⁵¹ This would mean that price would be determined on the basis of demand and supply.

exporting the surplus, as there may be some tax rebates under the export-promotion policy of their governments. They may prefer the elimination of restrictive covenants, e.g. restrictions on sales/exports, imposed by the suppliers, which may hinder them from expanding their production capacity. They may like to increase the employment level and take advantage of any tax incentives granted by their governments. They may wish to increase their own profits, which may mean less royalties and technical fees, and hence, less profits to the suppliers. If, however, a recipient is a subsidiary of the supplier, then, the overall profits of the organization would be taken into account and not their individual profits. In this event, their private interests may be similar.

In the light of these various interests, which one should prevail? This does not mean, however, that interests of other parties should be completely ignored. It only means 'which interest should be considered dominant'.

Out of the four typical interests involved, it would be a matter of opinion as to which one should override the others, when there is a conflict among them. And settlement of disputes and their regulation would play an important role in safeguarding such dominant interest.

1.6 6. Impact of Technology Transfer on Developing and Developed States-

Technology transfers between two developed states and such transfers between developed and developing states have certain differences.

First of all, in the case of the former, recipient states may need only the production processes as they may already have the technical skills necessary to operate them, whereas in the case of the latter, developing states not only lack the process itself but also the technical skills required to use that process.

Secondly, in the case of the former, there may be a mutual flow of technology whereby each state would, at one time, be the supplying state and, at another time, be the receiving state. However, in the case of the latter, there is usually a one-sided flow of technology with developed states being the supplying states and developing states being the recipient states.

Hence, in the case of transactions between two developed states, their interests would be very much similar because there would be an inward as well as an outward flow of technology. But in the case of transactions between developed and developing states, the impact on the former would be vastly different from that on the latter.

Technology transfer may not involve a mere handing over of a product design or a technical process. Technology supplier normally helps build a plant or a factory in the host state and trains local personnel of the host state as to the operation and management of that plant or factory. This brings about an economic and developmental growth in the developing state. Its technical capacity increases and it can be relayed to other local personnel who, in turn, may build more plants. The employment in the developing state will increase, the buying power of its population will increase, the standard of living will increase, more goods will be demanded for consumption, and production, as a result, will increase. The production capacity of plants will be expanded, more people will be employed, and the cycle will continue. At some point, production will exceed local demand or consumption, creating a surplus which may be exported, leading to a better balance-of-payments position in the developing state. The above-mentioned is a purely theoretical hypothesis and may be an extremely unpractical view of the matter. Though the process may not occur exactly as stated, it would be so to a certain degree and would benefit the developing state.

In the short-run, the impact of technology export on the developed state may be adverse because production facility will be transferred to the developing state and there will be a certain degree of retrenchment of workers in

that factory. But consumers will benefit as goods produced in the developing state will be sold at a lower price in the developed state.⁵² And gradually, the retrenched workers may be relocated in industries which have a comparative advantage over industries in the developing states.

In the long-run, technology transfer will benefit the developed state because a demand may be created in the developing state for various products which may be imported from the developed state, thereby increasing production in the developed state. Such increased production may, in turn, increase the employment level and the various consequences thereof will occur. For example, there will be more demand for goods, which may mean an increase in production which may result in increased employment.⁵³

⁵² Production facility may be shifted to a developing state where cheap labour is available. In the event, labour costs will be reduced, total costs will reduce, as a result, and the product will be sold at a lower price in the developed state, other variables remaining the same.

⁵³ Robert Radway has described the situation thus: "Public policy issues in the developing countries revolve round social and economic development, whereas such issues and public opinion in the industrialised countries frequently revolve round inflation, jobs, and displacement of inefficient industries by goods produced in low-wage base, developing countries ... In the context of growing world interdependence, the United States labor movement and government must recognize that improvement of the standard of living of the United States worker will depend increasingly on the improvement of the standard of living of the developing nations' workers. This is the challenge that the proposed New International Economic Order presents to the United States labor force," in "United States Regulations and Acquisitions" (1981), 14 Vand. J. Transnat'l. L. 327, at 328.

This was perceived in a Symposium on 'Mobilizing Technology for Development', organized by the International Institute for Environment and Development (IIED) in January 1979. It came up with a proposal that future technological co-operation between the North and the South based on long-term self-interest rather than on paternalistic premises of traditional development assistance should attempt to achieve inter alia, the following goal:

"Facilitating a more effective and equitable international division of labour in a world of technological advance and shifting comparative advantages. (It) focuses on the measures that need to be taken by the advanced countries and the more industrialized developing countries. New production capacities in some developing countries cannot only help overcome the worst aspects of poverty in other developing countries but can also contribute to lower inflation, higher wage jobs and increasing employment in the developed countries."⁵⁴

There are certain other benefits accruing to the developing state. For example, if a plant is built with some particular imported technology, there will arise a demand for auxiliary or ancillary products like spare parts, intermediate goods, etc., and their production will increase either with imported or indigenous technology, leading to an increased employment and all its consequences as stated above.

Technology is also beneficial in the social interest of the developing state. Its government has a public duty to ascertain that the imported technology is properly

⁵⁴ See Development Issue Paper, No. 7; supra note 43, at 7-9.

used to derive such social benefits. However, transfer of technology may also lead to certain economic and social costs if it is permitted indiscriminately.

Economic costs may be incurred through repeated importation of similar technology, resulting in a worsened balance-of-payments situation for the developing state.

Social costs may also be incurred. If a plant is built in a place where the employment rate is already high, it may not add much to overall social benefit and development as labour may have to be displaced and relocated. Similarly, if imported technology is used in the production of luxury items, inequalities in income may be increased with multinational corporations catering for the rich. This may not help the developing state in increasing its economic and developmental growth. It may be of special interest to the developing state to have plants built in backward underdeveloped areas and to import technology for the production of necessities like pharmaceuticals, etc. In order to achieve these goals, it may have to give some incentives like tax rebates, subsidies, etc., to technology suppliers as well as to recipients.

Also, the developing state has an interest in the environmental aspect of technology transfer transactions, especially where technology concerns some chemical processes. The host state has a public right to establish environmental standards in its enactments which parties cannot opt out by a contrary contractual clause.

Hence, the developing state has a duty as well as a right to see that the impact of any technology transfer within its territory is not adverse to its economic and developmental growth.

Its interests may have to be safeguarded against private interests of the parties. Suppliers of technology may impose certain restrictions on recipients in the advancement of their own private interests.

These restrictions imposed by the supplier may be acceptable to the recipient but they are not necessarily advantageous to developing state as a whole. For example, where the terms of transfer increase the costs of production, the recipient company may be able to pass on the burden to the consumer, in the form of higher prices. The monopolistic nature of the supplier's interest in the technology which is transferred helps of course, to make this possible. In other words, there is the possibility that private returns to the companies involved in the transfer are greater than social returns in the developing state.⁵⁵ In this case, the total net impact on the developing state may be adverse.

Besides recipients, there may be third parties/actors, like skilled and/or unskilled labour, and/or anybody who is injured either physically or economically, who may be interested in the transactions though they are not privy

⁵⁵ See Channels and mechanisms, supra note 6, at 54-55, para 156.

thereto. And remedies will be available to them otherwise than in contract, e.g., in torts, or under some specific legislation. Under the antitrust laws, the United States of America⁷ has sought redress for the economic injury caused to others. The government of the developing state, if it is a welfare state, would be interested in safeguarding such interests of its citizens and/or residents.

It can be easily seen that recipients' states have more substantial connection or more significant relationship to technology transfer transactions than suppliers' states.

Hence, if public interests of developing and developed states are compared, those of the former would and should carry greater weight in any decision-making involving both of them in the field of transfer of technology.

It is also evident that it would be beneficial to both, the developed and the developing states, if transfer is encouraged, taking into account the long-term economic and social effects thereof to both of them.

1.7 7. Difference Between Technology Transfer and Sale of Goods Transactions-

One may wonder why a technology transfer transaction should be given a different legal treatment than a sale/purchase of goods transaction. Both comprise sale of a

certain commodity, in the former, the technology, and in the latter, the goods produced by that technology. But there are certain disparities between the two which make such a distinction necessary.

Firstly, on the one hand, technology transfer transactions have an impact on the whole economic and developmental set-up in developing states. The set-up is re-adjusted as a result of such transfer. Transfer of technology sets in motion a chain reaction which affects the developing states for years to come. It has an on-going effect.

On the other hand, purchase of goods may not have such great impact. Goods may be classified into consumer goods, e.g. textiles, etc., and capital goods, e.g. machinery, etc. Purchase of consumer goods are, normally, single transactions whose effect would be felt neither by everybody around the developing state nor for a long period of time. If there is a purchase of textiles, then, unless the developing state is interested in protecting its textile industry and hence wishes to regulate their import, only the actual purchasers of those textiles are the ones who are affected, and even then, such effect is minimal. Their way of life is not affected. However, purchase of capital goods will have a continuing effect on the economy of the developing state.

Secondly, in case of goods, either the seller has them or the buyer has them. Both cannot consume them at the

same time. But that is not so with technology. Technical processes and product designs can be owned and used by any number of persons, all over the world, simultaneously. Surendra Patel has put the matter very succinctly when he said that, once a technology is transferred, both its (i.e. the technology) owner and new acquirer have it; or to use the economic jargon, the marginal cost of its transfer is zero. Unlike any other commodity, once obtained it cannot be used up by its consumption. Once mastered, its life cycle is indefinite. Once adapted, it appreciates ...".⁵⁶

Hence, if technology is transferred by a certain supplier, such supplier may lose exclusive control over it, but such supplier may still have it to improve it, to develop it further, and to use it again. And, at the same time, recipient can use it and develop it on its own. This may bring about a higher level of equitability among different states of the world. Hence, the treatment, legal and economic, accorded technology transfers and sales of goods should differ.

⁵⁶ Surendra J. Patel, "The Technological Transformation of the Third World - Main Issues" (Dec. 1980), II Man and Development 19, at 22; Reprinted in UNCTAD Reprint Series No. 15, UN Doc. TD/UNCTAD/OCS/RS/15.

1.8 8. Regulation of Transfer of Technology-

Regulation of various aspects of technology transfer transactions has plagued various developing state governments for the last two decades. They have tried to regulate them, nationally and internationally. Both types of legislation will be separately examined.

1.8.1 (1) National Legislation-

As mentioned earlier,⁵⁷ some developing states, e.g. Mexico, Brazil, India, China, Nigeria, Peru, etc., have enacted laws to regulate transfer of technology.⁵⁸

These states have established national ministries⁵⁹ or agencies⁶⁰ to deal with such transactions between their nationals/residents and foreigners. Under these laws, these agencies screen agreements to weed out certain restrictive conditions which are prohibited under their laws. After these agreements are approved by the agencies, they may have to be deposited at a National Registry estab-

⁵⁷ See supra page 24.

⁵⁸ For information on such enactments, see, Compilation, supra note 24.

⁵⁹ In Mexico, the Ministry of Patrimony and Industrial Development deals with technology transfer.

⁶⁰ In Nigeria, the National Office of Industrial Property, and in Brazil, the National Institute of Industrial Property, deal with technology transfer.

lished for the purpose. Only after such registration, are suppliers permitted to remit payments to their home states.

Also, these agencies may assist private parties, i.e. recipients, to negotiate effectively in order to get better bargains.

Through such administrative procedure, there may be a curtailment of restrictive conditions. But, there may be gentleman's agreements between suppliers and recipients which may make these measures ineffective. Hence, these states should be given authority to give effect to their laws through dispute settlement mechanism. These states have established a procedure for pre-entry matters. They now need a legal structure to settle post-entry matters.

1.8.2. (2) International Legislation-

Developing states have perceived a need to have legislative and judicial jurisdiction to enforce their laws. The chief international body where these states take their grievances is the United Nations Conference on Trade and Development (UNCTAD) which was established by the United Nations General Assembly in 1964.

In 1964, the Final Act I of UNCTAD, recommended, inter alia, that developing states should undertake appropriate legal and administrative measures and that the United Nations and other bodies should explore the possibilities

for the adaptation of legislation concerning the transfer of industrial technology to developing states.⁶¹

An Intergovernmental Group on Transfer of Technology was set up in 1970 to identify the obstacles to transfer of technology to developing states. In 1974, it requested the Secretary-General of UNCTAD to convene an Intergovernmental Group of Experts to prepare a draft outline to serve as a basis for the preparation of a universally applicable code of conduct on transfer of technology.⁶²

In 1975, U.N. General Assembly by its Resolution 3362 (S.VII) made a similar recommendation.⁶³

⁶¹ UNCTAD. Proceedings, First Session, Vol. I, Final Act and Report, UN Doc. E/CONF.46/141/v.1 (1964), at 57. Paras 2 and 3 of A.IV.26, dealing with Transfer of Technology, state, "2. Developing countries should undertake appropriate legislative and administrative measures in the field of industrial technology. 3. Competent international bodies, including United Nations bodies and the Bureau of the International Union for the Protection of Industrial Property, should explore possibilities for adaptation of legislation concerning the transfer of industrial technology to developing countries including the possibility of concluding appropriate international agreements in this field."

⁶² Report of the Intergovernmental Group on Transfer of Technology on its third session, UN Doc. TD/B/520 (6 Aug., 1974), which includes, in its Annex I, Res. 3(III) of 26 July 1974 on The possibility and feasibility of an international code of conduct in the field of transfer of technology.

⁶³ Development and international economic co-operation, G.A. Res. 3362 (S-VII) (Sept. 1975), which, inter alia, states, "3. All States should co-operate in evolving an international code of conduct for the transfer of technology corresponding, in particular, to the special needs of the developing countries."

U.N. General Assembly had also dealt with the question of transfer of technology in its resolutions on the Declaration on the Establishment of a New International Economic Order⁶⁴ and on the Charter of Economic Rights and Duties, in the previous year, i.e. in 1974.⁶⁵ By the said resolutions, states were given the right to take measures in the interest of their national economies and to regulate the activities of multinational corporations within their territories. Promotion of transfer of technology for the benefit of developing states was also recommended.

⁶⁴ Declaration on the establishment of a New International Economic Order, G.A. Res. 3201 (S-VII) (1 May 1974), which is based on equity, sovereign equality, interdependence, common interest, and co-operation among all States, irrespective of their economic and social systems... It declares, "4. The new international economic order should be founded on full respect, (*inter alia*) for the following principles: (g) Regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries; (p) To give to the developing countries access to the achievements of modern science and technology, to promote the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies."

⁶⁵ Charter of Economic Rights and Duties of States, G.A. Res. 3281(XXIX) (12 Dec. 1974). Article 2(2) states, "Each State has the right: (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities..." Article 13(4) states, "All States should co-operate in exploring with a view to evolving further internationally accepted guidelines or regulations for the transfer of technology taking fully into account the interests of the developing countries."

In its fourth session in May 1976, UNCTAD by its Resolution 89(IV) decided to establish an Intergovernmental Group of Experts to elaborate a draft code of conduct for the transfer of technology.⁶⁶ The Group of Experts on Transfer of Technology met six times between November 1976 and July 1978, and in its last session, it completed a draft International Code of Conduct on Transfer of Technology.⁶⁷ The first UN Conference on an International Code of Conduct on Transfer of Technology was held in 1978. One of the items on its agenda was 'applicable law and settlement of disputes'.⁶⁸ But the Group of 77, composed of developing states, and Group B, of developed states, have let their apparently irreconcilable ideologies limit the chances of attaining some kind of consensus on the code, in the near future. As of 1986, the chances of UNCTAD code becoming anything more than a pure academic exercise seem to be very

⁶⁶ International code of conduct on transfer of technology, Res. 89(IV) in UNCTAD Proceedings, Fourth session, Vol. I, Report and Annexes, UN Doc. T/218 v.1, at 22. It recommended, "(a) that work on a draft code of conduct for the transfer of technology should be accelerated with a view to its completion by the middle of 1977; (b) that such work should consist in drafting an international code of conduct." It decided to establish within UNCTAD an intergovernmental group of experts . . . , in order to elaborate the draft code.

⁶⁷ The International Code of Conduct on transfer of Technology, UN Doc. TD/CODE TOT/1 (1978).

⁶⁸ Applicable Law and Settlement of Disputes: Preliminary considerations on drafting provisions in the international code of conduct on transfer of technology, UN Doc. TD/AC.1/13 (13 Jan. 1978). It deals with possible approaches to the choice of law and the choice of forum, taking in account the positions taken by both, the developed and the developing states.

slim. The code may be abandoned. However, an effort must be made outside the UNCTAD set-up to bring some harmonization into the international legal system in the field of transfer of technology.

Another international body which has been indirectly active in technology transfer, because of its special interest in the protection of industrial property, is the World Intellectual Property Organization. The 'Paris Convention for the Protection of Industrial Property' was entered into force in 1883.⁶⁹ At present, it is under the administration of WIPO. But the original convention was agreed to among the present-day developed states, and now, the developing states which were mere colonies at that time, have proposed a further revision of the said convention, though there have been periodic revisions in the past.⁷⁰ The present revision has been proposed to suit their special needs and interests and the same is under negotiation.

United Nations Industrial Development Organization (UNIDO) also deals with transfer of technology, but more with its technical aspects than with its legal aspects.

⁶⁹ See supra note 42.

⁷⁰ The said 1883 Convention has been revised at Brussels on Dec. 14, 1900, at Washington on June 2, 1911, at the Hague on Nov. 6, 1925, at London on June 2, 1934, at Lisbon on Oct. 31, 1958, and at Stockholm on July 14, 1967.

1.9 9. Concluding Comments-

Transfer of technology has to be facilitated and encouraged. But contractual relations would not proceed smoothly due to economic, social, political and ideological differences between parties and states involved in these transactions. Some sort of harmonization, some unified dispute settlement mechanism and certain rules of law governing the disputes are needed. Change in the legal structure is long overdue. Predictability and certainty is crucial to any legal relationship. Settlement of disputes should not be left to the whims and fancies of the parties, as this may result in utter disharmony. The weaker bargaining power of recipients as well as economic, social and other interests of the interested states should be taken into consideration. This, however, does not mean that private interests of the parties should be ignored. It is not the purpose of this thesis to so suggest. Suppliers of technology, i.e. multinational corporations, may have certain legitimate rights, but settlement of disputes is a different area altogether which can be regulated by states involved, without curtailing profitability and viability of a technology transfer transaction. It remains to be seen whether it would be right to relegate private interests to a subordinate position, as compared to public interests of states and interests, in general, of everyone involved.

Most of the articles written on the subject of transfer of technology deal with economic and technical aspects of a transfer, appropriateness of the transferred technology, costs of a transfer, and restrictive business practices. Settlement of disputes, being an area traditionally left to the parties themselves to regulate, has been virtually ignored. Hence, this thesis was undertaken to see if there can be any solution other than the existing 'freedom of choice'. As technology transfer transactions between developed and developing states are increasing, more and more disputes are sure to arise, and hence, more attention should be paid to their settlement. Though arbitration as a dispute settlement mechanism meets the approval of all three groups of states (i.e. the Group of 77, Group B and Group D) it has not been considered in this thesis, as it would have unduly extended the scope of the thesis. Also, the transfer of technology provisions under the recent Law of Sea Convention, 1982⁷¹ have not been addressed.

The basic question that is being dealt with herein is whether, in view of the various interests involved, the freedom of choice of law and/or forum which has been the mainstay in the international law of contracts should be allowed to continue or whether it should be replaced wholly or partially by increasing government regulation/intervention, especially in the case of technology technolo-

⁷¹ Third United Nations Conference on the Law of the Sea, UN Doc. A/CONF.62/122 (7 Oct., 1982), Part XIV, at 113-117.

gy transactions.

Part 1
PROPER LAW

Chapter II

HISTORICAL BACKGROUND

When dealing with the subject of the law applicable to contracts, there seems to be a need to know the historical evolution of various theories dealing with the applicable law. This chapter will be divided into different eras to show how various views and theories evolved, over a period of time, in view of the changes that were taking place around the world.

2.1 1. Until the Twelfth Century-

In Ancient Rome, there was something akin to a dual legal system. Transactions between Romans inter se were governed by jus civile, whereas those between non-Romans, or between Romans and non-Romans were governed by jus gentium. However, Caracalla's edict in A.D. 212 brought all, Romans as well non-Romans, under one territorial law. And territoriality was accepted.⁷² Every person within a territory was governed by the law of that territory.

⁷² Clive M. Schmitthoff, The English Conflict of Laws (3rd ed. 1954), at 18 (hereinafter cited as Schmitthoff, 1954).

Cheshire has mentioned that questions concerning contracts appear to have been decided according to the law of the place where the contract was made and transactions relating to property were governed by the lex situs.⁷³

When barbarians conquered the Roman empire and settled there, the territorial nature of conflicts of law prevalent till then in the Roman empire, gave way to the personalty nature of law. Each tribe was governed by its own tribal law.⁷⁴ Wherever a person went, he carried the law of his origin with him.⁷⁵ Within a certain territory, there were as many different laws as there were tribes and conflicts of law gained a new dimension. If two persons of different tribes contracted, each was governed by his own law. Though, according to Professor Beale, there was no real conflict of laws, as each person was absolutely governed by his own personal law,⁷⁶ until there is a certain single law or rule, there will be some conflict of laws inherent in the legal systems, whether it is visible or not. What would happen if persons A and B were to enter into a contract, and the tribal law of A allowed him to enter into a particular type of contract, but B's law did not. A, in

⁷³ P.M. North, Cheshire's Private International Law (9th ed. 1974), at 17 (hereinafter cited as Cheshire, 1974).

⁷⁴ See Schmitthoff, 1954, supra note 72, at 19; See also, Cheshire, 1974, id. at 17.

⁷⁵ Martin Wolff, Private International Law (1945), at 21 (hereinafter cited as Wolff, 1945).

⁷⁶ See Schmitthoff, 1954, supra note 72, at 19.

such a case, would be left without any remedy against B. Even if, prima facie, there is no conflict of laws, the ultimate result is still elusive, i.e. there is no reconciliation of laws and no 'satisfactory' settlement of the dispute.

However, Wolff states that, "...sometimes the parties seem to have been at liberty to state, not the law under which they lived, but the law under which they wished to live."⁷⁷ This, according to Wolff, is the first deviation from the principle of the personal lex originis, the first example of a choice of law by the contracting parties.⁷⁸

This personalty nature continued till the tenth century when the territoriality principle was revived, with the emergence of a feudalistic society in England, Germany, and France. Each person was governed by the law of the territory of which he was the subject.⁷⁹ Other laws were disregarded. In Italy, too, with the emergence of city states like Milan, Bologna, etc., territoriality gained popularity.⁸⁰ Though territoriality seems to be the right solution to conflicts problems, that is not so. It is difficult to determine which territorial law is applicable, where two

⁷⁷ See Wolff, 1945, supra note 75, at 21.

⁷⁸ See Wolff, 1945, ibid.

⁷⁹ See Schmitthoff, 1954, supra note 72, at 19; See also, Wolff, 1945, id. at 21.

⁸⁰ See Cheshire, 1974, supra note 73, at 18.

persons, standing on the opposite sides of a territorial border, enter into a contract.

Hence, neither absolute personalty nor absolute territoriality is the ultimate answer.

2.2 2. From the Thirteenth till the Fifteenth Century-

In the thirteenth century, a number of city states developed in Italy, with a resulting increase in commercial intercourse between people. Also, commerce developed between Italy and other countries like Syria, Arabia, etc.¹¹ Thus there arose a dire need for a new approach to the conflicts problem.

Neither territoriality nor personalty principle seems to have provided an answer. Wolff states that, '... at first all the judges confined themselves to applying the law of their own cities. This practice was thought to be justified ... partly by the idea that parties in choosing their judge implicitly choose his legal system.'¹² Thus, the practice of applying the lex fori was established. But it may have resulted in hardship in choosing the proper forum because forum-shopping is likely to result in such a case. Parties may choose a forum whose law is the most beneficial to them. Or, the party with the superior bargaining power

¹¹- See Wolff, 1945, supra note 75, at 22.

¹² See Wolff, 1945, ibid.

may choose the forum whose law is the most beneficial to him.

Hence, in A.D. 1200, Aldricus proposed that judges should be granted discretionary power to apply a more effective, better and more useful law.⁸³ There is a subjective quality in this kind of proposal but that should not act as a deterrent against its application. It can also serve as a basis to arrive at a fixed rule of law if one tries to ascertain the most effective and a better law for each type of transaction. These subjective terms should be turned into an objective rule of law. The terms 'more effective', 'better', and 'more useful' have an inherent quality of justness and fairness towards both, the parties as well as the legislators, i.e. the states. As will be seen later, this proposal may well have been the basis of some of the modern approaches to conflicts law.

It was also, in this century, that a distinction was made between substantive and procedural law by Jacobus Balduini. According to him, the former was to be governed by the law of the place ubi contractus est and the latter by the lex fori.⁸⁴

Hence, an oscillation from the application of territoriality to personalty, to territoriality principle, with the application of the lex fori from time to time, completes the whole scenario until the thirteenth century.

⁸³ See Wolff, 1945, ibid.

⁸⁴ See Wolff, 1945, id. at 23.

The fourteenth century changed the face of the conflicts problem. An Italian jurist, Bartolus de Saxoferrato, for the first time, combined and made a compromise between territoriality and personalty principles, and proposed what came to be known as the 'statutist theory'. He disentangled the different questions, examined separately, all legal relations which resulted in a conflict of laws, and indicated the 'statute' that according to reason and equity was the most convenient to everyone of them.⁸⁵ Bartolus created two statutes, viz., the personal statute and the real statute, and attempted to bring all fact situations under either of them. The former statute governed persons, and the latter, things. He also founded a mixed statute to govern contracts. Under this statute, the lex loci contractus governed the validity of contracts, and the lex loci solutionis governed the breach of contracts.⁸⁶ Later, a similar approach was followed by Professor Beale.⁸⁷

The systematic separation of different legal relations, and bringing of them under a fixed rule of law, no matter how general that rule might be, was a great achievement of his time. Bartolus alienated contracts from the strict personalty or territoriality nature and gave them a separate status of their own. Also, he differentiated

⁸⁵ See Schmittthoff, 1954, supra note 72, at 20.

⁸⁶ See Wolff, 1945, supra note 75, at 23-25; See also Schmittthoff, 1954, id. at 20-21.

⁸⁷ See infra note 106.

between the lex loci contractus and the lex loci solutionis though such splitting of a contract also posed certain problems."

This statist theory seems to have been the basis for the legal systems in conflict cases all over the world, though, with certain variations considering the particular internal situation in each state.

2.3 3. From the Sixteenth till the Eighteenth Century-

The sixteenth century brought in its wake a great French jurist whose work has been a milestone in the field of conflict of laws, especially respecting contracts. Charles Dumoulin had accepted the statist theory of Bartolus but he preferred the personal statute to such an extent that he preferred to give effect to the intention of the parties in respect of any contract between them. Personal law follows a person wherever he goes. It is determined by certain fixed general rules like nationality, domicile, etc. However, Dumoulin advocated that the law chosen by the parties could follow them wherever they went just like the personal law." And from that day to date, this principle of

" In some cases, it may be hard to separate validity and breach of contracts, if breach occurs because the contract is held invalid under one law and not under the other.

" See Schmitthoff, 1954, supra note 72, at 21-22; See also Cheshire, 1974, supra note 73, at 21-22; See also

'party autonomy' or 'freedom of choice'⁹⁰ has gained precedence over other fixed rules of law - whether territorial, personal or mixed.

However, Bertrand D'Argentre, a contemporary and a critic of Dumoulin's theory, emphasized the territorial aspect of statutism. He believed in states regulating within their territory,⁹¹ rather than in persons choosing their own law and carrying it with them.

At that time, legal systems were not ripe for the acceptance of Dumoulin's theory of party autonomy. But, D'Argentre's idea of territoriality was already an accepted principle and it was further developed by the Dutch school of thought, in the following century. Eminent among these jurists were Paul Voet, John Voet and Ulric Huber.

Huber's principles of territorial sovereignty have influenced the Anglo-American conflict of laws. In his treatise, Huber expounded the following three principles:

"(a) The laws of every state operate within the territorial limits of such state and are binding on all its subjects but not beyond;

(b) All are considered as subjects of a sovereign who are found within his territory, whether permanently or temporarily resident there, and

Wolff, 1945, *supra* note 75, at 26-27.

⁹⁰ These two terms are used synonymously for the purpose of this thesis.

⁹¹ See Schmitthoff, 1954, *supra* note 72, at 22; See also Cheshire, 1974, *supra* note 73, at 21-22.

(c) Sovereigns out of comity act so that the laws of each brought into existence within the territory may hold their force everywhere so far as they do not prejudice the power of the law of another sovereign and his subjects."²

On the ground of territorial sovereignty, states had an absolute right to regulate persons and things subjected to their jurisdiction, i.e. they had legislative jurisdiction over persons in their territory; either permanently or temporarily. Huber can be cast into the role of a new territorialist, in the sense that he valued the extra-territorial aspect of territorial regulations. He was, basically, a territorialist. He did not advocate extraterritoriality as a matter of right but as a matter of courtesy or comity between nations.

Till the end of the seventeenth century, English conflict of laws was virtually non-existent. Courts were bound to apply their own law. Hence, the lex fori governed the contracts. If, in a particular case, a foreign law was applicable, the matter was taken out of the English jurisdiction and decided in the forum whose law was applicable. English common law courts applied only the domestic English law. Admiralty courts applied the general Law of Nations or the Law Merchant."³ However, in the beginning of the seventeenth century, common law courts were faced with the problem as to whether to apply common law to "foreign" cases.

² See Schmitthoff, 1954, id. at 23.

³ There was a dichotomy, as to applicable law - domestic law and Law Merchant, and as to jurisdiction - common law courts and admiralty courts.

They started deciding cases according to the Law Merchant. After 1660, common law courts assumed an exclusive jurisdiction over such cases and the Law Merchant became a part of the English common law.⁹⁴

However, as England's trade with the outside world increased, regulation of conflicts problems became necessary.

In Robinson v. Bland (1760),⁹⁵ Lord Mansfield accepted party autonomy, though this principle was not largely accepted in English jurisprudence till the following century.

2.4 4. The Nineteenth Century-

During the nineteenth century, there arrived on the world stage of conflict of laws some very eminent jurists of different nationalities.

In 1834, Joseph Story, an American professor and judge, became a major proponent of the territoriality doctrine, under the strong influence of Huber. He also believed in the extraterritoriality of state regulations in some cases, based on comity between nations.⁹⁶

⁹⁴ Alexander Sack, Conflict of Laws in the History of English Law, in Selected Readings on Conflict of Laws, (Maurice Culp ed. 1956) 1 (hereinafter cited as Sack).

⁹⁵ 2 Burrow 1077; 1 W.B1. 234.

⁹⁶ Joseph Story, Commentaries on the Conflict of Laws

Friedrich Carl von Savigny, a German, published his treatise in 1849.¹⁷ His theory became a turning point in the field of conflict of laws. Formerly, judges established a connection between a person or a thing and a territory. However, Savigny placed more stress on a legal relationship and its connection with a particular territory. A person or a thing may be connected with one particular territory whereas the legal relationship may be connected with another, e.g. as in third state joint ventures. Suppose that parties A and B of States X and Y respectively contract to transfer technology to State Z. Though parties have connection with their own States X and Y, their legal relationship is connected to State Z.

According to Savigny, one should try 'to discover for every legal relation (case) that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat)'.¹⁸ Savigny also endorsed party autonomy but he favoured the application of the lex loci solutionis, in the absence of any chosen law.¹⁹ His idea of the application of the lex loci solutionis resulted in splitting the contract, as parties were governed by the law

(1846), at 28-49 (hereinafter cited as Story, 1846). See also, Schmitthoff, 1954, supra note 72, at 28.

¹⁷ Friedrich Carl von Savigny, A Treatise on The Conflict of Laws (William Guthrie Trans. 1880) (hereinafter cited as Savigny, 1880).

¹⁸ See Savigny, 1880, Article 360, at 133.

¹⁹ See Savigny, 1880, id. at 134 ff.

of, the place where they were respectively to perform. Though Savigny's idea is, indeed, praiseworthy and noteworthy, his proposal of splitting is not, as it posed certain problems.¹⁰⁰

Savigny proposed that the locus solutionis or the place of fulfillment is the 'seat' of a transaction.¹⁰¹ But in practice, the locus solutionis may or may not be the seat of the legal relationship. For example, in a sale of goods transaction, delivery may be made in State X to a buyer who may have to take them to State Y where they are to be used. Here, the locus solutionis is State X, but the seat may be State Y. The term 'seat' implies one particular seat which has a dominant right to apply its law to a legal relationship. But here, State X, the locus solutionis does not have any interest in the transaction.

Savigny, being an universalist and not a territorialist, believed in the unification of laws for each type of legal relationship, independent of the forum where a dispute is brought.

Savigny's theory reminds us of Aldricus' theory.¹⁰² The most effective and more useful law would and should, ultimately, be the law of the seat of a legal relationship, if justice is to be done to both, the parties and

¹⁰⁰ For example, different laws were applicable in cases where performances were to take place in different states.

¹⁰¹ See Savigny, 1880, supra note 97, at 199.

¹⁰² See supra page 53.

the legislators, i.e. the states. Though the terms used are different, and though Aldricus required judges to apply the law, whereas Savigny preferred to establish rules independent of judges, the notion behind both ideas is the same. Both of them seem to have rebelled against the rigid territorialist theory.

While jurists were proposing various theories on conflict of laws, in England judges too were evolving conflict of law rules through jurisprudence. In Peninsular and Oriental Steam Navigation Co. v. Shand, (1865),¹⁰³ and in Lloyd v. Guibert, (1865),¹⁰⁴ the principle of party autonomy came to stay, so much so that in the 1889 decision of In Re Missouri Steamship Co.,¹⁰⁵ mandatory rules of the lex loci contractus were ignored in favour of the law chosen by the parties.

The English jurist Dicey was a staunch supporter of party autonomy whereas others like Westlake, Cheshire, and Morris advocated the objective theory, i.e. that the law applicable to a certain situation is the one with the most real connection with it.

¹⁰³ 3 Moo. P.C.Cas. (N.S.).

¹⁰⁴ L.R., 1 Q.B. 125.

¹⁰⁵ 42 Ch.D. 321.

2.5 5. The Twentieth Century-

The conventional approach to the problem of conflicts of law was overlooked in favour of the modern ones. But the territorialist doctrine surfaced now and again in the views of modern American jurists.

The territorialist theory was revived in the present century by Professor Joseph Beale¹⁰⁶ and later on, it was adopted in the First Restatement on Conflict of Laws.¹⁰⁷ Beale's theory is known as the 'vested rights' theory, according to which a right or an obligation in a contract is created by or vested in one particular law and hence, that law should govern that right, irrespective of where the dispute may have arisen. Beale tried to find a single major factor in a transaction which could identify the state whose law should govern the transaction.¹⁰⁸ Accordingly, he split contracts with the lex loci contractus governing the validity of contracts and the lex loci solutionis governing the performance and the breach of contracts.¹⁰⁹

¹⁰⁶ Joseph Beale, Selections from a Treatise on the Conflict of Laws (1935) (hereinafter cited as Beale, 1935).

¹⁰⁷ Restatement on Conflict of Laws (1934) (hereinafter cited as Restatement, 1934). J. Beale was the Reporter of the First Restatement.

¹⁰⁸ Robert Leflar, American Conflicts Law (3rd ed. 1977), at 173, (hereinafter cited as Leflar, 1977).

¹⁰⁹ See Beale, 1935, supra note 106.

Beale's theory was attacked by Walter Wheeler Cook whose own 'local law' theory gave undue importance to the lex fori. According to him, a forum never enforces a foreign right, but, a right created under its own law, though identical to the foreign right.¹¹⁰ It creates its own local right but models it as nearly as possible upon the law of the country in which the decisive facts have occurred.¹¹¹

Albert Ehrenzweig,¹¹² another American jurist, also favoured the lex fori doctrine but with certain exceptions.¹¹³

Elliot Cheatham and Willis Reese put forth nine policies¹¹⁴ which may be considered by judges, in order to ascertain the applicable law. These policy factors were incorporated in the Second Restatement on Conflict of Laws in 1971.¹¹⁵

¹¹⁰ Walter W. Cook, "The Logical and Legal Bases of the Conflict of Laws" (1924), 33 Yale L. J., 457 (hereinafter cited as Cook, 1924).

¹¹¹ See Cheshire, 1974, supra note 73, at 28.

¹¹² Albert Ehrenzweig, A Treatise on the Conflict of Laws (1962) (hereinafter cited as Ehrenzweig, 1962).

¹¹³ Albert Ehrenzweig, "Specific Principles of Private International Law" (1968-II), Recueil Des Cours 167.

¹¹⁴ Elliot Cheatham & Willis Reese, "Choice of the Applicable Law" (1952), 52 Col. L. Rev. 959 (hereinafter cited as Reese, 1952); For more details, see infra pages 105-109.

¹¹⁵ Restatement of the Law, Second - Conflict of Laws 2d, (1971) (hereinafter cited as Restatement Second, 1971); For more details, see infra note 168.

In 1954, the New York Court of Appeals decided the Auten v. Auten case on the basis of the 'most significant relationship' test or the 'dominant contacts' test.¹¹⁶ This test is now also known as the 'centre-of-gravity' approach or the 'grouping-of-contacts' approach.

In 1957, Hessel Yntema came up with seventeen policies in the light of which the applicable law was to be ascertained.¹¹⁷

A major break-through was made when Professor Brainerd Currie¹¹⁸ proposed the theory of 'governmental-interest analysis'. According to him, a disinterested forum should weigh the policies behind the substantive laws of the states with competing interests, and apply the law of the state most interested. However, if the forum has an interest, or if it cannot decide between two competing interests, then it should apply its own law. Thus, Currie, in his own way, revived the lex fori doctrine. Though he favoured the theory of interest analysis, he gave undue importance to the lex fori as the law of the first resort (when the forum had an interest) or of the last resort (when the forum could not

¹¹⁶ 124 N.E. 2d 99, (N.Y.Ct. of Appls.). For the facts of the case, see infra pages 109-110.

¹¹⁷ See Hessel Yntema, "The Objectives of Private International Law" (1957), 35 Can. Bar Rev. 721; See also, Leflar, 1977, supra note 108, at 204; See also, infra note 167.

¹¹⁸ Brainerd Currie, Selected Essays on the Conflict of Laws (1963) ch.4, at 177 (hereinafter cited as Currie, 1963); For more details, see infra pages 113-116.

decide between two competing laws), as the case may be.¹¹⁹

In 1965, David Cavers¹²⁰ enumerated seven 'principles of preference', the last two being applicable to contracts. He tried to cover the area of contracts, almost in its entirety, with the help of these two principles.

In 1966, Robert Lefflar placed his five 'choice-influencing considerations'¹²¹ before the legal public. The first four are similar to those formulated by Cheatham and Reese. But the fifth one, viz., the application of a better rule of law, seems to be similar to Aldricus' proposal.¹²²

2.6 6. Concluding Comments-

Hence, to date, there have been various rules of law applied to contracts, viz., the lex loci contractus, the lex loci solutionis, the lex fori, the law chosen by the parties, the law with the most real connection, etc.

¹¹⁹ See infra page 114.

¹²⁰ David F. Cavers, The Choice-of-Law Process (1965), at 181 (hereinafter cited as Cavers, 1965); For more details, see infra pages 117-119.

¹²¹ See Robert Lefflar, "Choice-Influencing Considerations in Conflicts Law" (1966), 41 N.Y.U.L.Rev. 267 (hereinafter cited as Lefflar, 1966); For more details, see infra pages 120-121.

¹²² See supra page 53.

Through the fixed rules of law in the earlier centuries, the present century has seen a certain flexibility in rules whereby each case may be decided on its own merits. However, whether rigid rules or flexible rules are better equipped to bring any particular case to a just solution will be seen in the next chapter, especially in the case of transfer of technology transactions.

Chapter III

PROPER LAW OF A CONTRACT

This chapter shall deal with the ways in which a 'proper law' of a contract can be ascertained.

'Proper law' of a contract was evolved by English jurists, which expression means the 'law applicable to a contract'. When parties choose a law completely unconnected with the transaction, it cannot be rightly called the 'proper law'. It may be termed the 'chosen law' or the 'applicable law'. 'Proper law' seems to be a term to be used when the law is determined by an objective method.

3.1 Determination of the Proper Law

There are various ways of determining the proper law, but in this thesis, for the purpose of simplification, they have been broadly classified into the subjective method of determination, which includes the application of law chosen, either expressly or impliedly, by the parties, and the objective method which includes the applicable law decided upon by judges, with the help of some external factors.

3.1.1 (1) Subjective Method-

Since the time of Dumoulin, in the sixteenth century, parties have been granted an almost fundamental right to choose their own law. In 1865, the concept came to be established in English jurisprudence.¹²³

Dicey was a subjective theorist and when he defined the term 'proper law' of a contract, he completely ignored proper law determined by the objective method. According to him, a proper law of a contract is

"... the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed; or (in other words), the law or laws to which the parties intended, or may fairly be presumed to have intended, to submit themselves."¹²⁴

However, he failed to show which law would be the proper law if judges could not presume it fairly.

Dicey gave undue preference to the principle of party autonomy or freedom of choice. Unlike Dumoulin, however, Dicey distinguished between an express and an implied choice of law. He felt that parties have a right to choose their own law, and in the absence of an express choice, judges are under a duty to ascertain what parties wanted as the applicable law. The 'presumed intention' actually borders on vagueness, even without any fairness included in it. Parties may or may not intend fairly and judges, in the end,

¹²³ See supra notes 103 and 104.

¹²⁴ A.V. Dicey, A Digest of the Law of England with Reference to Conflict of Laws (1896), Rule 143, at 540.

have to rely and would rely on their own judgement, though helped by some external factors, or rebuttable presumptions, to decide cases before them. Presumed intention would be best ascertained by the objective method.

Later on, the definition of 'proper law of a contract' was changed. Now, a proper law of a contract means

"the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection."¹²⁵

The express and implied choice of law will be dealt with separately.

3.1.1.1 A. Express Choice of Law-

(A) General-:

The principle of party autonomy is now accepted in Anglo-American conflict laws, but it is not without its share of critics.

Opponents of the subjective method/theory have criticized it on the ground that it allows parties to legislate,¹²⁶ even if only for themselves. This, in fact, is a

¹²⁵ J.H.C. Morris (ed.), Dicey and Morris on the Conflict of Laws (9th ed. 1973), Rule 146, at 721 (hereinafter cited as Dicey and Morris, 1973).

¹²⁶ See Beale, 1935, supra note 106, at 1079-1080. He states, "The fundamental objection to this (party autonomy) in point of theory is that it involves permission

right accruing only to sovereign states. And such party legislation may override state legislation, unless it falls within any of the exceptions to the principle of freedom of choice. But this attack has not much reduced its viability as the basic principle in the field of contracts.

In one of the major cases on contracts of this century, viz., Vita Food Products, Inc. v. Unus Shipping Co.,¹²⁷ it was held that the law chosen by the parties need not have any connection with the transaction concerned.¹²⁸ In practice, however, there are some instances when party autonomy is not permitted, e.g. when the applicable law does not have any connection with the transaction. Thus, in effect, the decision in the Vita Food Products case has eroded to a certain extent.

If parties are allowed a free rein over their contracts, unpredictability may set in. And such unlimited power may be extremely damaging, particularly in technology transfer transactions, where there is, in most cases, unequal bargaining power. This would give technology suppliers a strong upper hand over recipients, and eventually,

to the parties to do a legislative act ... The meaning of the suggestion, in short, is that since the parties can adopt any foreign law at their pleasure to govern their act that at their will they can free themselves from the power of the law which would otherwise apply to their acts."

¹²⁷ (1939) 1 All. E. R. 513, (P.C.); For the facts of the case, see infra pages 72-73.

¹²⁸ See id. at 521, which stated, "Connection with English law is not, as a matter of principle, essential."

it may lead to the application of laws beneficial to the suppliers.

Though the principle of party autonomy followed everywhere may become universal and uniform, it may be a uniformity of the rule and not a uniformity of the result, or a uniformity of the applicable law. Each case would then be dealt with on its own merits and its chosen law, without any uniformity in similar types of transactions. Judges, especially the common law judges, who have, since time immemorial, looked at the precedents for guidance in deciding similar disputes and transactions, may be bereft of such support.

Suppose that in a licensing agreement between Corporations A and B of States X and Y respectively, the law of State Z is chosen as the applicable law. In a similar licensing agreement between Corporations A and C of States X and Z respectively, the law chosen of State X is chosen. In the former case, parties are of an equal bargaining power and so, they could choose a neutral law to govern their contract. But in the latter case, C is a small firm and hence, a weaker party. So, A could impose the choice of its own local law which may be beneficial to it.

If one follows the principle of party autonomy without any reservations, then the application of the chosen laws in both of the above two examples is justifiable. But should such unrestricted application of party autonomy be

permitted? Unfettered party autonomy may lead to injustice because the party with the stronger bargaining power may be able to bargain for its own law and get it. Also, a judge looking at the above two examples, when deciding a third similar case where no law has been chosen, would not have much guidance either from the parties or from the rule of law. He, then, would base his decision on his own ideas of justice, which would be very subjective. He would also look at his own conflicts rules in order to arrive at a just decision. This may give rise to forum-shopping on the part of the parties. Also, there would not be any predictability or certainty in the decision, as freedom of choice is not absolute.

In the Vita Food Products case,¹²⁹ Unus Shipping Co. of Nova Scotia contracted with Vita Food Products Inc. of New York for carriage of a cargo of cured herrings from Newfoundland to New York. The Bill of Lading issued at the Newfoundland port failed to incorporate the Hague Rules which had been adopted by Newfoundland's Carriage of Goods by Sea Act, 1932. It provided for the application of English law. In reality, the bill of lading should have been considered invalid as against the Act. However, English courts held that provisions in Newfoundland's Act were directory and not obligatory and that failure to observe them did not make the bill of lading illegal. This decision had the effect of letting parties legislate for themselves

¹²⁹ See supra, note 127.

by choosing the English law.

England whose law was chosen was unconnected with the transaction and hence, its law should not have been applied by the judges. Its law was not the 'proper law' in the strict sense of the term, i.e. it was not chosen in an objective manner. The word 'proper' connotes 'suitability', 'justice', 'rightfulness'. In this case the English law was not the right law.

The Newfoundland Carriage of Goods by Sea Act was a self-limiting statute whose enactment was within the legislative jurisdiction of Newfoundland, in respect of any acts done within its territory. But the statute was undermined. If such statutes are to be effective, legislative jurisdiction should either be accompanied by judicial jurisdiction so that the law may be enforced, or be authorized under an universal rule of law.

A short-coming of self-limiting statutes is that the states enacting them cannot enforce them against parties affected by them if parties decide to submit to the forum of another state. If there is a self-limiting statute enacted by a substantially interested state, freedom of choice should be curbed in favour of enforcement of that statute.¹¹⁰

¹¹⁰ For more information on self-limiting statutes, see F.A. Mann, "Statutes and the Conflict of Laws" (1972-73), XLVI Brit. Y. B. Int'l. L. 117.

By choosing the law of a particular state, the parties submit themselves to the mandatory rules of that state and also to its directory or optional rules of law. This practice does not seem to be just because there may be other states whose mandatory rules may be more important than those of the chosen state.

If, in the Vita Food Products case, English law had some mandatory rules contrary to those of Newfoundland whose law may have been applicable in the absence of parties' choice, then the rules of the forum may have overridden those of the latter.

Suppose that Corporations A and C of States X and Z respectively, enter into a contract to transfer technology to State Z. They choose the law of State X with all its mandatory and directory rules. If State Z has also enacted some rules to protect its citizens from a stronger foreign party, such rules may be ineffective, if State X has some exactly contrary rules. Would such a result be wise? It may be advisable for mandatory and directory rules of interested states to have precedence over those of uninterested states like England in the Vita Food Products case, whose law may have been chosen by the parties. As among uninterested and interested states, the rules of the latter should apply. And, between various interested states, the rules of the most interested state should apply.

There may be an even greater problem if the uninterested state whose law is chosen is also the forum deciding the dispute.¹³¹ In such a case, the forum may be able to exclude all foreign laws contrary to its own, under the guise of enforcing its 'public policy'.¹³²

The above situation may even lead to a deliberate evasion of law, especially mandatory rules of the most interested state.

The drawbacks of the principle of party autonomy have created a need to place some 'limitations' or 'restrictions' or 'qualifications'¹³³ on its absolute implementation. However, such restrictions are placed by the forum according to its law and not according to some supernational universal law or according to the law which would have been applicable in the absence of the chosen law. A choice-of-law clause may not be recognized on the ground that it is against the public policy of the forum. The decision whether or not to enforce such clause is subjective to every individual state. Thus, parties are granted a loophole to choose a forum whose restrictions are less strict and whose public policy is more liberal. Each of the restrictions is seen in the light of the lex fori, or the law of the forum where the action is brought, and hence, forum-shopping may

¹³¹ This is what happened in the Vita Food Products case.

¹³² However, the forum may also invalidate a choice-of-law clause as contrary to its public policy.

¹³³ These three terms are used interchangeably in this thesis.

result.

These qualifications are partly embodied in the decision of the Vita Food Products case which, inter alia, states, "... 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."¹³⁴

Let us consider each of these qualifications, together with others.

(B) Exceptions-:

(a) Not Bona Fide and Legal-:

The chosen law must be bona fide and legal. The term, 'bona fide', at the very least, seems to be ambiguous. It has been defined as, 'on or with good faith, honestly, openly and sincerely.'¹³⁵ This would seem to mean that parties must choose the law with an honest intention in mind, e.g. in the interest of convenience, and should not evade any law which would have been applicable in the absence of such choice. As some sort of evasion is inevitable, the term 'bona fide' may have meant that parties should not

¹³⁴ See supra note 127, at 521.

¹³⁵ Gulf States Utilities Co. v. Heck, 191 So. 2d 761, at 766 (La. App.); See also, 5A Words and Phrases (Permanent ed. 1968), at 47 (hereinafter cited as Words and Phrases).

evade some mandatory rule of law, by making some contrary choice of law.

Suppose, in the above example,¹³⁶ that a certain clause in the contract is forbidden by the law of State Z, but the law of State X permits such clauses in the contracts. Such evasion of the prohibitory law of State Z should be treated as not 'bona fide'.

The term 'bona fide' has also been defined as 'in good faith - honestly as distinguished from bad faith; without fraud or unfair dealing.'¹³⁷ Suppose that Corporations A and C of States X and Z respectively, with enter into a contract to transfer technology to State Z. They have unequal bargaining power, the former being the stronger party and the latter being the weaker party. They choose the law of State X which is beneficial to A. Should the chosen law of State X not be deemed as mala fide because of the unequal bargaining power between the parties?

In any case, what is bona fide and what is not so, is a very subjective decision and would depend on the attitude of judges. There are no universal standards to determine what is bona fide and what is mala fide. Hence, a choice of a particular law may be bona fide in one forum but it may not be so in other interested states. Even judges in

¹³⁶ See supra page 74.

¹³⁷ State ex rel. Pieper v. Patterson, 70 N.W. 2d 838, at 841, 246 Iowa 1129; See also, Words and Phrases, supra note 135, at 47.

the same state may differ on the point.¹³⁸ Subjectivity brings with it, uncertainty and lack of uniformity.

Legality of a contract may be interpreted in the light of various laws and not just the lex fori. For example, a contract may be held illegal under the lex loci contractus, under the lex loci solutionis as far as its performance is concerned, under the lex fori, or under the proper law. But, if the proper law is the one ascertained by the objective method rather than the subjective method, then such interpretation may carry more weight. For example, if a contract is legal under the law of the state having the most significant relationship with the transaction, its legality may be more justifiable than if the contract is legal under the law chosen by the parties, because parties would not be foolish enough to choose a law that would render their contract illegal.

¹³⁸ See Beale, 1935, *supra* note 106, at 1081. He states, "In many cases, for instance, where the parties absolutely accepted and followed out the law of the place of performance the courts have nevertheless held the agreement to adopt that law not to be a bona fide agreement simply on the ground that their intention was to avoid the more stringent provisions of the law of the place of the making. This form of the rule leaves it for the court to determine whether the parties did or did not act bona fide in adopting one law or the other, and it is often difficult to anticipate what the court will decide. Thus, in two cases (Jackson v. American M. Co., 15 S.E. 812, 88 Ga 756 (1891); Odom v. New England M.S. Co., 18 S.E. 131, 91 Ga 505 (1893)), where to the ordinary apprehension the facts were practically identical the same court held differently as to the bona fides of the parties; and then as a result, applied different laws to what apparently were identical contracts."

(b) Objectionable to Public Policy:-

Another limitation placed on freedom of choice is that the chosen law should not be objectionable to the public policy of the forum.

Just as in the case of 'bona fide', in the case of public policy, it is the forum's viewpoint that counts. When a case is said to have been decided on the basis of public policy, it normally means the public policy of the forum. A forum can decide disputes before it entirely on the basis of its public policy. It may consider the public policies of other states, but that would entirely depend on its discretion.

If a certain clause in the contract or if the whole contract is void as against its public policy, the forum may not enforce such clause or such contract, even though it may be valid under its proper law, i.e. the law applicable in the absence of any choice by the parties.

However, it has been held that certain types of transactions, if deemed valid under their proper law, though void but not illegal under the lex fori, may still be enforced by the forum, so long as they are not contrary to the sense of morality or justice of the forum. Saxby v. Fulton (1909) is a case in point.¹³⁹ In this case, money was lent in Monte Carlo where gaming contracts are valid for the purpose of gaming there. The English court held that

¹³⁹ (1909) 2 K.B. 208.

the money was recoverable in England even though such a loan was void in England.¹⁴⁰

The reverse should also be held true. If a particular clause is void as per public policy of the proper law which has been determined objectively, but not according to the lex fori then such clause should not be enforced.

Suppose that Corporation A of state X and Corporation C of State Z enter into a contract to license technology to State Z. They choose the law of State Y. If public policy of State Z forbids a particular clause in contracts, e.g. a clause choosing an unconnected law, but such clause is permissible under the public policy of State Y, it should not be enforced, as otherwise there would be an evasion of the proper law. Forum should weigh the interests of various interested states, and consider the public policy of the most interested state, especially if policies of various states differ.¹⁴¹ Every legal rule should boil down to an interest-weighting if its purpose is to do justice. In the above example, if State Z has the most substantial connection with the transaction, then, if its law and public policy are ignored in favour of the law and public policy of the forum this may result in an evasion of the most substantially connected law. The purpose of its law would be undermined by parties' choice.

¹⁴⁰ See Schmitthoff, 1954, supra note 72, at 130.

¹⁴¹ This is similar to what has been proposed by Brainerd Currie.

In technology transfer transactions, clauses contrary to public policy of the most closely connected state should be held void everywhere. Otherwise, the special interests of such states, which they seek to regulate, may not be protected, as the forum may have completely diverse interests. This may happen when the most closely connected state is a developing state that is trying to protect its economic, social and developmental interests through public policy, and the forum is a developed state with no such interests. Suppose that, in order to increase its capital base, a developing state lays down a policy whereby the remittance of profits by a foreign corporation is not permitted for the first 5 years of its incorporation in the developing state. The law may not be recognized in a developed state. India has laid down certain guidelines for Indian entrepreneurs to use in the case of foreign collaboration agreements and one such guideline requires them to subject their collaboration agreements to Indian laws.¹⁴² If, in contravention of such a guideline, an action is brought in a foreign forum, it would be entirely in the discretion of such forum whether to give effect to such choice-of-law clause or not, depending on its own public policy and conflict rules. There will be conflict of interests between the two states. In such an event, the forum should consider the policies of the most closely connected state i.e. the developing state.

¹⁴² For information on these guidelines, see Compilation, supra note 24, at 86.

(c) No Connection with the Transaction-

This qualification was expressly rejected in the decision of the Vita Food Products case which stated that "... connexion with English law is not, as a matter of principle, essential."¹⁴³ This statement seems to have been unwarranted. How can a law of a state which does not have any interest in the outcome of a dispute and the decision under which law may not even be used as a precedent be the governing law? English law did not have any interest in the outcome of the dispute. If another case similar to the Vita Food Products case arises in England, this case may not be applied as a precedent. If, on the contrary, a fixed rule of law is established, it would act as a precedent.

The statement in the Vita Food Products case does not agree with one's sense of logic and rationality. Just because parties decide to choose the laws of Utopia, their choice does not and should not render all laws of the interested states inapplicable. Such chosen law, however, may be used with other external factors in arriving at the proper law.

Such an unconnected law should be treated as a mala fide choice because, even if one's imagination is stretched to the utmost, it would still not be a fair choice. Fair choice would mean a connected law and, if

¹⁴³ See supra note 123.

there is more than one connected law, then the most connected law. Since the time of the Vita Food Products decision, courts also seem to have come to a similar conclusion.

At present, judges tend to apply the test of the 'most substantial connection', or 'reasonable connection', or 'appropriate connection', in determining whether the chosen law is applicable or not.

Out of these three tests, the 'substantial connection' test seems to be the most desirable in the light of justice and fairness. Only the law which is substantially connected ought to be applied.

If there is more than one law which is substantially connected, judges should choose between either of them irrespective of any choice by parties, and if one of them is also the parties' choice, then that may be applied. Even if they have chosen a law, judges should ascertain the substantially connected law. In the case of transactions for sale of goods, there may be more than one substantially connected law. The Restatement Second states that, "as to a particular issue, a contract may have a "substantial relationship" to two or more states, it can have its "most significant relationship" to only one."¹⁴⁴ But in technology transfer transactions, it may be fairly easy to determine the substantially connected law, because it may be obvious as to which state is most closely connected with the transaction. Only a few states are, normally, interested in one

¹⁴⁴ See Restatement Second, 1971, supra note 115, at 651.

particular transaction, viz., the states of suppliers and recipients, and in the case of third state joint ventures, the state where technology is to be ultimately used.

'Reasonable connection' with transactions seems to be only one degree better than 'an interest' proposed by Prof. Currie. However, he has not defined what such interest ought to be to entitle the forum to apply its own law.

Suppose, in a management contract, that technology supplier, Corporation A, and technology recipient, Corporation C, choose the law of State X, the domicile of A. The contract is to be performed in State Z, the domicile of C. Moreover, the contract was made in State Z and payment to A is to be made there. In this case, one can safely conclude that State X which is reasonably connected and which has an interest may apply its laws, especially if the action is brought in State X. But, if one goes a step further to look for the substantially connected law, one would encounter the law of Z which would, ordinarily, be applicable. Hence, the above statement¹⁴⁵ can be modified thus, 'as to a particular issue, a foreign contract will have 'reasonable relationship' with all the states involved, it may have 'substantial relationship' with two or more states, but, it can have a 'most significant relationship' with only one.'

The Uniform Commercial Code (Sec.1-105) of the U.S.A. favours party autonomy but it limits such choice to laws with a 'reasonable relation' or connection to a trans-

¹⁴⁵ See Restatement Second, 1971, ibid.

action. It further provides that, in the absence of any such choice, a court would apply the test of 'appropriate relation'.¹⁴⁶

It would be difficult to ascertain which term, 'reasonable' or 'appropriate' connection, refers to a higher degree of connection with the applicable law. In fact, the code may have been more effective in bringing about justice if it had incorporated the 'substantial' connection test. The decision as to which law is reasonable or appropriate is subjective, as there are various degrees in them. However, the substantially connected law or the law having the 'most significant relationship' with the transaction may be objectively determined, as there would be one such law, especially in the case of technology transfer transactions.

Hence, as of now, the statement in the Vita Food Products decision seems to have only a historical and academic value.

(d) Adhesion Contracts:-

¹⁴⁶ 1 U.C.C. Sec.1-105 (1976). It states, in its subsection 1, "(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law, either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state."

An adhesion contract is a 'standard form' contract in which one of the parties usually adheres to the contract as it does not have the necessary power to negotiate and change the terms. In these types of contracts, applicable law is chosen by the stronger party and is, invariably, beneficial to it. As there is no actual consensus between parties, there is no just or real freedom of choice. This is the case of employment and insurance contracts. In such cases, the employee and the insured respectively, are comparatively weaker. Hence, any choice of law in their contracts is not permitted. Judges choose the law by the objective method. State regulation is quite common.

Is 'standard form' a necessary ingredient of an adhesion contract? Even a contract which is not in a standard form should be treated as an adhesion contract. The essence of such contracts should be the unequal bargaining power that is implied by the use of a standard form. There is no reason why all contracts between parties with unequal bargaining power should not be deemed to be adhesion contracts, in the strict sense of the term.

Prof. Bolgar, in her article, has mentioned some of the features of an adhesion contract which are, (a) the continuing and general nature of the offer, (b) the monopolistic position or at least the great economic power of the offeror, (c) a widespread demand for the goods and services offered, (d) the use of standard forms of type contracts,

the stipulations of which serve mostly the interests of the offeror and the reading, let alone the understanding of which presents difficulties to the offeree.¹⁴⁷

Consider a licensing agreement. On the one hand, the licensor is in a very strong position to bargain for what it wants, as its patents are highly in demand and it can license them to any one of a large number of potential licensees on the best of terms. On the other hand, the licensee is in a desperately weak position. It is in need of the patent and it can get it only from that one licensor. Demand exceeds supply. In such a case, though, there may outwardly be negotiations between the parties and the licensor may agree to some minor terms in favour of the licensee, odds seem to be against the licensee from the very outset. In the end, the licensee may accept all the terms, or at least all the crucial ones, to its detriment, including the applicable law which may turn out to be either the licensor's local law or some other unconnected law beneficial to it. The supplier is reluctant to choose recipient's law because it thinks that the laws of developing states are not sufficiently developed. What the licensee actually does is that it adheres to the terms offered by the licensor. In the event, would it not be just to classify such a transaction as an adhesion contract? Should there not be government regulation?

¹⁴⁷ Vera Bolgar, *The Contract of Adhesion: A Comparison of Theory and Practice* (1972), 20 Am. J. Comp. L. 53, at 54.

The scope of adhesion contracts should be broadened to cover not only contracts where one party adheres to the whole of it, but where there is an unequal bargaining power and the ultimate effect of any visible negotiations is still an acceptance of onerous clauses.

It would be right to consider technology transfer transactions between parties of developed and developing states as adhesion contracts and give them the relevant legal treatment, like overruling the law chosen by parties and applying the objective method.

3.1.1.2 B. Implied Choice of Law

Dicey, unlike Dumoulin, gave credence to the 'presumed intention' theory or the implied choice of law by the parties.

At least one can understand, though with reservations, the application of an express choice of law, on the ground that parties actually want such law to govern their contract. There is some logic behind such application.

However, it is incomprehensible why an implied choice of law should be enforced. It can be argued that if parties wanted to choose some particular law, they would have done so expressly. They would not have relied on the value judgement of some unknown judge who would look into the dark unknown recesses of their minds and guess correctly

or fairly correctly what their intentions really are. If party autonomy is considered desirable in certain types of transactions, then it should be limited to an express choice, because, in the case of an implied choice of law, judges actually look at the circumstances of the case rather than at the intention of the parties.

In two similar cases,¹⁴⁸ the language used in contracts was identical. One case was brought in a U.S. court and the other in an English court. The Supreme Court of the U.S.A. held that parties intended to submit to the U.S. law, whereas the English Court of Appeal held that parties intended to submit to the English law. If parties in the said disputes had impliedly chosen the lex fori, then their choice/intention was carried out. But if they had some other law in mind, then judges cannot be deemed to have presumed their intentions rightly. Ascertainment of the implied choice of law may enable the courts to apply the lex fori.

It has been mentioned by Cheshire that factors from which intention of the parties can be inferred are, the form of the documents involved in the contract, terminology of the contract, language used in the contract, currency in which the payment is to be made, nationality of the parties, etc. And such factors have also been supported by the jurisprudence.¹⁴⁹

¹⁴⁸ Liverpool & G.W.S. Co. v. Phenix Ins. Co., 129 U.S. 377; 129 U.S. 377; In Re Missouri Steamship Co., 42 Ch.D. 321.

There are also some general rebuttable presumptions which judges consider in order to ascertain the implied choice, or the presumed intention.

Presumptions:-

(a) Lex Fori:-

Ascertainment of the implied choice was, possibly, a good device for judges to apply the law of the forum, as it was presumed in England that a choice of forum included a choice of law as well, unless rebutted. A few centuries ago, in England, the conflict was between jurisdictions rather than between laws. The very fact that a particular forum was chosen meant that its law was chosen, as courts had the power only to apply their own law. If the applicable law was found to be a foreign law, the foreign court was considered to be the proper forum.¹⁴⁹ Due to such practice, English jurisprudence may have developed in favour of such presumption. For example, if parties chose the forum of State X, whether before or after the dispute arose, to decide that dispute, they were presumed to have tacitly submitted themselves to the law of State X.

¹⁴⁹ See Cheshire, 1974, supra note 73, at 211-212.

¹⁵⁰ See Sack, supra note 94.

Today's modern society has become highly interdependent, as private transactions of an international character between North and South, East and West have increased since World War II. In the event, more than one state may be interested in any single transaction. Application of the lex fori was prevalent in olden times when disputes were more domestic in nature and common law courts applied their own law, even in respect of cases where it was obvious that another law would be otherwise applicable. But, if forum continued to apply its own law, at the present time, it may lead to injustice, because the forum where the dispute is brought may be either unconnected or remotely connected or it may be one of the many states connected with the transaction.

Suppose that A and C of States X and Z respectively, enter into a contract to transfer technology to State Z. They choose forum F to decide their dispute, but do not choose any particular law. Suppose further that the transaction has a substantial connection with State Z, and a reasonable connection with State X. In this case, application of the lex fori by the forum F may cause injustice, not only to private interests of parties but also to public interests of State Z and, to a certain extent, those of State X. And the greater the interest of State Z, the greater would be the injustice so caused, and the outcome would be extremely deplorable if forum F is completely disinterested.

Lex fori, as a presumptive law, should have been given up a long time ago. The only advantage it has, is that judges know their own law better.

However, to satisfy the ends of justice, fairness and equity, judges should not stick to their own law alone, especially when the contract involves foreign elements.

(b) Lex Loci Contractus--:

This law, viz. the territorial law, has been presumed to be applicable since the time of Ancient Rome where the law of the state where the act was done, prevailed. It is presumed that the very fact that parties entered into a contract at a certain place means that they want to apply that law, as otherwise, they would not have contracted there.

This law, at least, has some interest in the outcome of the dispute, howsoever slight it may turn out to be, vis-a-vis the lex fori, which may, in some cases, be absolutely unconnected.

However, there have been attacks on this presumption too.

First of all, the locus contractus may be hard to ascertain, especially if the contract is made by parties inter absentes. Such ascertainment may be comparatively easier, if both parties are either from common law states or

from civil law states because then the incidents of contracts would be similar. But if they are from two different legal systems, the difficulty would be heightened. For example, in a common law state, contract is concluded at the place where acceptance is mailed, whereas in a civil law state, contract is concluded at the place where acceptance is received. Suppose that A from England and B from France enter into a contract by letter. A mails his acceptance in England, and B receives it in France. According to the English law, the locus contractus is England, whereas according to the French law, the locus contractus is France. It would depend entirely on the forum to decide as to which law (English or French) is the lex loci contractus. There is no universal rule as to what constitutes a locus contractus. Hence, determination of the lex loci contractus, brings about uncertainty or indecision as it may not be easily ascertainable.

Let us look at technology transfer transactions. Here, a distinction may be made between technology transfer contracts which are being entered into for the first time between parties, and those which are a part of a long series of various contracts based on an on-going relationship between them. In the case of the former, it may be fair to presume that there will be across-the-table negotiations between them. In this case, it may be easy to ascertain the lex loci contractus. However, in case of an on-going rela-

tionship, there may not be any face-to-face negotiations, and parties may conclude the contract by phone or telex, etc. The place of concluding the contract may not be as ascertainable as in the first example.

Secondly, the place where the contract is concluded may be accidentally chosen by the parties. For example, they may decide to sign the contract when they are passing through the territory of some state. It would be ludicrous if the law of such a state became applicable unless that state also had other connections with the contract.

Also, it may sometimes happen that negotiations occur in one state and the actual signed contract is mailed in and received in two other states. In such an event, which state would be the locus contractus - the state where negotiations were conducted or either of the other two states? Could the locus contractus mean, and include the locus negotiati?

However, it may not be proper to propose that the locus negotiati is also the locus contractus. Negotiations may take place in some state which is not deliberately chosen by the parties. Also, they may, partly, be conducted in one state and, partly, in another. Would the state, in which they were finalised, be the locus negotiati?

According to Professor Beale, the lex loci contractus should be applicable to the validity of contracts because lawyers negotiating in the locus contractus would

know only that law and hence, they would be able to advise the parties in view of that law.¹⁵¹ This supposition seems to be far-fetched.

Suppose that negotiations are being conducted in State Y, between parties of States X and Z, for a technology transfer from State X to State Z. By virtue of Beale's argument, lawyers would know the law of State Y and hence the lex loci contractus should govern the contract. Would it not, however, be logical to presume that the lawyers advising the parties from States X and Z would be the lawyers from their respective states? Parties would bring their own lawyers to State Y and would not engage some unknown lawyers from State Y to guide them in as important a venture as a technology transfer, normally, is. Application of the lex loci contractus, on the basis of Beale's argument, would not be logical.

However, some jurists like Story have rightly said that the lex loci contractus can be applied only if the contract is made there and is to be wholly performed there. Such a proposition would be even more valuable in the case of technology transfer transactions other than bare licensing agreements. In such transactions, the state where performance is to be made is the state with the most substantial connection, and if the contract is also concluded there then it would be an added contact for the application of its

¹⁵¹ Joseph Beale, "What Law Governs the Validity of a Contract" (1910), 23 Harv. L. Rev. 271.

law.

(c) Lex Loci Solutionis:-

The third presumption is the application of the lex loci solutionis. Such application is justifiable if the contract is made in that state and is to be partly or wholly performed there.¹⁵² This presumption vis-a-vis others, at least, has a logical basis for application, particularly in technology transfer transactions.¹⁵³

There can be no uncertainty as to the locus solutionis as there may be in the case of the locus contractus.

It has been argued that the locus solutionis and hence, the lex loci solutionis is unascertainable, if performance is to be made partly in one state and partly in another. This argument may hold true in the ordinary sale of goods transaction where part delivery may be made in one state and part in another. But that is not so in the case of technology transfer transactions.

In this case, even if part performance, e.g. making feasibility studies, designing the plant, etc., is executed in State X, it would be very simple to determine the

¹⁵² See Story, 1846, supra note 96, at 432.

¹⁵³ In sale of goods transactions, performance may not be fixed in a particular state, i.e. delivery of goods may be made in different states. However, in technology transfer transactions, except in case of a bare licensing agreement, performance is normally fixed, and such place will have a substantial connection with the transaction.

state in which the crucial part of the performance, e.g. construction of the plant in a turn-key project, is to be executed. Such a state, in the ultimate analysis, would and should constitute the locus solutionis and its law should govern. As, in technology transfer transactions, the locus solutionis would coincide with the state having the most substantial connection, the situation may give an added dimension to the application of the lex loci solutionis.

The opponents of this presumption claim that parties may change the locus solutionis in order to get the best deal out of such a presumption. This, also, may be true in the case of the sale of goods. For example, if laws of State X are stringent as to sellers' liability, the seller may deliver the goods in State Y where laws are less stringent, and the buyer may have to take them to State X at his own risk. But in the case of technology transfer transactions, such a changing of the place of performance by the parties in order to suit their own ends is not possible.¹⁵⁴ For example, a management contract has to be performed at a certain fixed place and stringency or leniency of law cannot change it.

Even Savigny, who endorsed freedom of choice, presumed an intention in favour of the lex loci solutionis or the law of the place of fulfilment as the law of the seat of the legal relation, in the absence of an express choice of

¹⁵⁴ A bare licensing agreement may be an exception to this proposition.

law.¹⁵⁵

(d) Lex Validitatis:-

Yet another presumption is that the law that validates the contract should apply. If there are two or more laws connected with a transaction and all except one invalidates the transaction, then the validating law should be presumed to apply. The application of the lex validitatis is based on the premise that parties assume, at the outset, that their transaction would be held valid and that such an expectation should be satisfied.

It seems as if parties' interests are paramount here. But what about the interests of the state most closely connected with the transaction and whose law may invalidate the contract? Should regulatory or mandatory rules of such a state not have precedence over mere expectations of private parties?

Application of the lex validitatis is unsound and unreasonable. Such a law should be treated as mala fide if it is not substantially connected, as it may encourage an evasion of mandatory law.

This shows that it would not be proper to rely on the implied choice of law.

¹⁵⁵ See Savigny, 1880, supra note 97, at 199 ff.

3.1.2 (2) Concluding Comments on the Subjective Method

The whole argument in favour of freedom of choice is that 'justified expectations of the parties' must be satisfied.¹⁵⁶ This may be fairly true in the case of an express choice of law but not so in the case of an implied choice of law.

An express choice may be predictable and certain, but how can an implied choice be so? No matter what presumptive law is applied, its application will depend on the judgement of each individual judge and will change from one forum to another. It is not proper to rely on an implied choice of law.

However, if the implied choice theory is turned into what Westlake formulated to be a most real connection theory, then there may be some justification for its application.

In R. v. International Trustee for the Protection of Bondholders Akt., (1937), it was held that a proper law of contract "is the law which the parties intended to apply ... If no intention be expressed the intention will be presumed by the Court from the terms of the contract and the relevant surrounding circumstances."¹⁵⁷

¹⁵⁶ In adhesion contracts, the justified expectations of the two parties may be vastly different.

¹⁵⁷ (1937) 2 All. E. R. 164, at 166 (H.L.).

This clearly shows that presumed intention should be ascertained from external factors and not be limited to the behaviour of the parties. Presumed intention theory should be abandoned in favour of the objective method, which is dealt with below.

3.1.3 (3) Objective Method-

Various theories and tests have been put forth in order to ascertain the proper law in an objective manner. We shall look at these theories/tests in order to see which theory would be better suited to determine proper law in technology transfer transactions.

3.1.3.1 A. Westlake's Theory of 'Most Real Connection'-

Unlike Dicey, Westlake, another English jurist and his contemporary, disfavoured the principle of party autonomy. He may be labelled as an objective theorist as he advocated the ascertainment of the proper law of a contract with the help of some significant external factors. He pointed out the manner in which it should be selected, thus,

"... the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has the most real connection, and

not to the law of the place of contract as such.¹⁵⁸

Westlake's theory may make a valuable contribution to the development of the applicable law in technology transfer transactions, because the state with the most real connection will be the one with the greatest interest in having its law applied to such transactions. As seen earlier,¹⁵⁹ this state would be the recipient's state.

Though Dicey's subjective theory has gained universal application, Westlake's objective theory may have influenced some of the twentieth century modern American jurists to formulate their own objective theories. Prior to Westlake, rights and obligations in a contract were deemed to have arisen in the locus contractus, and hence, the lex loci contractus applied to contracts. This practice may have prompted him to specifically denounce it in his statement.¹⁶⁰

¹⁵⁸ John Westlake, A Treatise on Private International Law (5th ed. 1912), at 305, Article 212.

¹⁵⁹ See supra pages 30-36.

¹⁶⁰ See Westlake, supra note 158.

3.1.3.2 B. Savigny's Theory of 'Seat of a Transaction'

Savigny, also of the nineteenth century, was an universalist. He tried to find a universal solution to each type of a legal relationship. His theory of ascertaining the 'seat' of a legal relation and applying its law to that legal relation appears to be similar to Westlake's theory.

Dumoulin, the proponent of party autonomy, can also be called an universalist, but he cannot be placed in the same category as Savigny. Dumoulin placed all types of contracts, whether dealing with sale of consumer goods or sale of capital goods, under one universal principle, i.e. that they should be governed by the parties' choice of law. Savigny, on the other hand, tried to differentiate between types of legal relationship. According to Savigny's theory, a contract for sale of goods cannot be treated on par with a contract for transfer of technology. Each type of contract has different consequences and hence needs to be treated differently. According to him, it is necessary 'to discover for every legal relation (case) that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat).'¹⁶¹

It may be argued that, though Savigny also seconded freedom of choice, he did so with restraint and limited it to the express choice of law. He presumed that parties' choice should be treated as the 'seat' of their legal rela-

¹⁶¹ See Savigny, 1880, supra note 97, Article 360, at 133.

tion,¹⁶² and that is where he differs from Westlake's theory which completely disregards the law chosen by parties.

Whereas Savigny preferred the lex loci solutionis, in the absence of an express choice of law, Westlake did not have any such preference. Westlake left it completely to the English courts and government to deal with each type of a transaction as they deemed fit.

Thus, from Dumoulin to Savigny to Westlake, there has been a silent and a gradual erosion of the principle of freedom of choice, and this trend has been taken up with great fervour by the present century American jurists/judges.

Let us consider each of these jurists/judges in some detail, in order to see where the theoretical trend is leading.

3.1.3.3 C. Beale's Theory of 'Vested Rights'

In the U.S.A., in the conflicts of law field, the first prominent jurist of this century was Professor Joseph Beale, whose territorial theory¹⁶³ was adopted in the First Restatement on Conflict of Laws (U.S.A.) in 1934.¹⁶⁴

¹⁶² See Savigny, 1880, id. at 199 ff.

¹⁶³ See Beale, 1935, supra note 106.

¹⁶⁴ See Restatement, 1934, supra note 107.

Beale proposed what came to be known as the 'vested rights' theory. He was of the opinion that a right or an obligation under a contract is created by the law of the place where it is made and will follow the person wherever he goes. The right is vested in the locus contractus and hence, its law should apply. He also proposed that breach of contract should be governed by the lex loci solutionis, as a right arising out of such a breach is vested in the locus solutionis.

Accordingly, the First Restatement, inter alia, provided that, 'the law of the place of contracting determines the validity and effect of a promise ...'.¹⁶⁵ It further provided that, 'the law of the place of performance should govern the breach of contract'.¹⁶⁶

Beale's theory reminds us of the ancient territorial doctrine which had been abandoned, and seems to be a step backward in the development of conflict of laws. Jurists have come a long way from the territorial doctrine and this theory would be like reverting back in time.

Beale also advocated the splitting of contracts. This would have led to uncertainty. There is a shaded area in various issues of contracts where judges would find it difficult to determine whether to apply the lex loci contractus or the lex loci solutionis. For example, a breach of contract may ultimately depend on the validity of con-

¹⁶⁵ See Restatement, 1934, id. Section 332, at 408.

¹⁶⁶ See Restatement, 1934, id. Section 370, at 447.

tract.

Though the First Restatement adopted Beale's theory, one evasive device, viz. that a clause is objectionable to public policy, could be used advantageously by the forum in order to avoid application of the fixed rule of either the lex loci contractus or the lex loci solutionis, in the interests of justice.

Beale's theory is not sound and logical and hence, even the makers of the Second Restatement on Conflict of Laws gave it a wide berth.

3.1.3.4 D. Cheatham and Reese's 'Policy Factors'

Professors Elliot Cheatham and Willis Reese introduced flexibility in the method of determining the proper law.

According to them, in the case of the existence of any statute providing for the application of any particular law, judges should apply that law. However, in the event that such a statute does not exist, they may look at the policy factors which they propounded in order to arrive at the applicable law. Judges, however, are not bound to look at these factors.

These policy factors are as follows:

- "(i) the needs of the interstate and international systems;

- (ii) a court should apply its own law local law unless there is a good reason for not doing so;
- (iii) a court should seek to effectuate the purpose of its relevant local law rule in determining a question of choice of law;
- (iv) certainty, predictability, uniformity of result;
- (v) protection of justified expectations;
- (vi) application of the law of the state of dominant interest;
- (vii) ease in determination of applicable law;
- (viii) the fundamental policy underlying the broad local law field involved; and
- (ix) justice in the individual case."

In 1957, Hessel Yntema followed suit with his own seventeen policy factors.¹⁶⁷

The Second Restatement on Conflict of Laws (Prof. Reese was its Reporter) embodied, in its article 6(2), some of the policy factors advocated by Professors Cheatham and Reese.¹⁶⁸

¹⁶⁷ See Yntema, 1957, supra, note 117, at 734-735. The policy factors are, 'uniformity of legal consequences, minimization of conflict of laws, predictability of legal consequences, the reasonable expectations of the parties, uniformity of social and economic consequences, validation of transactions, relative significance of contacts, recognition of the "stronger" law, cooperation among states, respect for interests of other states, justice of the end results, respect for policies of domestic law, internal harmony of the substantive rules to be applied, location or nature of the transaction, private utility, homogeneity of natural law, ultimate recourse to the lex fori, and the like.'

¹⁶⁸ See Restatement, 1971, supra note 115, at 10. According to it, the policy factors are, "(a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of oth-

However, ascertainment of the applicable/proper law may become easier if these policy factors are narrowed down even further and then fixed rules of law are derived therefrom, for different types of transactions. For example, in the case of technology transfer transactions, protection of justified expectations and ease in determination of applicable law may be relegated to a subordinate position. This narrowing down of policy factors and deriving of fixed rules of law will, in the end, bring about certainty and predictability of result, and also ease in the determination of the applicable law. Certainty and predictability of result and ease in the determination of the applicable law need not be considered as separate policy factors.

The weight to be given to each of these factors will vary according to the type of transaction involved. These factors do not point to a particular rule of law - whether effect should be given to the law chosen by the parties or to the law of the state most closely connected or to any other law. However, it would be easier if certain fixed rules of law can be derived from these policy factors, for different types of transactions, taking into account their different circumstances.

er interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied."

Let us consider different types of transactions.

If a transaction is regarding the sale of consumer goods like clothing, then, unless the purchaser's state has a particular interest in protecting its textile industry, it may not deem it necessary to interfere in the transaction,¹⁶⁹ and parties may be allowed to choose their own law and transact their own terms. More weight may be given to the 'justified expectations of the parties'.

Suppose the transaction concerns the sale of capital goods, like heavy machinery and equipment. In this case, purchaser's state may have some interest in seeing that the same machinery is not repeatedly purchased and that such machinery would constructively contribute to its economy through increased productivity, lower costs and larger employment. Hence, states' interests should gain more importance than private interests.

Suppose now that it is a technology transfer transaction, e.g., construction of a chemical plant. The state where such construction is to occur would have an even greater interest in the transaction and it may vie for some of its policies being interpreted in the terms of the contract. In such a case, the application of its law may become a matter of great importance. Here, the 'application of the law of the state of dominant interest' should be the relevant factor to be taken into consideration. Justified

¹⁶⁹ Such transactions may be too many and too routine for the states to interfere.

expectations of parties should be virtually ignored for the purpose of determining the applicable law.

Thus, on one end of the scale are parties' interests and on the other, states' interests. The type of transaction would and should determine to which side the scale should be tilted.

3.1.3.5 E. Auten v. Auten's Theory of 'Most Significant Relationship'

In 1954, the decision in Auten v. Auten¹⁷⁰ created a turning point in the field of contracts. Formerly, courts applied fixed rules like the lex loci contractus, the lex loci solutionis the lex fori, or a combination, in the case of splitting of contract.

In this case, the parties were a husband, Harold and his wife, Margarite who were British subjects and had lived there during their married life. When Harold was in the U.S.A. on a temporary visa, he obtained a Mexican divorce with an intent to remarry. Margarite came to New York to meet him and as a result, a separation agreement was entered into between them in New York, whereunder she agreed to refrain from suing him on the agreement. When he failed to pay the instalments, she sued in England, in 1934. In 1947, she sued in New York to obtain the past payments. The

¹⁷⁰ See supra note 116.

lower courts in New York held that New York law, which was not similar to the English law, was applicable. However, the New York Court of Appeals applied the 'most significant relationship' test or the 'dominant contacts' test, and came to the conclusion that English law was applicable. This later, came to be known as the 'centre-of-gravity' or 'grouping-of-contacts' theory.

There have been a lot of criticisms levelled against this theory, though it seems to be a sound enough proposition. Professor Currie has argued that contacts may be grouped quantitatively and hence, the real significant isolated contact may be overlooked.¹⁷¹ This, however, need not be the case. Judges are fully equipped to decide any case before them on the basis of a qualitative grouping of the contacts which a transaction has with different states. Currie seems to be underrating that intellectual ability of judges.

There are more chances of the grouping of contacts on a quantitative basis in the case of sale of goods transactions where a large number of states may be connected.

¹⁷¹ Brainerd Currie, "Conflict, Crisis and Confusion in New York," (1963) Duke L.J. 1, at 40. He has criticized it thus, "The contacts are totted up and a highly subjective fiat is issued to the effect that one group of contacts or the other is more significant. The reasons for the conclusion are too elusive for objective evaluation ... The pronouncement that the contacts with State X are the more significant has a mystical sound, as if the supreme authority had pronounced the true Nature of Things."

This need not occur in technology transfer transactions where, normally, very few states are involved in one particular transaction, viz., only the states of the supplier and the recipient, respectively, and in some cases, a third state if performance is to be made there, as in the case of third state joint ventures. In such cases, it is hard to believe that judges can come to a wrong conclusion by grouping the contacts quantitatively. Even if all contacts are in different states, the place of performance, being the most important contact, should carry more weight than all others and judges cannot err by overlooking that fact and by giving greater weight to other contacts or by totting up contacts as mentioned by Currie.

Also, the theory of the 'centre-of-gravity' of a particular transaction appears to be similar to the theory of the 'seat' of a legal relation propounded by Savigny. The 'seat' should be the state which has a special interest in a transaction vis-a-vis other states.

The court in Auten v. Auten felt that the merit of the centre-of-gravity approach is that, 'it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction 'most intimately concerned with the outcome of (the) particular legislation'.¹⁷² The court stated that, '... by stressing the significant contacts, the

¹⁷² See Auten v. Auten, supra note 116, at 102.

centre-of-gravity approach enables the court ... to reflect the relative interests of the several jurisdictions involved...¹⁷³

In other words, judges have to determine which state's interest should have precedence. This, in turn, seems to be similar to Currie's 'governmental-interest analysis', though the approach taken to arrive at the results is different in both of them. In technology transfer transactions, grouping of contacts and governmental-interest analysis would and should lead to the same conclusion, viz., the application of the law of the state having dominant interest in the transaction. Hence, by criticizing the 'grouping-of-contacts' theory, Prof. Currie seems to be criticizing his own theory.

The 'centre-of-gravity' theory also seems to be similar to 'policy factors' of Cheatham and Reese, because in order to reach the centre-of-gravity of a transaction, judges would have to take the help of the policy factors. Or, if they follow these policy factors, they should reach the centre-of-gravity of the transaction. Hence, ascertainment of the state having dominant interest with the help of either, the centre-of-gravity theory or the governmental-interest analysis, should be the mainstay in the field of international contracts, from now onwards, and an attempt should be made, with such theories, to arrive at a fixed rule of law for each type of transaction.

¹⁷³ . See Auten v. Auten, ibid.

3.1.3.6 F. Currie's 'Governmental-Interest Analysis'

In 1963, Professor Brainerd Currie came up with a brilliant theory which got a great deal of attention from the legal community. It came to be known as the 'governmental-interest analysis'.¹⁷⁴

According to Prof. Currie,

"Governmental-interest analysis is ... concerned with the ways in which the respective states are related to the parties, the events and the litigation; ... Governmental-interest analysis is also concerned with the significance of those relationships ... Governmental-interest analysis determines the relevance of the relationship by enquiring whether it furnishes a reasonable basis for the state's assertion of an interest in applying the policy embodied in its law."¹⁷⁵

According to him, a state enacts laws in order to further its policies, either political, economic, or social. And that state has a particular interest in protecting and furthering its policy by applying the particular law that embodies it. Hence, the policies or interests of states should be examined closely to see which policy of which government should get priority of protection or furtherance.

Till Currie hit upon this marvellous idea, jurists were concerned with the interests of parties to contracts and the legal relation between them and any state. States'

¹⁷⁴ See Currie, 1963, supra note 118.

¹⁷⁵ See Currie, supra note 171, at 39-40.

interests inter se were overlooked. But Currie gave them the prominence they deserved and which had been denied to them.

Westlake, Savigny and others also referred to states with substantial connection, but this was an abstract connection. It was a jurisdiction-selecting rule. The content of their substantive laws was not looked into. However, Currie stressed the law-selecting rule. It is the content of law that is more important.

Under governmental-interest analysis, courts are required to weigh the conflicting interests of different states and to apply the law of the state whose policies or interests should take priority. The decision would be made on an issue-by-issue basis rather than on the basis of the whole transaction. Though the approach may be just, it may involve a lot of uncertainty.

However, Currie, like Ehrenzweig, favoured lex fori. His motto seems to be 'when in doubt, apply the lex fori'. He proposed that only a disinterested forum was free to apply a foreign law by weighing the policies of the interested states. But if the forum had an interest in the transaction, or if the forum could not judge which interests should get priority, then, in that case, the lex fori should be applied.¹⁷⁶ This is a drawback of this theory.

¹⁷⁶ See Currie, 1963, supra note 118, at 183-184.

¹⁷⁷ See supra note 127.

Only in cases like the Vita Food Products case,¹⁷⁷ where England was a completely disinterested forum, would the governmental-interest analysis theory be really effective. But such cases are few and far between. Forum would, normally, have some connection with the transaction.

Suppose that Corporations A and B, of States X and Y respectively, enter into a joint venture agreement to build a plant in State Y. They choose the forum of State Z, the place where contract was entered into, though accidentally. It would be unfair to both, the parties and their respective states, if State Z was to apply its own local law, as envisaged by Currie's theory. State Z, being the locus contractus, has an interest in the transaction, but this should not be determinative of the outcome of the dispute. In reality, it does not have any interest in the transaction. This is where Currie's theory may prove to be ineffective. It is possible that forum Z may weigh the policies of States X and Y, but it is uncertain and it depends on forum Z. According to Currie, only a disinterested forum should weigh the policies. But he has failed to define the term 'disinterested'.

However, if the lex fori per se is removed from the picture, and if forum weighs the policies of various states, including its own, and apply the law of the state most interested in the transaction, even in cases where such forum has an interest in the transaction, then, this theory

may prove to be very valuable, particularly in technology transfer transactions, where states' policies are very much affected. Developing states' economic, social, and developmental policies have to be safeguarded if they are to be effective.

Currie had criticised the 'centre-of-gravity' theory on the ground that judges would arithmetically group contacts without weighing them qualitatively.¹⁷⁸ A similar argument can be made against his own theory - that judges may not be able to evaluate objectively the interests of different states. But that is what judges are bound to do, even in intra-state transactions where parties may plead the laws beneficial to them. Judges have to look behind such laws, at their guiding policies, and at the facts of the case, in order to decide for or against the plaintiff.

It has been mentioned earlier¹⁷⁹ that though the approaches adopted in centre-of-gravity theory and governmental-interest analysis are different, in essence, both of them look at states' interests and hence, the end result in both of them should be similar, especially in the case of technology transfer transactions.

¹⁷⁸ See Currie, supra note 171.

¹⁷⁹ See supra pages 112.

3.1.3.7 G. Cavers' 'Principles of Preference'-

In 1965, David Cavers propounded what he referred to as seven 'principles of preference'.¹⁸⁰ His sixth and seventh principles deal with contracts and he has covered the area of contracts quite succinctly. He states, in his sixth principle, as follows:

- "6. Where, for the purpose of providing protection from the adverse consequences of incompetence, heedlessness, ignorance or unequal bargaining power, the law of a state has imposed restrictions on the power to contract or to convey or encumber property, its protective provisions should be applied against a party to the restricted transaction where (a) the person protected has a home in the state (if the law's purpose were to protect that person) and (b) the affected transaction or protected property interest were centered there or, (c) if it were not, this was due to facts that were fortuitous or had been manipulated to evade the protective law."¹⁸¹

He adds in the seventh principle,

- "7. If the express (or reasonably inferable) intention of the parties to a transaction involving two or more states is that the law of a particular state which is reasonably related to the transaction should be applied to it, the law of that state should be applied if it allows the transaction to be carried out, even though neither party has a home in the state and the transaction is not centered there. However, this principle does not apply if the transaction runs counter to any protective law that the preceding principle would render applicable or if the transaction

¹⁸⁰ See Cavers, 1965, supra note 120.

¹⁸¹ See Cavers, 1965, id. at 181.

includes a conveyance of land and the mode of conveyance or the interests created run counter to applicable mandatory rules of the situs of the land. This principle does not govern the legal effect of the transaction on third parties with independent interests."¹⁸²

These two principles may be significant in the case of self-limiting statutes. States may enact such statutes to protect their nationals/residents who may have weaker bargaining power. For example, states may enact laws to the effect ~~that~~ all technology transfer transactions with their nationals/residents as importers should be subject to their own local laws.¹⁸³ Though states have legislative jurisdiction to enact such self-limiting statutes, these statutes may not be as effective as intended by the states enacting them. However a universal application/recognition of Cavers' principles may make them effective.

Cavers has classified contracts into two types of transactions, those where states have interests to protect and those where they do not. In the former type, states can dictate the terms and the applicable law. Only, in case of the latter, Cavers has advocated freedom of choice. And according to him, such a choice should be limited to a reasonably connected law.

A state has a vested interest in the safeguarding of its interests when a transaction is centered there and/or when either of the parties is its citizen and/or a resident.

¹⁸² See Cavers, 1965, id. at 194.

¹⁸³ For more information on self-limiting statutes, see supra note 130.

Thus, Cavers' theory indirectly embodies the 'centre-of-gravity' approach as well as Currie's 'governmental-interest analysis' theory. All these theories lead to the same inference - that states with dominant interest in a particular type of transaction have the right to see that it is protected, not only in their courts but also extraterritorially, i.e. in the courts of other states when they apply their conflict rules. But such an application of their law extraterritorially would largely depend on the judges of those foreign fora.

Cavers' theory is of particular importance in a technology transfer transaction where states' and parties' interests may clash. As far as traditional approaches to conflict of laws are concerned, the latter has precedence. Now, the time has come to give more importance to the states' interests.

Cavers made a particular reference to unequal bargaining power in his principles. As is evident, such unequal power is inherent in technology transfer transactions between parties of developed and developing states. Hence, Cavers' theory may be relevant in the establishment of rules of law in technology transfer transactions.

3.1.3.8 Leflar's Theory of 'Choice-Influencing Considerations'

A year later, in 1966, Robert Leflar formulated his theory of 'choice-influencing considerations',¹⁸⁴ of which the first four are similar to the policy factors proposed by Cheatham and Reese. The last one, viz. application of a better rule of law, is similar to the 'more effective, better and more useful law' proposed by Aldricus.¹⁸⁵

These 'choice-influencing considerations' are as follows:

- "A. Predictability of results;
- B. Maintenance of interstate and international order;
- C. Simplification of the judicial task;
- D. Advancement of the forum's governmental interests;
- E. Application of the better rule of law."¹⁸⁶

According to the last consideration, Leflar favours a rule-selecting principle like Currie, rather than the jurisdiction-selecting principle.

Leflar has suggested that the relative importance of considerations varies according to the area of law involved. He should also have added, 'and according to the type of transaction involved in the area of contractual

¹⁸⁴ See Leflar, 1966, supra note 121.

¹⁸⁵ See supra page 53.

¹⁸⁶ See Leflar, 1966, supra note 121, at 282.

law'. Each type of contract should have a different set of considerations or different weight being given to these considerations, in order to arrive at a rule of law for it. He has made a study of 12 diverse cases in contracts, torts, etc., and has shown that, in each case, the weight to be given to each of his choice-influencing considerations would be different.¹⁸⁷

According to Leflar, a better rule of law will be the one which, if applied, will do justice to each individual case. As centre-of-gravity theory, governmental-interest analysis, and Cavers' principles of preference propose the application of the law of the most closely connected state, they appear to be similar to Leflar's fifth choice-influencing consideration.

3.1.4 (4) Concluding Comments on the Objective Method-

According to the older approaches to choice-of-law problems, jurisdiction-selecting principle was followed. For example, Beale, in his 'vested rights' theory, advocated the application of the law of the place of contracting and the law of the place of performance. He tried to ascertain the jurisdiction whose law may be applied and not the contents of the law to be applied. Even Westlake, with his 'most real connection' theory, preferred the jurisdiction-

¹⁸⁷ For details of the cases, see Leflar, 1966, id. at 310-324.

selecting principle. But if one considers the theories of Currie, Cavers, and Leflar, they advocate the law-selecting principle rather than the jurisdiction-selecting principle for settlement of disputes. The law-selecting principle requires judges or legislators to inquire into the content of various laws, and the policies behind them. Such an analysis would be best done by judges after the dispute has arisen, as they would then know who the parties are and which state's policies are to be reviewed. But such a practice would bring in uncertainty, and would not serve the purpose of establishing fixed rules of law.

However, jurisdiction-selecting and law-selecting principles need not, necessarily, be mutually exclusive. They may be compatible and may lead to the same result, depending on which jurisdiction is selected. For example, if the jurisdiction selected is the state with the most substantial connection with the transaction, then its law would, in most cases, be the law that would do justice to parties as well as to others. However, if the jurisdiction selected turns out to be the locus contractus, or the forum of the state whose law is chosen by the parties, etc., its laws may not provide the better or the more useful or the more effective law.

But no matter which - the jurisdiction-selecting principle or the law-selecting principle - is followed in order to arrive at a rule of law, both of them should, in

the end, lead to the same choice-of-law rule. In the case of technology transfer transactions, it may lead to one applicable law, the law of the host developing state.

If one looks at the various modern approaches or theories in conflict of laws, one finds that they are more flexible and can be adapted to different situations and to different types of transactions, but they lack, to a certain degree, certainty, uniformity and predictability. These are also important in order to bring about stability in transactions so that parties as well as states will know which law will be applicable to any dispute between them.

If these modern approaches are left as they are, without any modification, they may lead to uncertainty. So, starting with these modern approaches as step No. 1, one should try to establish a fixed rule of law for each type of transaction, even though this would be a herculean task. Broad generality of rules should be avoided. There would be flexibility in these fixed rules of law, to the extent that they would be different for different types of transactions. A single rule of law should not be applied to contracts in general with certain exceptions as is the current practice.

• Chapter IV
FINAL OBSERVATIONS

In this chapter we shall see which - a fixed rule of law or party autonomy - would be more suitable for the special needs of technology transfer transactions. Even if party autonomy is found to be unsuitable, it would not, however, mean that parties' rights and obligations would be curtailed. This thesis does not deal with various substantive laws of the states; it deals with what rules of law should be established to determine which substantive law would be applicable. Whether, eventually, parties can obtain whatever terms they want, would be a matter of the substantive law determined by rules of law.

4.1 Fixed Rule of Law v. Party Autonomy-

Though the principle of party autonomy is prevalent in the international commercial community, it has been eroded to a great extent by the opposing theories of modern American jurists, mentioned in the previous chapters.

Party autonomy has been favoured because it gives effect to the justified expectations of parties. And, fixed rule of law, e.g. application of the law of the most closely connected state, is advocated on the ground that states' interests are more important than private interests of parties. As justified expectations and states' interests are at the two ends of the scale on the basis of which rules of law may be established, we shall look at bases in the shaded area in between, viz. uncertainty, uniformity and predictability of results, ease in the judicial task, etc.

4.1.1 (1) Uniformity, Predictability and Certainty of Results-

Freedom of choice has been claimed to be effective because it brings about uniformity, certainty and predictability of results. But such an argument applies as much to a fixed rule of law as to freedom of choice. In fact, a fixed rule of law would be better qualified to bring about uniformity of results; because party autonomy is subject to certain limitations.

4.1.1.1 A. Uniformity-

Party autonomy brings about only an uniformity of rule but not of result. How could such be the case if one particular chosen law is to be applied in one dispute and another chosen law is to be applied in a similar dispute, possibly even between the same parties? Even judges cannot rely on decisions based on chosen law, due to lack of certainty.

Let us suppose that party autonomy is continued in technology transfer transactions, and that in one such transaction, parties A and B choose the law of State X as the applicable law. In another very similar transaction, the same parties choose the law of State Y. Then, even in the event that similar disputes, in these two transactions, are brought in the same forum, decisions may differ. In one dispute, the decision may be in favour of A and, in the other, it may be in favour of B. Hence, even if the facts in the two disputes are similar, the decisions may differ.¹⁸⁸ This does not and should not be the result of a rule of law. As there may not be uniformity of results, the rule of party autonomy should be abandoned and new choice of law rules established.

¹⁸⁸ Also, there may be an undermining of the interests of the connected states if States X and Y are unconnected or remotely connected with the transaction.

4.1.1.2 B. Predictability and Certainty-

Another argument in favour of party autonomy is that parties can predict the consequences of their legal relationship, as they know beforehand which law would be applicable.

But as far as predictability is concerned, if there is a fixed rule of law, e.g. that the law of the host state would apply in technology transfer transactions, parties, at the time of entering into the transaction, would be able to ascertain/predict what the legal consequences of the application of such law would be. Millions of dollars may be involved in a technology transfer transaction and parties may find it worthwhile to engage lawyers in order to ascertain the legal consequences.

In fact, such predictability would be less in the case of party autonomy than in the case of a fixed rule of law, because, even though parties may predict the consequences under the law chosen by them, forum may apply a law other than the chosen law. This may not be foreseen by them at all. This may cause hardship to them and may bring about unpredictability.

4.1.2 (2) Ease in the Judicial Task-

Another factor which should be considered while establishing a rule of law is that it should relieve judges of the task of looking for the applicable law. Freedom of choice claims to fulfil this condition.

The same was decided in Siegelman v. Cunard White Star Ltd.,¹⁸⁹ where the judge stressed party autonomy with a view to lessening the burden of judges in deciding cases, and to increasing certainty of results. If a rule is decided on by legislators, it would have the same desired result. If the reasoning in Siegelman's case is upheld, then party autonomy should have been extended to other cases, e.g. cases of divorces with mutual consent,¹⁹⁰ etc.

In the case of freedom of choice, with all its limitations and qualifications, there is a lot of uncertainty as to which law should be applicable and whether choice-of-law clause should be upheld or not, and this uncertainty would also cause hardship to judges.

However, if a fixed rule of law is established for each type of transaction, then judges may have to look only at the law determined by such fixed rule of law. Applica-

¹⁸⁹ 221 F. 2d 189, at 195 (1955), (U.S. Ct. of Appeals).

¹⁹⁰ In such divorce cases, parties may not be given the right to contract as to the law applicable to a divorce action between them. If they are given such right, then courts may not be burdened with the task of ascertaining where marriage was celebrated, where matrimonial residence was established, etc. At present, fixed rules of law are established for settling the question.

tion of a fixed rule would reduce burden on judges, as such rule would direct them to the applicable law.

When one considers the subjective method, on the one hand, and the objective method, on the other, one can see that the latter seems to be quietly replacing the former. Objective method is perfectly sound and effective whereas subjective method is not. Subjective method incorporates one universal rule but the rule does not culminate in a universal and a uniform result. Though objective method consists of various theories and rules, their result appears to be the same in the end. Most theories are in favour of the application of the law of that state which has the most substantial connection with a transaction and thus, the greatest interest in having its law applied.

It would be advisable to follow the objective method in technology transfer transactions where states, especially recipients' states, have substantial interest in not allowing parties to override their laws which may be of a protective nature - protective of their citizens, and protective of their economy and development.

Prof. Leflar feels that the proper way to deal with choice-of-law problems is to wipe the slate clean of all the old rules and theories, and to start afresh.¹⁹¹ This is what should be done.

¹⁹¹ See Leflar, 1966, supra note 121, at 267.

The principle of party autonomy should be abolished and new rules be established, either independently or with the help of the theories of modern American jurists. Though their theories are flexible and may lead to uncertainty and unpredictability, they may be used to develop fixed rules of law for each type of transaction. Agreed, it is an insurmountable task, but that may be the only solution.

4.1.3 (3) Justice-

One of the purposes of settlement of disputes is to do justice to parties involved in disputes. Hence, the rule of law so established, should be such as to do justice in each individual case before a court and in cases in general which may be brought before the courts, in future.

4.1.3.1 Who Can Bring Justice-

Justice, in an individual case, may be done either by the parties by legislating for themselves, i.e. by choosing the applicable law and the forum, or by states, through either their judicial or legislative bodies.

But, justice, in all cases in general, may be done only by states, as parties do not have the power to legis-

late. It is the sovereign power of the state to legislate and bring about justice. It is the task of judges as well as legislators to provide justice, not only to the parties to a transaction, but also to others who may be indirectly involved. In the case of technology transfer transactions, many other actors are also involved, e.g. states acting on behalf of the public in general. Hence, justice should be done to all.

Cheatham-Reese's 'policy factors' indicate the divergence between various interests, e.g. justified expectations of the parties, and application of the law of the state with dominant interest. Also the interests of the two parties may be diverse. The weaker party may be interested in getting some sort of legal protection from the manipulations of the stronger party¹⁹² and, at the same time, the latter may be more interested in transacting international business. A balance has to be struck between them in order to arrive at a just solution, and to bring about justice to all the actors involved.

However, how does one arrive at a just solution? The task may be undertaken either by judges or by legislators.

1. The Judiciary-:

¹⁹² For example, the weaker party (a borrower) may need some legal protection against high interest rates which may be imposed by the stronger party (lender).

Imparting justice is not an easy task because justice to one may cause injustice to another. This is more emphasized in the case of conflict of laws. Suppose there are two conflicting laws, one of which is chosen by the parties, and the other of which is normally applicable in the absence of choice by them. Under the former law, a decision may be rendered in favour of one party, and under the latter, decision may be in favour of the other. Which law, in such a case, would bring about justice in the dispute? If the choice-of-law clause is upheld, it may cause injustice to the other party, who may have a legitimate right under the other most closely connected law. In such a case, the most closely connected law should be applied by courts wherever situate. The state having the most substantial or the most significant connection should be granted legislative jurisdiction under international law.

Judges will have to look for some rules which may direct them to a particular law. The applicable law must have a substantial connection in order to do justice.

However, as the judiciary would be defining justice and establishing fixed rules of law on a case-by-case basis, the evolution of the rules of law may take a long time. Also, conflicts between judges of the same state may hinder the establishment of rules of law.¹⁹¹

¹⁹¹ Even the establishment of the principle of party autonomy took a long time in the U.S.A., as some judges rejected it as against the public policy while others favoured it. See infra notes 217, 218, 219 and 231.

2. The Legislators-:

7

If it is left to the judiciary to formulate choice-of-law rules on a case-by-case basis, considerable uncertainty would result. In the alternative, if legislators are to be burdened with such an insurmountable task, they may tackle it, either through national legislation or through international agreements.

(a) National Legislation-:

Legislators may develop choice-of-law rules by enacting national legislation. States have the authority to legislate and establish rules of law on a national level, but without any endorsement from the international community, these laws and rules will not be fully effective. Take, for example, self-limiting statutes.¹⁹⁴ States, of their own volition, may develop a choice-of-law rule. Some developing states, like Mexico, India, Peru, China, etc., have enacted legislation/guidelines on technology transfer transactions whereby the applicable law has been restricted to their own law. They have been establishing a choice-of-law rule that 'the law of the recipient's state should govern technology transfer contracts'. Let us take a look at some of the legislation.

¹⁹⁴ For more details, see supra note 130.

(i) Mexico-

Mexican legislation presents an excellent example of national legislation in the field of transfer of technology. Article 7 of its enactment titled 'Law on the control and registration of the transfer of technology and the use and exploitation of patents and trademarks' 1982,¹⁹⁵ deals with the matter. It states,

Article 7. "The acts, agreements or contracts referred to in Article Second hereof, shall be governed by Mexican laws, or by the applicable international agreements or treaties to which Mexico is a party, should this be the case."¹⁹⁶

However, even such a positive law on the matter may not be a panacea for the problems of such transactions. Unless other states recognize the law, its effectiveness will be very limited.

(ii) India-

India is another state which has tried to regulate these transactions. But, its regulations are in the nature of guidelines for Indian entrepreneurs and not in the nature of any positive legislation. In Guidelines for Industries, 1982,¹⁹⁷ Chapter IV deals with Foreign Collaboration. It,

¹⁹⁵ See Compilation, supra note 24, at 98-105.

¹⁹⁶ See Compilation, id. at 98.

inter alia, states,

"4. The following are the guidelines which the entrepreneurs are required to take note of in negotiating proposals for foreign collaboration so as to ensure that such proposals conform to the policies of Government:

(xii) Collaboration agreement will be subject to Indian laws."¹⁹⁸

In view of the ineffectiveness of the statutes it is hard to think that these guidelines will have any effect on the international level. The Guidelines may not have the legal force which a positive law may have.

(iii) Peru-

Peru is another state which has enacted law on the matter. Its 'Rules for establishing the precise rights and obligations of the licensors and licensees of foreign technologies, marks or patents, of 23 Oct. 1981,¹⁹⁹ deals with choice of law in its article 16 which states,

Article 16. Every contract shall contain at least clauses dealing with the following:

(f) Express submission to the laws ... of Peru."²⁰⁰

¹⁹⁷ Guidelines for Industries , " Policy and Procedures", Part I (Jan. 1982), Government of India, Ministry of Industry, Department of Industrial Development; See also, Compilation, id. at 83-87.

¹⁹⁸ See Compilation, id. at 85-86.

¹⁹⁹ Published in El Peruano, 28 Oct. 1981; See also, Compilation, id. at 135-141.

²⁰⁰ See Compilation, id. at 138.

Unlike the previous two laws, under Peruvian law, parties have to make an express submission to its laws. This clause may have more recognition in a foreign forum. The foreign forum which permits a choice-of-law clause by parties on the basis of its reasonableness, will give effect to a clause choosing Peruvian law, as Peru will have reasonable connection with the transaction. However, if the foreign forum where action may be brought also has some connection with the transaction, then Peruvian law may not be applied.

But would Mexican, Indian, and Peruvian enactments be recognized and enforced by other states, or even by the parties themselves? These statutes do not seem to be enforcement-effective except in the states where they are enacted. For example, Mexican law may not be effective in the enforcement of its substantive provisions outside Mexico, even when one of the parties is a Mexican, unless parties submit to the judicial jurisdiction of Mexico. In the absence of a choice of law by parties and in the event that the action is brought outside Mexico, the foreign forum may impose its own notions of what is the applicable law. It may, however, consider the Mexican statute, but such consideration would be within its discretion.

Thus, a self-limiting or choice-of-law statute may not have any recognition on its own. To be fully effective as intended by the states which enacted them, i.e. to give

them an extra-territorial effect when the state have a significant relationship with the transaction, they may need to be accompanied by a universal rule of law which may be established by an international agreement.

(b) International Legislation (agreement):

Universality desires uniformity of results independent of the forum, whereas particularism requires each forum to make its own conflicts of law rules. In this sense, there is universality in the application of a certain state's law, e.g. the law of the state most connected with the transaction. If judiciary is allowed to establish choice-of-law rules or if legislators are permitted to establish such rules through national legislation, there would be prevalence of particularism rather than universalism. Universalism is more desirable where transactions are connected with more than one state.

National legislation by itself is not adequate to establish a rule of law unless it is uniform in all states, which is impossible. To this end, i.e. to establish a universal rule of law, there should be development of such a rule on an international level. Legislators (governments) of different states must meet at an international conference and consider the various laws that may be involved in a particular type of a transaction. They can start with technol-

ogy transfer transactions as it may be easier for them to know the policies of the states involved. Every action is difficult, till it is done. Gradually, there may be a consensus, though it seems, at present, a remote possibility.

The applicable law may be different if technology transfer transaction is between parties of two or more developed states. There are a large number of such transactions and as there is a mutual flow of technology, interests of all the states may be similar. In such a case, one could concede to a partial freedom of choice. But then, the key question would be the exact definition of the expressions, the 'developed state' and the 'developing state', which is very difficult. Today's developing state may be tomorrow's developed state. Hence, only one rule need to be established for transactions between developed states inter se, between developing states inter se, and between developed and developing states.

(i) Andean Pact-

Development of such regulations on a regional level has been undertaken by the Andean Group of states²⁰¹ and the same is incorporated in Decision 24 of the Commission.²⁰²

²⁰¹ They are Chile, Bolivia, Peru, Columbia, and Ecuador.

²⁰² Common regulations governing foreign capital movement, trademarks, patents, licenses and royalties (1971); See also, Compilation, supra note 24, at 227.

Though this Decision does not expressly provide for the applicability of the law of the recipient state, it does so indirectly. It has established that recipient's state should have national jurisdiction over the disputes.

First paragraph of its article 51 states,

Article 51. No instrument pertaining to investment or to the transfer of technology may contain a clause removing disputes or conflicts from the national jurisdiction and competence of the recipient country, or permitting subrogation by states of the rights and actions of their national investors.²⁰³

If the recipient's state has jurisdiction, then, it can enforce its self-limiting statute, even in the absence of an universal rule of law to the effect that the law of the recipient state should apply. However, such regional agreement will be effective only if both, the supplier and the recipient, are from either of these states. If supplier is from a developed state which is not a party to this agreement, then, such regional agreement may not be effective or it may be effective to a limited extent.

(ii) EEC Convention on the Law Applicable to Contractual Obligations-

Another regional agreement which deals indirectly with technology transfer transactions²⁰⁴ is the EEC Conven-

²⁰³ See Compilation, id. at 231.

²⁰⁴ This agreement deals with all contractual obligations in general.

tion on the Law Applicable to Contractual Obligations.²⁰⁵

Its article 3, which guarantees freedom of choice, inter alia, states,

"1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract."²⁰⁶

However, in the absence of any express or implied choice, article 4 provides that the contract will be governed by the law of the most closely connected state. It, inter alia, states,

"1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected...

2. ... it shall be presumed that the contract is most closely with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or incorporate, its central administration..."²⁰⁷

It is difficult to define the term 'characteristic performance'. However, it has been said that, "it is the party whose performance is the characteristic one who has the more active role to play and thus it may reasonably be supposed is the more likely to need to consult the law during per-

²⁰⁵ See (1980) O.J.C. 282; See also, (1980), 19 I.L.M. 1492.

²⁰⁶ See 19 I.L.M., id. at 1493.

²⁰⁷ See 19 I.L.M., ibid.

formance."²⁰⁸ But what about cases where characteristic performance is in a state other than the habitual residence or the central administration? In such cases, the active party may consult the other law. Hence, the article should have been thus, "the law of the most closely connected state would be the law of the state where the characteristic performance is to be effected." This is so because the place of performance, normally, has a substantial or the closest connection with the transaction, and especially so in the case of technology transfer transactions.

As the EEC Convention is between states with similar ideologies, it has a limited application under international law. Developing states, who are not parties to it, are not obliged to abide by the provisions therein dealing with freedom of choice.

(iii) U.N. Conference on Code of Conduct on Transfer of Technology-

The above-mentioned two agreements or instruments are between states with similar ideologies i.e. between developing states inter se, and between developed states inter se. When all these states tried to draft an agreement or a code of conduct on transfer of technology, their ideologies proved irreconcilable.

²⁰⁸ Anthony J. E. Jaffey, "The English Proper Law Doctrine and the EEC Convention" (1984), 33 Int'l. and Comp. L.Q. 531, at 548.

Developed states were all in favour of freedom of choice for the parties whereas developing states wished that these transactions be governed by their laws, thus restricting parties' freedom of choice.

As the UNCTAD Code seems to have failed to provide a fixed rule of law, the same can be established gradually, beginning with its incorporation in bilateral treaties, then into regional treaties, and then in multilateral ones.

There is, at present, in prevalence, a practice of applying some mandatory provisions in a connected foreign law, while applying another law generally. For example, forum F may apply some mandatory rule of law of State X, though the applicable law may be its own law or the law of State Y. But such application of mandatory rules will depend on the discretion of forum F. Such ad hoc application of some mandatory rules may not render them fully effective. Also, parties will not be certain as to whether a particular mandatory rule will be applied or not. Hence, it should be the foreign law itself together with its mandatory and directory rules which should be applied and not just some particular rule of the foreign law, as, in that case, the real purpose of the enactment of such a rule may not be served.

Party autonomy need not be divested of completely from the law of contracts. It may be used as a casting vote. If in a legal relationship, it is found that two

states have an almost equal dominant interest in the transaction, then parties' choice between either of them, can be held conclusive. But if the choice is for a third law, such choice may be disregarded. However, in the case of technology transfer transactions, it may not be possible for two states to have an equal dominant interest and hence, party autonomy should not be used.

In the case of most technology transfer transactions, there is involved the construction of some plant, e.g., a turn-key project or a management contract, in the territory of developing states, and which is then handed over to the other party. Hence, it should be treated in the same manner as a conveyance of an immoveable property. And, there should be an exclusive application of the lex situs of that property, and no freedom of choice should be permitted. Such lex situs would coincide with the lex loci solutionis as well as the law of the state most connected with the transaction, and this would give an added dimension to the application of such law.

It is evident from this Part that legislative jurisdiction will not be effective unless there is a judicial jurisdiction accompanying it, which we shall examine in the next Part.

Part 2

PROPER FORUM

Chapter V

PROPER FORUM TO SETTLE DISPUTES ARISING UNDER A CONTRACT

One has already seen that jurists, like Brainerd Currie, Albert Ehrenzweig, etc., attributed undue importance to the lex fori. Forum is important because its public policy, its mandatory provisions have to be applied even though the proper law of contract is different.

Therefore, one has to determine, properly and justly, the forum competent to take jurisdiction over a particular dispute because, ultimately, the outcome of the dispute will depend on the forum where the action is brought.

These prescribed fora are, what may be termed 'bases of jurisdiction'.

First of all, let us see what is 'proper forum'. The proper law of a contract has been defined by Dicey, Westlake, etc., but the proper forum of a contract has nowhere been defined. It would be difficult to define the concept of a 'proper forum'. If determined by the subjective method, a proper forum would be the forum chosen by the parties. But such a forum may not have any connection with the transaction. In the event, the basis of such a choice would not be just or fair to various interests involved in

the transaction. What should, then, be the criteria for defining the term 'proper forum'? Should the proper forum be based on minimum contacts/connection, reasonable connection, substantial connection, or the most significant relationship with the transaction? For the purpose of this thesis, the 'proper forum' would be the forum determined by the objective method, on the basis of its substantial connection or the most significant connection with the transaction. However, as an issue can have the most significant relationship with only one state,²⁰⁹ it may be the proper criterion to localize a particular transaction in a particular state.

At the beginning of this chapter, the term 'jurisdiction' will be defined and the two methods, viz. the subjective method and the objective method, will be studied.

Lastly, a conclusion will be drawn as to which method is better, especially in the case of technology transfer transactions.

5.1 1. Jurisdiction-

Jurisdiction (in international law) can be referred to the power of any sovereign state to exercise its authority over certain categories of persons, things and legal relationships, either through its legislative or its

²⁰⁹ See Restatement Second, 1971, supra note 115, Section 203, at 651.

judicial body.²¹⁰

Jurisdiction is 'the power of a state to create interests which, under the principles of the common law, will be recognized as valid in other states'.²¹¹

The main point is that the matter must have been 'properly' (in the international sense) brought before a judicial body. That is, the forum should be a proper forum. Various bases of jurisdiction determine whether a particular forum is a proper forum or not. Hence, judicial jurisdiction is the competence of a state, in international law, to decide a case brought before its courts.

Henceforth, for the purpose of this paper, the terms 'jurisdiction' and 'judicial jurisdiction' will be used interchangeably.

A court may have the competence to decide a dispute either on the basis of jurisdiction in personam over either party, but preferably the defendant in the dispute, or on the basis of jurisdiction in rem over things like immoveable property.

States have general jurisdiction in personam if the defendant is present in their territory (in common law states) or if he is their national (in civil law states). However, in certain cases, states may assume jurisdiction if

²¹⁰ Jurisdiction may also mean the actual territory or limits within which such judicial or legislative power may be exercised.

²¹¹ See Restatement, 1934, supra note 107, Section 42, at 69.

defendant is domiciled or is habitually resident therein, or if the transaction (in our case, a contract) has some contact with the state, e.g., if the state is the forum chosen by the parties by an express or an implied agreement, or if it is the forum loci contractus, the forum loci solutionis, or the forum whose law has been chosen by the parties, etc.

A state will have jurisdiction in rem if the subject-matter of dispute is located within its territory, e.g. if immoveable property is located therein.

No matter what type of dispute is involved, a state should have some contacts with the transaction in order to exercise jurisdiction over it and to entertain any dispute arising out of it.

An action arising out of a contractual obligation is considered to be an action in personam and hence, in most part, jurisdiction in personam will be dealt with in this thesis, and jurisdiction in rem will be omitted.

5.2 2. Determination of the Proper Forum-

For the purpose of this thesis, bases of jurisdiction will not be classified into general/original and assumed jurisdiction.²¹² Instead, another classification will be used. These bases of jurisdiction will be divided

²¹² This is the classification used under English law. See Schmitthoff, 1954, supra note 72, at 427-436.

into two methods, viz., subjective method and objective method of determination of the proper forum. The assumption of jurisdiction by a state on the basis of its being the forum chosen by the parties, either expressly or impliedly, will be included in the subjective method. All the other bases, viz., the forum where defendant is present or ordinarily resident or domiciled, etc., the forum loci contractus, the forum loci solutionis, or the forum whose law has been chosen, will be included in the objective method.

5.2.1 (1) Subjective Method-

Recently, parties to a contract, in most states, have been given the right to choose the forum where actions, arising from their contractual relationship may be brought. They may make an express or an implied choice. The forum where an action can be brought on the basis of such choice has been established under the principle of submission.²¹¹

5.2.1.1 A. Express Choice of Forum-

(A) General:

²¹¹ See Schmitthoff, 1954, id. at 423.

Parties may agree, in an express manner, on a particular forum where disputes that may arise between them, in future, may be brought. Such a forum is termed as the 'forum prorogati'. Such forum prorogati, in effect, ousts the rightful jurisdiction of the forum where disputes may have been brought, in the absence of such choice.

Suppose that parties A and B choose State Z as the forum in lieu of State Y, which would have been the proper forum in the absence of such choice. Then, State Z is forum prorogati and the agreement is a prorogation agreement for it. State Y is ousted of its jurisdiction and is forum derogati and the same agreement is a denogation agreement for it.

At present, in some jurisdictions, parties are granted the right to choose the forum where they can bring any disputes between them, on the ground that expectations of parties are of prime importance. However, such recognition of parties' choice is of recent origin, especially in common law states like England, the U.S.A. and Canada.

In England, choice-of-forum clauses were held to be valid on the basis of the general principle that parties should abide by their contracts'.²¹⁴

²¹⁴ Racecourse Betting Control Board v. Secretary for Air (1944) 1 Ch. 114 (C.A.).

²¹⁵ (1958) 1 All. E.R. 333; (1958) 1 W.L.R. 259 (C.A.).

In The Fehmarn case,²¹⁵ the English Court of Appeal held that, as a general rule, choice-of-forum clauses are valid.²¹⁶

In the U.S.A. in the Muller case,²¹⁷ the U.S. Court of Appeals for the Second Circuit held that a reasonable choice-of-forum clause would be held valid. However later, in Carbon Black Export v. S.S. Monroza²¹⁸ the U.S. Court of Appeals for the Fifth Circuit held the choice-of-forum clause invalid as against public policy. The principle of freedom of choice as to forum has been accepted in the U.S.A. with the U.S. Supreme Ct. decision in M/s. Bremen v. Zapata Off-Shore Co.²¹⁹ where the forum chosen by the parties was completely unconnected with the transaction.

In this case, the parties were Unterweser Reederei GmbH, a German towing company and Zapata Off-Shore Co., a U.S. company. They contracted for towage of an oil rig, Chapparal belonging to the latter, by a tug, Bremen, belonging to the former, from the Gulf of Mexico to Italy. They chose English forum for settlement of disputes between them. Zapata brought an action in Tampa, Florida in contravention of the choice-of-forum clause. The District Court, relying

However, in this particular case, the English court entertained the suit brought in contravention of the choice, on the ground that contacts with the chosen forum were minimal.

²¹⁷ Wm. H. Muller & Co., Inc. v. Swedish-American Line Ltd., 224 F.2d 806 (2d Cir. 1955).

²¹⁸ 354 F. 2d 297 (5th Cir. 1956).

²¹⁹ 407 U.S. 1 (1972).

on the Carbon Black decision, held the choice-of-forum clause invalid. However, the U.S. Supreme Ct. held the clause valid, on the ground that it was reasonable even though transaction had no connection with the forum, England. In an action brought by Unterweser in England, English court held the clause valid and entertained the suit,²²⁰ even though it was connected with the transaction only on the basis of such choice-of-forum clause.

It is argued that freedom of choice brings certainty and uniformity to any dispute. This, however, is not true because there are some limitations to such freedom of choice. Parties are not allowed to choose any forum they deem fit to settle their disputes.

In this part, some mention will be made of the laws of some common law and civil law states, in order to get a better idea of the position of party autonomy as a determinant of proper forum.

According to Dicey & Morris, "The court has jurisdiction to entertain an action in personam against a person who submits to the jurisdiction of the court."²²¹

It is further stated, "This rule of the common law is confirmed by Order 10, r.3 which provides as follows:

"(1) Where-

²²⁰ Unterweser Reederei GmbH v. Zapata-Off-Shore Co., The Chaparral, (1968) 2 Lloyd's Rep. 198.

²²¹ See Dicey and Morris, 1973, supra note 126, para 16, at 167.

(a) a contract contains a term to the effect that the High Court shall have jurisdiction to hear and determine any action in respect of a contract, or apart from any such term, the High Court has jurisdiction to hear and determine any such action..."²²²

The U.S. Restatement Second provides that, "a state has power to exercise judicial jurisdiction over an individual who has consented to the exercise of such jurisdiction."²²³

According to Prof. Castel, in Canada, "voluntary submission in actions relating to breach of contract often are based on the agreement of both parties...The law of the various provinces recognizes the validity of such contracts."²²⁴

Ontario Rules of Civil Procedure also permit parties to choose the forum where an action between them may be brought. An Ontario court may assume jurisdiction if parties agree to submit to it.²²⁵

²²² See Dicey and Morris, 1973, id. Rule 21, at 168-169; See also, Rules of the Supreme Court, Order 10, r. 3.

²²³ See Restatement Second, 1971, supra note 115, Rule 32, at 130.

²²⁴ J.G. Castel, Conflict of Laws: Cases, Notes & Materials (4th ed. 1978), at 5-4.

²²⁵ Ontario Rules of Civil Procedure, O. Reg. 560/84 as amended to Jan. 1, 1985 (hereinafter cited as Ontario Rules). Its Rule 17.02(f)(iii) states, "A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims, (f) in respect of a contract where, (iii) the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract."

Now, let us examine the law of the civil law states.

According to Prof. Lenhoff, "As for the French law, the principle of the freedom of the parties to settle their problems by contract is fundamental; and this is also true in regard to jurisdiction."²²⁶

He further states, "As a rule, the (German) Code of Civil Procedure regards an express agreement in which the parties have chosen a court as a factor establishing competence of the chosen court."²²⁷

However, according to Prof. Perillo, "It (The Italian Code of Civil Procedure) provides that derogation of Italian jurisdiction is not permitted²²⁸ except in certain cases."

As per Prof. Lenhoff, "According to the current view taken of Spanish law, an agreement to such an effect (the exclusion of Spanish courts) is not valid.... Portuguese law exhibits the same aspect."²²⁹

It is evident from the above-mentioned provisions in various states that the more developed of the developed states have been more liberal in granting to the parties the

²²⁶ See Arthur Lenhoff, "The Parties' Choice of a Forum: Prorogation Agreements" (1960-61), 15 Rutgers L. Rev. 414, at 440 (hereinafter cited as Lenhoff).

²²⁷ See Lenhoff, id. at 455.

²²⁸ See Joseph M. Perillo, Jr., "Selected Forum Agreements in Western Europe" (1964), 13 Am. J. Comp. L. 162, at 165 (hereinafter cited as Perillo).

²²⁹ See Lenhoff, supra note 226, at 445.

freedom of choice, than the less developed of the developed states like Spain, Portugal, etc.

This, however, does not mean that there are no exceptions or limitations on such freedom in the former category of developed states. Such limitations are in prevalence there as well. All limitations will not be found in all states. Some states may consider choice-of-forum clauses beyond the power of private parties, or they may limit it to a reasonable choice; others may exclude this kind of agreement from certain areas of the law. In some cases, the choice may be forced upon one party by the other which has greater economic power - possibly in an adhesion contract - or both parties may try to use the stipulation for undesirable purposes.²³⁰ These exceptions or limitations are dealt with below.

(B) Exceptions:

(a) Objectionable to Public Policy:

Public policy plays an important role in determining whether a chosen forum will assume jurisdiction or not. The forum prorogati has to ascertain whether an action is objectionable to its public policy or not, and also whether a prorogation agreement per se is against its public policy.

²³⁰ See Kurt H. Nadelmann, "The Hague Conference on Private International Law and the Validity of Forum Selecting Clauses" (1964), 13 Am. J. Comp. L. 157, at 158.

or not.

The U.S. courts have decided time and time again that ousting of a proper jurisdiction is against public policy²³¹ and hence, have held prorogation agreements to be invalid and unenforceable.

Similarly, in England, the ousting of proper jurisdiction is against public policy, especially when English courts are the ones to be ousted of their proper jurisdiction. The English courts may consider an ouster of foreign jurisdiction as valid. But they may be reluctant to be ousted of their own jurisdiction, where parties have chosen a foreign forum overriding a proper English forum and an action is brought in an English court in contravention of such choice.

In Addison v. Brown (1954),²³² where a U.S. court was ousted of its jurisdiction in favour of English jurisdiction, the latter held that, "although it may be contrary to the public policy to oust the jurisdiction of English courts, I cannot think that it is the public policy of England to oust the plaintiff in English courts from suing in an agreement, assuming that it is otherwise actionable, on the ground that that agreement purports to oust the juris-

Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174 (1856); Meacham v. Jamestown F & C.C.R.R. Co., 105 N.E. 653, 211 N.Y. 346 (1914) (N.Y. Ct. App.); Carbon Black Export v. S.S. Monrosa, 254 F. 2d 297 (5th Cir. 1958).

²³² (1954) 1 W.L.R. 779; (1954) 2 All.E.R. 213.

diction of a foreign court."²³³

A prorogation agreement may be treated to be of a procedural nature and only the clause embodying the choice of forum may be deleted from the contract. However, the subject-matter of contract may itself be repugnant to the public policy of the forum where action has been brought. In this case, the whole contract together with the choice-of-forum clause may be held invalid.

Suppose that England has some interest in a contract in restraint of trade. Parties have chosen a foreign forum where such contracts are valid. However, an action is brought in England in contravention of such choice. English court may invalidate the choice because of the nature of the contract the substantive provisions of which violate its public policy. If such choice is held valid, the English court may have to dismiss the action and the same contract may be upheld in the chosen forum where a subsequent action may be brought.

It is to be noted here that public policy of the forum prorogati or the forum in which the action may be brought (it may or may not be the forum derogati) is relevant in determining whether it has jurisdiction or not. The public policy of the forum derogati (if the action is not brought there) is held to be irrelevant. In the event that the public policy of the forum derogati does not permit an ouster of its jurisdiction in a particular type of agree-

²³³ (1954) 2 All.E.R. 213, at 217.

ment e.g. an agreement which involves a public law, and the forum prorogati recognizes such an agreement, then such a forum derogati does not seem to have any remedy to force parties to submit to its jurisdiction, even though it has some positive law on the matter, as we shall see later.

In fact, even in cases where the law of the forum derogati is the proper law, the forum prorogati is not bound to look at the public policy of such a forum derogati, and this may lead to injustice. However, according to Prof. Cheshire, "It is ... rarely that contracts valid under a foreign proper law are denied enforcement in England as being contrary to the public policy of the forum."²¹⁴

But what about contracts which are invalid under their proper law, but valid in England? Would English courts entertain suits arising out of them or not?

As the forum derogati would have been the proper forum, in the absence of such derogation/prorogation, its public policy is extremely relevant, and should be considered in the forum in which action is brought, as the forum derogati would have a substantial interest in the outcome of the dispute.

(b) Existence of Statutory Limitations/Compulsory Rules:

²¹⁴ See Cheshire, 1974, supra note 73, at 230.

The only recourse that a forum derogati may have against theousting of its jurisdiction may be to enact statutes to prevent or prohibit the same. They are statutory limitations or compulsory rules which, by their very nature should not be contravened by an agreement to the contrary. Though they cannot be contravened in a purely domestic dispute, in the case of an international dispute, parties may be able to evade their application by choosing a foreign forum, either expressly or impliedly.

If parties to an agreement or subject matter of an agreement are subject to the natural/original/general jurisdiction of the forum derogati, then they are subject to its laws. In such a case, the forum prorogati should not assume jurisdiction. For example, if the proper forum does not recognize a choice-of-forum clause, the forum prorogati should not have the competence to decide the dispute. Here, the problem of contacts (connection) may also arise. What would happen if proper forum (forum derogati) had the most significant connection but the forum prorogati (where the action is brought) had some minimum connection? According to Prof. Currie's theory,²³⁵ the forum prorogati would apply its own law and public policy, if it has an interest in the dispute, and if there has been no choice of law by the parties.

²³⁵ See supra note 118.

Most states have some type of statutory limitation or compulsory rule against derogation of their jurisdiction.

According to Prof. Lenhoff, "... (T)here have, probably everywhere, been enacted, by means of legislation, compulsory rules securing local jurisdiction over insurance companies."²³⁶ Based on specific statutory restrictions, in both France and Germany, derogation clauses in insurance contracts are believed to be ineffective.²³⁷

In Germany, ... no derogation agreement is permitted in individual labor cases, or in cases in which one party has taken advantage of his superior economic or social leverage.²³⁸

According to Prof. Lenhoff, Spanish law does not allow any derogation agreement and Portuguese law permits such clause only in contracts between foreigners, to be performed abroad and does not involve any property in Portugal.²³⁹

Similarly, the Italian Code of Civil Procedure provides that derogation of Italian jurisdiction is not permitted by contract except in a pecuniary (obbligazione) case between aliens or between an alien and a citizen who is neither a resident nor a domiciliary of Italy.²⁴⁰

²³⁶ See Lenhoff, supra note 226, at 424.

²³⁷ See Perillo, supra note 228, at 165.

²³⁸ See Perillo, ibid.

²³⁹ See Lenhoff, supra note 226, at 425.

²⁴⁰ See Perillo, supra note 228, at 165.

Prof. Eek states that, in Scandinavian countries, in the field of commercial law, forum selection clauses are prohibited for certain matters by special statutory regulation. For instance, a claim for annulment of a Swedish patent or of a registration in Sweden of a trademark can be tried by a Swedish court only.²⁴¹

This would also be the case of self-limiting statutes, i.e. statutes which delineate the parameters of their scope and application.²⁴²

Suppose that a developing State X enacts a statute whereby any choice of a foreign forum in technology transfer transactions in which any of its nationals, residents, or domiciliaries, etc. is an importer of technology, would be invalid. Even then, such state cannot force parties to submit to its jurisdiction if they do not want to. So long as other states do not recognize the validity of such legislation, and entertain any disputes between the parties, such legislation may not have any effective force. However, if the decision in foreign State Y against the resident of State X is to be enforced in State X, then such self-limiting legislation in State X may bar such enforcement. But if the resident has some assets in State Y, the decision would be enforced as against these assets and the self-limiting statute of State X would be ineffective. There-

²⁴¹ See Hilding Eek, "The Contractual Forum: Scandinavia" (1964), 13 Am. J. Comp. L. 173, at 176-177.

²⁴² See supra note 130.

fore, a universal general principle or rule of law is needed for recognition and enforcement of such a law. National legislation has to be accompanied by some fixed rule of law supporting it.

Hence, we return time and time again to the same question - how can such statutory regulations be enforced if parties decide to sue in a foreign forum, in contravention of such regulations?

(c) Forum Non Conveniens:

Actually, forum non conveniens is a concept separate from choice-of-forum clauses. A forum can dismiss a suit on the basis of its being a forum non conveniens, even in the absence of choice-of-forum clauses. It is a common law concept.

An action may be brought in a forum, in contravention or by virtue of a choice-of-forum clause. Such forum is not bound to entertain the suit. It has discretion to either entertain it or dismiss it, depending on the facts of each individual case.

In Unterwaser Reederei case, Diplock, L.J., stated that, "there is ... undoubtedly a discretion on the part of the Court ... to refuse to allow service of the writ outside the jurisdiction, despite the contractual term in the contract".

See supra note 220, 164.

This shows that even an English court may not validate a choice-of-forum clause in a contract if it so deems fit.

(i) Action Brought in Contravention of a Choice-of-Forum Clause-

If a suit has been brought in a forum in contravention of a clause choosing a foreign forum, the first-mentioned forum may dismiss the suit, especially if it does not have any connection with the transaction, and if the chosen forum has some connection. But it may entertain the suit if it also has some connection/contacts with the transaction.

It may, however, not dismiss the suit even though it is unconnected, if plaintiff is not guaranteed a similar remedy in the chosen forum. It would balance the interests of parties to ascertain whether plaintiff would be ensured of justice in the chosen forum or not, and whether such chosen forum would be grossly inconvenient to him or not.

Suppose that parties A and B choose the forum of State X. However, A brings an action against B in the forum of State Z. If forum X does not have any personal jurisdiction over B and if forum Z is uncertain whether forum X would give effect to parties' choice or not, then forum Z may not dismiss the suit or it may do so conditionally.

The existence of a clause granting jurisdiction to a foreign forum would lay the onus on the plaintiff to prove that the clause is unjust and unreasonable. The plaintiff would have to prove that the forum where the action is brought is a forum conveniens and that the chosen forum is a forum non conveniens.

Section 84 of the U.S. Second Restatement on Conflict of Laws provides,

"A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff."²⁴⁴

Section 80 of the said Restatement states,

"The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair and unreasonable."²⁴⁵

However, in its comment under section 80, it states that

"such a provision, however, will be disregarded if it is the result of over-reaching or of the unfair use of unequal bargaining power or if the forum chosen by the parties would be a seriously inconvenient one for the trial of the particular action."²⁴⁶

A major drawback of Section 80 is that the forum where action is brought will determine the reasonableness test. In fact, such a test should be made by the state with the most substantial connection. In the alternative, there should be some generally laid down standards as to what is

²⁴⁴ See Restatement Second, 1971, supra note 115, at 251.

²⁴⁵ See Restatement Second, 1971, id. at 244.

²⁴⁶ See Restatement Second, 1971, ibid.

fair and what is reasonable. The criteria of reasonableness will change from one state to another and from one judge to another in the same state.

Take the case of M/s. Bremen v. Zapata Off-Shore Co.²⁴⁷ In this case, the U.S. Supreme Court established the reasonableness test in American jurisprudence and allowed the parties to bring the suit in the chosen forum on the ground that the choice was reasonable even though England did not have any connection with the transaction. Suppose the suit had been brought in Germany rather than in the U.S.A. In such a case, would the choice have been held reasonable? German court may have set aside the choice on the ground that London had no contact with the transaction and hence, it was an inconvenient forum and choice was unreasonable. The test is subjective and takes away considerable certainty as to the forum where an action can be brought.

In Mittenthal v. Mascagni (1903),²⁴⁸ the U.S. court found that most of the factors connected the transaction with the chosen forum, Italy, and hence, it dismissed the suit.

In Wm. H. Muller & Co., Inc. v. American-Swedish Line Ltd. (1955),²⁴⁹ the U.S. court held that the choice of the Swedish forum was not unreasonable and held itself to be

²⁴⁷ See supra note 219.

²⁴⁸ 183 Mass. 19, 66 N.E. 425 (Supreme Judicial Ct. of Mass.).

²⁴⁹ See supra note 217.

a forum non conveniens.

Let us look at two English cases on point. In The Fehmarn case (1958),²⁵⁰ the English Court of Appeal found that the chosen forum, Russia, had only minimal contacts whereas it had many. It held itself to be a forum conveniens and invalidated the choice.

In another case, The Eleftheria (1970),²⁵¹ the Greek law and forum were chosen. Though most of the evidence was in England, the applicable Greek law was different from English law. Hence, English court declined jurisdiction and upheld the choice.

When one looks at these various cases, one finds that there is a lot of uncertainty involved and parties, if they have chosen a forum, may be at a loss to know whether their choice will be held valid or not. There is a paradox

²⁵⁰ See supra note 215.

²⁵¹ (1970) P. 94; (1969) 2 All. E.R. 641; (1969) 2 W.L.R. 1073; 113 Sol. Jo. 407; (1969) 1 Lloyd's Rep. 237. It established certain factors which may be considered by the English court when exercising its discretion over the matter. They are (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgement obtained; (iii) be faced with a time bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

here. The choice is permitted in conflicts of laws because it is said to lead to certainty. But such choice does not bring about certainty.

Let us now consider a technology transfer transaction. Suppose that Corporation A of State X and Corporation B of State Y enter into a contract to transfer technology to State Y. They agree on State X as their forum. But A brings an action against B in State M. Forum M will ascertain the facts and may find that it does not have any contact with the transaction and dismiss the suit, or require B to submit to the jurisdiction of State X. Forum M will determine the reasonableness of the parties' choice and may come to the conclusion that the choice is reasonable, as State X has some connection with the transaction. But, as we have seen earlier, State Y, the recipient's state, has more contacts than State X, the supplier's state. However, contacts with State Y may not be considered at all by forum M. This would not really do justice to the parties, especially B, who may have to defend itself in yet another forum.

Here, A had an opportunity to bring an action in State X, but it did not. In the event, it should forfeit its right to bring the action in the chosen forum. Forum M should ignore the clause, ascertain which state has the most contacts with the transaction and require A and B to bring an action there.²⁵²

²⁵² See Restatement Second, 1971, supra note 115, Section

Forum M may, however, consider the contacts with State Y and come to the conclusion that it is the forum conveniens and require the suit to be brought in State Y i.e. it may not recognize the choice-of-forum clause at all. But this decision would be left to the discretion of forum M, a forum which does not have any connection with the transaction, and hence, there would be lack of certainty and predictability.

(ii) Action Brought by Virtue of a Choice-of-Forum Clause-

If an action is brought in the forum chosen by the parties, such forum may declare itself to be a forum non conveniens and, to that extent, such declaration acts as a limitation on the validity of such clauses. Hence, it would be proper to mention here that even though choice-of-forum clauses are prima facie valid, courts have discretion to deny them any effect, depending on the facts of each case. The decision would be in the discretion of each individual judge, though the facts of the case are also important. One judge may give more weight to some criteria whereas another

84, at 253. Its Comment (e) states, "... an inappropriate forum under the rule of this Section must dismiss the action outright, or do so conditionally (as by requiring that the defendant stipulate to accept service of process and not plead the statute of limitations in some second state that is deemed a more convenient forum), or else stay the action pending institution of suit and service of process upon the defendant in a more convenient forum."

judge may give more weight to other criteria in order to determine whether it is a forum conveniens or not.

In a case where an action is brought in a chosen forum, the onus lies heavily on the defendant to prove that the clause was unjust and unreasonable and that such forum is not convenient.

Sections 80 and 84 of the U.S. Second Restatement on Conflict of Laws deal with the matter.²⁵³ If the chosen forum considers itself to be unreasonable and inconvenient, it may set aside the choice, provided that a more appropriate forum is available to the plaintiff.

In Gulf Oil Corp. v. Gilbert (1947),²⁵⁴ the U.S. Supreme Court laid down criteria as to what is reasonable. It stated that,

"Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgement if one is obtained. The court will weigh relative advantages and obstacles to a fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex", "harrass", or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favour of the defendant, the plaintiff's choice of forum should rarely be disturbed."²⁵⁵

²⁵³ See Restatement Second, 1971, id. at 244 and 251.

²⁵⁴ 330 U.S. 501, 91 L Ed 1055, 67 S. Ct. 839 (1947).

²⁵⁵ 330 U.S. 501, at 508, 91 L.Ed. 1055, at 1062.

In Goodwine v. Superior Court of Los Angeles,
(1965),²⁵⁶ it was stated that,

"In determining the applicability of the (forum non conveniens) doctrine, the court must consider the public interest as well as the private interests of the litigants. The court must consider such factors as the ease of access of proof, the availability and costs of obtaining witnesses, the possibility of harassment of the defendant in litigating in an inconvenient forum, the enforceability of the judgment, the burden on the community in litigating matters not of local concern, and the desirability of litigating local matters in local courts."²⁵⁷

Such considerations or factors are relevant in a technology transfer transaction. Most evidence and witnesses would be available in recipient's state. Judgment would be easily enforceable there, especially if parties are present or have some assets therein. The local public, besides the litigants, may be interested in the outcome of the dispute. The plant which has been built would be located in the host state and could be easily inspected by court officials or witnesses, if necessary. In the case of a joint venture between a multinational organization and a comparatively smaller corporation in recipient state, the former may not be inconvenienced to litigate in recipient state as it can be deemed to have been doing acts/business there, but the latter may find it difficult to take its witnesses abroad.

²⁵⁶ 407 P. 2d 1, 63 Cal. 2d 481, 47 Cal. Rptr. 201 (1965).

²⁵⁷ 407 P. 2d 1, at 4.

A relevant case on point is Copperweld Steel Company v. Demag-Mannesmann Boehler (1973).²⁵⁸ In this case, DeMag was a German engineering firm who furnished plans and specifications for the construction of a casting plant at Warren, Ohio, for the plaintiff. The plant was actually built by another contractor. It was completely finished and turned over to the plaintiff. The plaintiff sued for breach of contract as it contended that the plant did not operate satisfactorily. The printed part of the contract contained a clause submitting disputes to the court in the area where the supplier had its main office, i.e. Germany. Plaintiff contended that this clause was not negotiated by them. It brought an action in the U.S. court in contravention of this clause. The U.S. District Court held the clause unreasonable and it gave a variety of reasons.

It stated that,

"The plant in question located at Warren, Ohio, may be the subject of intensive inspection during trial. The plant was in part fabricated in this country by the Birdsboro Corporation. All records regarding the operation of the plant are here. Plaintiff's personnel who operated the plant are here. All of the plaintiff's personnel who engaged in the negotiation of the contract in issue are here. Certain of the defendants' personnel involved in the sale are located in the United States. Practically everything done in connection with this transaction has been done in the English language. Similarly all witnesses are English speaking. To conduct this litigation before a German court would require translation with its inherent inaccuracy."²⁵⁹

²⁵⁸ 54 F.R.D. 539 (W.D.Pa. 1972); 347 F.Supp. 53 (W.D.Pa. 1972); 354 F.Supp. 571 (W.D.Pa. 1973).

²⁵⁹ See 54 F.R.D. 539 (W.D.Pa. 1972) at 542.

Defendants cited the Bremen case,²⁶⁰ but the court held that the two cases were not similar. It stated,

"It was the German engineers who had expanded their horizons into the United States. They maintained an office in Pittsburg and solicited business there. Their business will hardly be encouraged if they insist on trying the case in Germany because of a formal clause which applied to their export of machinery when they were really performing engineering services here."²⁶¹

This may mean that the U.S. court also recognizes the importance of technology transfer transactions which is evident from the fact that it did not validate the choice-of-forum clause. If this could happen between parties of two developed states, it may happen between parties of developed and developing states.

English law has laid down very high standards that would make it very difficult for defendants to prove that English forum is a forum non conveniens. A mere balance of convenience is not enough.²⁶² English court would not normally set aside a choice-of-forum clause unless defendant proves that the suit was brought in a manner which is vexatious and oppressive to him.²⁶³

The terms 'vexatious' and 'oppressive' are vague and relative according to the circumstances of each case.

²⁶⁰ See supra note 219.

²⁶¹ See 354 F. Supp. 571 (W.D.Pa. 1973) at 573.

²⁶² See Cheshire, 1974, supra note 73, at 124-125.

²⁶³ See Cheshire, 1974, id. at 124.

Suppose that Corporation A of State X and Corporation B of State Y enter into a contract in State Y to be performed there. They choose English forum though the applicable law is that of State Y. All evidence is located in State Y. Whereas A is a large corporation, B is comparatively small. Here, English court may hold itself to be a forum non conveniens, on the ground that the choice is 'oppressive' to the defendant.

Hence, it may be said that a discretionary power lies in the forum where action has been brought, to determine whether it is a convenient forum or not. But, though it may be a convenient forum as compared to the chosen forum, there may be another even more convenient forum where action could have been brought. This is provided for in art. 84 of the Second Restatement.²⁶⁴ But will it really help the recipient state if it is not the chosen forum and the action is not brought there even when it contains in its law a prohibition against choice of forum by the parties?

5.2.1.2 B. Implied Choice of the Forum-

Just as parties may choose a forum, expressly, before a dispute arises, so also, they may choose a forum impliedly, after a dispute has arisen. Such a choice may be evident from a unilateral action on the part of the plain-

²⁶⁴ See Restatement Second, 1971, supra note 115, at 251.

tiff in bringing the action in a forum and then, a unilateral action on the part of the defendant in appearing in that action.

Under English law, if plaintiff brings an action in an English court, and defendant (accepts service of process, either personally or through an agent, he is deemed to have voluntarily submitted to the jurisdiction of the English court. Later on, he cannot object to such jurisdiction, or to the binding nature of the judgement.²⁶⁵

Under section 32 of the U.S. Second Restatement on Conflict of Laws²⁶⁶ U.S. courts can acquire jurisdiction on the basis of consent of the defendant. Acceptance of the process and a mere appearance in the U.S. court is sufficient for such court to establish jurisdiction over him.

Though, in the civil law states like Germany, the defendant can impliedly submit to the jurisdiction of their courts,²⁶⁷ there is a major difference between them and the common law states.

In France and Germany, there is no need for the service of process for the establishment of jurisdiction.²⁶⁸

²⁶⁵ See Dicey and Morris, 1973, supra note 125, at 167-168.

²⁶⁶ See Restatement Second, 1971, supra note 115, at 130; See also, supra note 223.

²⁶⁷ See Lenhoff, supra note 226, at 455; See also Ernest G. Lorenzen, The Conflict of Laws Germany, 39 Yale L. J., (1929-30), at 825, (hereinafter cited as Lorenzen, 1929-30).

²⁶⁸ See Ernest G. Lorenzen, The French Rules of the Conflict of Laws, 36 Yale L. J., (1926-27), at 738 and 747 (hereinafter cited as Lorenzen, 1926-27); See also Lor-

A mere appearance by the defendant in their courts is not enough.²⁶⁹

In Germany, under article 39 of the Code, 'an implied agreement is deemed to exist where the defendant, without having raised an objection to the competence of the court, pleaded to the merits of the case.'²⁷⁰ Hence, if the defendant did not plead on the merits, he can apply to set aside the default judgement rendered against him.²⁷¹

It is, however, important to note that though the parties may submit to the jurisdiction of a particular court, the court has the discretionary power to decline jurisdiction, on grounds similar to the exceptions mentioned in the 'express choice of the forum.'²⁷²

enzen, Lorenzen, 1926-27). See also, Lorenzen, 1929-30, id. at 816.

²⁶⁹ See Lorenzen, 1929-30, id. at 825.

²⁷⁰ See Lenhoff, supra note 226, at 455, fn. 271.

²⁷¹ See Lenhoff, id. at 456.

²⁷² As these exceptions have already been discussed hereinbefore, they will not be repeated here; See supra pages 155-173.

5.2.2 (2) Concluding Comments on the Subjective Method-

When courts give effect to the parties' choice, whether express or implied, these courts are giving primary importance to private interests rather than states' public interests. This practice may be possible in the case of transactions involving sale of goods, which are numerous, and which may be difficult to regulate strictly.

As is evident, even when there are statutory regulations in effect in a forum derogati, it cannot force parties to submit to its jurisdiction. This proves that the legal structure is so established that parties can take advantage of the many loopholes granted to them.

But, in the case of technology transfer transactions, where states' interests are as important as or even more important than the parties' interests, the subjective method is not advisable or even desirable.

Hence, if need be, the parties' choice of forum may be considered only as an additional factor/contact in determining, objectively, the proper forum.

5.2.3 (3) Objective Method-

Besides subjective method which has been adopted by various states recently, there is objective method which has been used traditionally by states in order to determine

whether they had jurisdiction over disputes or not. These are the bases or factors on which jurisdiction may be based. This thesis shall deal with each of them separately.

5.2.3.1 A. Forum Where the Defendant is Present or Ordinarily Resident or Domiciled-

Common law courts entertain actions on the basis of the presence of defendants within their territory. Under English law, defendant need not be domiciled or ordinarily resident in England. According to Dicey and Morris, an English court will exercise personal jurisdiction if the defendant is in England.²⁷³ This practice has been followed because of the English procedural requirement of service of process/writ on defendants. English courts cannot serve the process on a defendant outside their territory unless the defendant has designated an agent to receive such service in England, he has waived such service or the case falls within the scope of Rule 23.²⁷⁴

Even a few hours' presence of the defendant in England has enabled English courts to establish jurisdiction

²⁷³ See Dicey and Morris, 1973, supra note 125, Rule 20, at 158. It states, "The (English) court has original/general jurisdiction to entertain an action in personam if, and subject to Rules 21 to 23 only if, the defendant is in England and served there with the writ in the manner prescribed by statute or statutory order."

²⁷⁴ See Dicey and Morris, 1973, id. at 168-169.

over him,²⁷⁵ though the defendant can plead that the English court is a forum non conveniens.

English courts may assume jurisdiction if the defendant is domiciled or ordinarily resident in England even though he may be outside England at the time of service.²⁷⁶

Under English law, a foreign corporation has to file the name and the address of a person authorised to accept service of process on its behalf. In the alternative, service may be made by sending the writ to its place of business in England, if it carries on business there. Service may also be made by leaving a copy thereof with the chairman, president, etc., of the corporation.²⁷⁷

Suppose that A of State X and B of State Y enter into a contract to transfer technology to State Y. England has no contact whatsoever with the transaction. While A and B are on a brief visit in England, A brings an action against B, in England. Here, though the English court may decline jurisdiction on the facts of the case, it may a priori take jurisdiction and B may have to defend and plead forum non conveniens. This would cause hardship to B, in such a case.

²⁷⁵ See Cheshire, 1974, supra note 73, at 79-80.

²⁷⁶ See Dicey and Morris, 1973, supra note 125, Rule 23(3), at 176, (Rule 23(3)), which states, "The court may assume jurisdiction if in an action begun by the writ relief is sought against a person domiciled or ordinarily resident in England."

²⁷⁷ See Dicey and Morris, 1973, id. at 164.

Under U.S. law too, presence of the defendant is a primary basis for assumption of jurisdiction.²⁷⁸ But U.S. courts may take jurisdiction over a U.S. domiciliary not present there,²⁷⁹ over a person resident therein,²⁸⁰ or over a U.S. national and citizen of the United States.²⁸¹

Under the Restatement Second, a foreign corporation may be served with the writ by serving it on the agent of such corporation,²⁸² if it does business in the state,²⁸³ or if it does any act in the state.²⁸⁴ Also, the U.S. court may exercise jurisdiction over a foreign corporation whose acts outside the United States have effects in the United

²⁷⁸ See Restatement Second, 1971, supra note 115, Section 28, at 121. It states, "A state has power to exercise judicial jurisdiction over an individual who is present within its territory whether permanently or temporarily."

²⁷⁹ See Restatement Second, 1971, id. Section 29, at 123, which states, "A state has power to exercise judicial jurisdiction over an individual who is domiciled in the state."

²⁸⁰ See Restatement Second, 1971, id. Section 30, at 124, which states, "A state has power to exercise judicial jurisdiction over an individual who is a resident of the state unless the individual's relationship to the state is so attenuated as to make the exercise of such jurisdiction unreasonable."

²⁸¹ See Restatement Second, 1971, id. section 31, at 127, which states, "A state has power to exercise judicial jurisdiction over an individual who is a national or citizen of the state unless the nature of the individual's relationship to the state makes the exercise of such jurisdiction unreasonable."

²⁸² See Restatement Second, 1971, id. Section 44, at 173.

²⁸³ See Restatement Second, 1971, id. Section 47, at 175.

²⁸⁴ See Restatement Second, 1971, id. Section 49, at 179.

States, unless it is unreasonable.²⁸⁵ According to Schultz, a defendant has to have some contacts with the U.S.A., otherwise U.S. courts cannot extend the long-arm jurisdiction over a non-resident defendant.²⁸⁶

In Canada too, courts can entertain an action in personam if defendant is served with the writ of summons.²⁸⁷ In the case of foreign corporations, writ may be served on certain specified officers of the corporations if these corporations are doing business in Canada.²⁸⁸

Ontario Rules of Civil Procedure provide that a service may be made by leaving a copy thereof with some officer of the corporation.²⁸⁹

As per article 14 of the French Civil Code, "A foreigner, even if not residing in France, may be cited before French courts for the execution of obligations by him contracted in France with Frenchman; he may be brought

²⁸⁵ See Restatement Second, 1971, id. Section 50, at 178-179.

²⁸⁶ Mathew Schultz, "Note: Minimum Contacts in Contract Cases: A Forward-Looking Reevaluation" (1982), 58 Notre Dame L. Rev. 635, at 636.

²⁸⁷ James G. McLeod, The Conflict of Laws (1983), at 79, (hereinafter cited as McLeod, 1983).

²⁸⁸ See McLeod, 1983, id. at 83.

²⁸⁹ See Ontario Rules, supra note 225. Its Rule 16.02(c) states, "Where a document is to be served personally, the service shall be made, on any other (i.e. other than a municipal corporation) corporation, by leaving a copy of the document with an officer, director or agent of the corporation, or with a person at any place of business of the corporation who appears to be in control or management of the place of business."

before the courts of France for obligations by him contracted in foreign countries towards Frenchman."²⁹⁰

Article 15 of the French Civil Code provides: "A Frenchman may be brought before a court of France for obligations contracted in a foreign country, even with a foreigner."²⁹¹ This criterion used in France is based on 'nationality' criterion rather than on 'presence' followed in England, etc.²⁹² According to Lorenzen, a fundamental difference between the French and the Anglo-American notions arises from the fact that the jurisdiction of the French courts is affected vitally by the nationality of the parties to the suit.²⁹³

It seems that in Germany too, nationality or habitual residence criterion is followed. According to Cohn, 'the incorporation of the nationality test into the German law of conflicts of laws is the most striking development of the nineteenth century in this field of law'.²⁹⁴

²⁹⁰ John H. Crabb, on, The French Civil Code as amended to July 1, 1976 (1977), at 25 (hereinafter cited as French Code); See also, Lorenzen, 1926-27, supra note 268, at 742.

²⁹¹ See French Code, id. at 26; See also, Lorenzen, 1926-27, id. at 743.

²⁹² See supra pages 177-178.

²⁹³ See Lorenzen, 1926-27, supra note 268, at 738.

²⁹⁴ E.J. Cohn, "Conflict of Laws" in Manual of German Law, Vol. II, (E.J. Cohn ed. 2nd ed. 1968), 94, at 97 (hereinafter cited as Manual).

Cohn further states that, 'when German private international law refers to the concept of 'domicile', it should mean 'habitual residence'.²⁹⁵

This discrepancy between 'presence' and 'nationality' may lead to conflicts of jurisdiction between England and France.

Suppose a Frenchman enters into a contract in England with an Englishman, to perform an act in England. In this case, both parties will be able to sue in either of the states, provided the Englishman is presently residing in England.

Now, reverse the example. The Frenchman enters into a contract in France with an Englishman residing in England, to perform an act in France. Here, the Frenchman will be able to sue in either state, whereas the Englishman can sue only in France, unless the Frenchman has some other link with England.

This may lead to great discontent between the parties because one party may be able to sue in either of the connected states whereas the other cannot, and some sort of harmonization of rules of law is necessary.

The fundamental rule of the French law governing jurisdiction, going back to Roman law, is that the defendant is to be sued at his domicile.²⁹⁶

²⁹⁵ See Manual, id. at 99.

²⁹⁶ See Lorenzen, 1926-27, supra note 268, at 738-739.

In French law, service of process within the state does not confer jurisdiction.²⁹⁷

According to Prof. Lorenzen, "Jurisdiction based on personal service is not recognized at all in Germany. German law starts with the general proposition that a person may be sued at his domicile with respect to all actions."²⁹⁸ A person may also be sued in Germany if he has been a resident there for some length of time.²⁹⁹ German courts may assume jurisdiction over foreign corporations if they have any branches in Germany.³⁰⁰

As both criteria, viz., presence and nationality, are not without some advantages, it would be advisable for a court to establish jurisdiction if defendant is either a 'domiciliary' or a 'resident' or a 'national' and 'present' in the territory. Only then, will there be certainty and foreseeability as to where he may be sued.

5.2.3.2 B. Forum Loci Contractus-

Under the Roman law, a state assumed jurisdiction if it was the forum loci contractus.³⁰¹ Since then, this

²⁹⁷ See Lorenzen, 1926-27, id. at 738.

²⁹⁸ See Lorenzen, 1929-30, supra note 267, at 816.

²⁹⁹ See Lorenzen, 1929-30, id. at 817.

³⁰⁰ See Lorenzen, 1929-30, id. at 818.

³⁰¹ See Savigny, 1880, supra note 97, at 199.

has been one of the accepted bases for the exercise of jurisdiction.

If a particular forum is the place where contract is entered into, then any dispute arising out of that contract may be brought in that forum.

An English court may serve a writ outside its jurisdiction if the dispute has some connection with England. According to Dicey and Morris, Rule an English court may assume jurisdiction if a contract is made in England.¹⁰² In this case, English court will serve process outside England.

For example, if A and B of States X and Y respectively, enter into a contract in England for the transfer of technology from State X to State Y, then if either of the parties brings a suit in England, an English court may assume jurisdiction over the suit, though England may have no other connection with the transaction. It is permitted to serve writ outside England.

Such an assumption of jurisdiction by a forum loci contractus has been condemned by the German jurist, Savigny. According to him, a forum loci contractus where the obligation originated is in itself accidental, transito-

¹⁰² See Dicey and Morris, 1973, *supra* note 125, at 178-179. Its Rule 23(6)(i) states, "The court may assume jurisdiction if the action begun by the writ is brought against a person not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul, or otherwise affect contract, or to recover damages or obtain other relief in respect of the breach of contract, being (in either case) a contract which was made in England."

ry, and foreign to the substance of the obligation and to its further development and efficacy.¹⁰³

Like the English law, article 420 of the French Civil Code also recognizes forum loci contractus as a basis for assuming jurisdiction, in commercial transactions.¹⁰⁴

But how can one justify such an assumption of jurisdiction, when, as in the above example, the forum is otherwise absolutely unconnected with the transaction. It may not have any interest in the outcome of the dispute. By assuming jurisdiction, it may oust the 'proper' forum of its rightful jurisdiction.

Also, there are many differences in the incidences of contractual elements like offer and acceptance, between the common law and the civil law states.¹⁰⁵ Nowadays, contracts are negotiated on the phone or by telex and it would be very difficult to ascertain the forum loci contractus.

Moreover, a technology transfer transaction may involve a long negotiating process which would make determination of the forum loci contractus very difficult.

Such assumption of jurisdiction by an otherwise unconnected forum may lead to irrational consequences as the lex fori plays an important role in some aspects of the suit

¹⁰³ Savigny, 1880, supra note 97, at 198.

¹⁰⁴ See Lorenzen, 1926-27, supra note 262, at 740.

¹⁰⁵ Under the civil law system, contract is concluded where the acceptance is received; under the common law system, contract is concluded where the acceptance is mailed or sent.

even when the proper law is a foreign law. For example, a forum may apply its public policy though such policy is contrary to the public policy of the proper forum.

Suppose that A of State X and B of State Y enter into a contract (e.g. a contract in restraint of trade), which is legally permitted in both States X and Y, and is to be performed in State Y. However, by some accident, contract is concluded in England. Then, if an action is brought, subsequently, in England, and English court assumes jurisdiction under Rule 23(6)(i), the contract may be held invalid as against English public policy. This may result in the undermining of the laws and policies of State X and State Y.

Hence, it would be advisable to discard the forum loci contractus as a basis for assuming jurisdiction. This factor may be and should be considered relevant only when such forum has some other extraneous connection with the transaction as well, e.g. if, besides being the forum loci contractus, it is also the forum domicilii of the defendant or the forum loci solutionis of the contract, etc.

5.2.3.3 C. Forum Loci Solutionis-

This is yet another base for assumption of jurisdiction. The forum where contract is performed is a more valid base than the forum loci contractus.

Roman law recognized this base besides the forum loci contractus.³⁰⁶

English law does not expressly give any acknowledgement to this base. It rather considers itself to have jurisdiction, (i) if the breach is committed in England; or (ii) if the breach is committed outside England, but such breach precludes the performance to be made in England.³⁰⁷

The Province of Ontario (Canada), also has a similar rule, Rule 17.02(f).³⁰⁸

The present situation in England and Ontario does not seem to be based on realistic notions. It would be a rare case where a contract was broken in England but was to be performed outside England. Generally, a contract is bro-

³⁰⁶ See Lorenzen, 1929-30, supra note 267, at 822; See also, infra note 309.

³⁰⁷ See Dicey and Morris, 1973, supra note 225, Rule 23(7), at 183. Rule 23(7) states, "The court may assume jurisdiction if the action begun by the writ is brought against a defendant not domiciled or ordinarily resident in Scotland or Northern Ireland, in respect of a breach committed in England of a contract made in or out of England, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of England that rendered impossible the performance of so much of the contract as ought to have been performed in England."

³⁰⁸ See Ontario Rules, supra note 225, Rule 17.02(f)(iv). It, inter alia, reads thus: "A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims, (f) in respect of a contract where, (iv) a breach of the contract has been committed in Ontario, even though such breach was preceded by or accompanied by a breach outside Ontario that rendered impossible the performance of that part of the contract that ought to have been performed in Ontario; "

ken where it is to be performed.

It is possible for a party to intimate in England to the other party that he intends to commit breach of contract which was to be performed by him in State X. But, would such an intimation result in a breach in England or in State X? Though breach may have started in England, it should be deemed to have concluded in State X.

Moreover, such place of breach may be accidental. Suppose that A of State X and B of State Y entered into a contract to perform in State Y. When both were accidentally in England, A informed B that he did not intend to perform his part of the contract in State Y. It would be ludicrous if B were allowed to sue A in England on the ground that it is the place of the breach of the contract. He may sue A on the ground that A is present in England. But that is a different point with which one is not concerned here, and has already been discussed.

Prof. Lorenzen states, "In Roman law, suit might be brought in the place where a contract was to be performed. This is still the law of Germany today."¹⁰⁹

Article 420 of the French Civil Code also permits the forum loci solutionis to assume jurisdiction. In commercial transactions, the plaintiff may bring his suit ... (2) before the court of the district in which ... the goods were to be delivered; or (3) before the court of the dis-

¹⁰⁹ See Lorenzen, 1929-30, supra note 267, at 822-823.

strict where the payment was to be made.¹¹⁰

It would be advisable to consider the forum loci solutionis as the proper forum. As Savigny has suggested, the expectations of parties are directed towards the fulfilment of the contract.¹¹¹ And such expectations are fulfilled when and where the performance is made.

This is especially so in the case of a technology transfer transaction, where a contract is entered into for the purpose of 'transferring the technology'. Parties' motivation is directed towards such transfer. Performance is made and expectations are fulfilled when the 'transfer' is completed. In the event, it may be just to assume that the place where such transfer is made would and should be the proper forum.

Also, the place of performance has a vested interest in the transaction, unlike the forum loci contractus which may be wholly unconnected. In some transactions for the sale of goods, the place of performance may be fixed for some ulterior motive other than the ordinary fulfilment of the contract, e.g., to take advantage of less stringent laws.

Suppose that A of State X contracts to sell goods to B of State Y. State Y has strict laws regarding seller's liability whereas State Z does not have such laws. A may, therefore, agree to deliver the goods in State Z and B may

¹¹⁰ See Lorenzen, 1926-27, supra note 268, at 740.

¹¹¹ See Savigny, 1880, supra note 97, at 199.

have to take them to State Y at his own risk. Here, the place of performance may not have a vested interest in the transaction.

But, such an eventuality is practically impossible in technology transfer transactions, except maybe in the case of bare licensing agreements. The place of performance is fixed for each transaction. Parties cannot change it to avail themselves of any leniency in various laws.

In most transactions between parties of developed and developing states, in addition to the licensing of technology, supplier renders some services, e.g. building of a plant, installation of machinery, management, and/or supervision, etc., in the recipient's state. Hence, the recipient's state has a greater interest in the transaction. Performance in the recipient's state cannot be avoided. But, payment of royalties or technical fees may be made in any state.

Performance of the supplier will, in most cases, be fixed whereas that of the recipient may not be. However, the performance by the former is the essence of technology transfer transactions, and hence, the place of such performance should have judicial jurisdiction to decide the disputes.

5.2.3.4 D. Forum of the Applicable Law-

This base is considered under English law which permits English courts to assume jurisdiction in cases where English law is applicable.¹¹²

In England, in the olden days, if a suit was to be decided by English law, then English courts used to assume jurisdiction. But in present times, when choice of law has been accepted as a general rule, such an approach by the English courts is obsolete.

Suppose A of State X and B of State Y enter into a contract to transfer technology to State Y and agree on the English law as the applicable law. In the event that A sues B in an English court, the court may assume jurisdiction rather than decline it, on the ground that its law is applicable. When parties agree on a particular law, it is limited to the substantive positive law of that state. But, in this example, if English court assumes jurisdiction, it may also apply its procedural law, public policy, mandatory provisions, etc. Hence, not only may there be an over-stepping in the assumption per se of jurisdiction but there may also be an over-stepping in the application of its law. And this

¹¹² Dicey and Morris, 1973, supra note 125, Rule 23(5)(iii), at 179. Rule 23(6)(iii) states, "The court may assume jurisdiction if the action begun by the writ is brought against a person not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul, or otherwise to affect a contract, or to recover damages or obtain other relief in respect of the breach of contract, being (in either case) a contract which is by its terms or by implication governed by English law."

should be avoided in the interests of the international legal community.

Province of Ontario also contains, in its Rules of Civil Procedure, a provision¹¹¹ similar to the Rule 23(6)(iii) stated by Dicey and Morris.

Such an assumption of jurisdiction would not be just and proper in any type of a contract, including technology transfer transaction.

However, an English court may have a valid argument for assuming jurisdiction under Rule 23(6)(iii) in cases where its law has been objectively determined to be the proper law, on the basis of the 'centre-of-gravity' test or the 'most significant relationship' test. In such cases, it would be the state having the most substantial connection with the transaction and so, it will have a substantial interest in the transaction.

In technology transfer transactions, it is evident that the proper law, if objectively determined, may, in most cases, be the law of the recipient's state. In such a case, recipient's state may properly assume jurisdiction.

¹¹¹ See Ontario Rules, supra note 225, Rule 17.02(f)(ii). It reads thus, "A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims, (f) in respect of a contract where (ii) the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario."

The question of jurisdiction should be determined separately from the question of proper law. They are two separate concepts and should be treated as such. Hence, in the above example,¹¹⁴ even if English law is applicable, jurisdiction should lie with State Y, the recipient's state.

5.2.3.5 E. Forum Situs of the Property-

There is an established rule in both, the civil law and the common law systems, that the forum where property is situated or found would constitute the proper forum for actions in rem, and it has an exclusive jurisdiction over such actions.

In the case of actions which are mixed; involving both, in personam and in rem actions, e.g. a contract involving property, they may be brought in the forum domicilii of the defendant as well. Forum situs, in this case, is not an exclusive forum.

This has some relevance in technology transfer transactions. In most cases, such transactions involve the building of a plant, and installation of machinery and equipment, and they are property fixed to the land. Supplier builds the plant and then transfers it to the recipient. Would recipient's state have the right to assume jurisdiction on the ground that it is the forum situs of the proper-

¹¹⁴ See supra page 191.

ty?

5.2.4 (4) Concluding Comments on the Objective Method-

The objective method should be followed for determining the proper forum. However, some of the bases of jurisdiction should be abandoned.

The forum loci contractus and the forum where breach is made may be purely accidental and hence they should be discarded.

Forum of the state whose law has been chosen by the parties is illogical as it may not have any connection with the transaction, but the forum of the state whose law has been determined by the objective method to be the proper law, may be a valid and effective basis.

There is no doubt about the effectiveness of the forum situs of the property as a basis for jurisdiction. But the most logical basis, in the case of contracts, for the assumption of jurisdiction should be the forum loci solutionis.

Chapter VI

FINAL OBSERVATIONS

2

In this chapter, we shall see which - a fixed rule of law or party autonomy - will suit technology transfer transactions, better.

6.1. 1. Fixed Rule of Law v. Party Autonomy-

At present, party autonomy is one of the basic principles in international contracts, and a fixed rule of law is followed only in the absence of choice by parties.

We shall see these two diverse methods in the light of their advantages, viz: certainty, uniformity and predictability of results and reasonableness.

6.1.1 (1) Certainty, Predictability and Uniformity of Results-

Subjective method is said to be better than objective method because it is certain, predictable and uniform. But is it really so?

Under the subjective method, in any two similar cases, the choice of forum may be different, depending on many variables like the bargaining power of parties, the time factor, the states involved, etc.

Suppose that in one transaction, parties A and B choose State X as their forum. In another very similar transaction, parties A and C choose State Y as their forum. There is no certainty in ~~such~~ a method. Only the rule of law, i.e. that parties' choice would be upheld, is certain. There is, however, no certainty as to the application of the law or the result of the application of such law. Each forum will decide the dispute on the basis of its own public policy and other similar factors.

Similarly, same parties may choose two different fora for two different but very similar transactions. If they do, the decisions in two very similar disputes may also be different, depending on the forum chosen by them. Even if the law chosen by them in both transactions is the same, the decisions may be different because the chosen fora are different.

Hence, no two decisions in two similar disputes may be similar. There may be no precedents to follow. Also, as freedom of choice is not without exceptions, parties would not be sure that the forum chosen by them would hold their choice to be effective. They would be at the mercy of the individual judges. It was seen that in the

U.S. courts some judges held such choice-of-forum clauses valid whereas others held them invalid as against their public policy.¹¹⁵

As¹¹⁶ at present, there is no guarantee as to the effectiveness of a choice, how can one say that subjective method leads to certainty and predictability?

As different fora differ on the effectiveness of a choice, the practice of forum-shopping may proliferate. Parties may tend to choose a forum with a public policy that does not discourage the use of choice-of-forum clauses.

Such forum-shopping should be avoided as much as possible, as it may lead to an evasion of the law of the state having the greatest interest in a transaction. If subjective method is followed, parties may try to evaluate the law and policies of different states and choose a forum whose laws are beneficial to them. This would be especially so if they do not choose the applicable law, in which case, the forum will normally be inclined to apply its own local law. However, if objective method is followed, they need not do any such forum-shopping.

Such forum-shopping may increase because *lex fori* may play an important role in settlement of disputes. Not only may the forum apply its public policy and mandatory provisions, but it may also apply its own substantive law, if it is in doubt as to which law to apply.¹¹⁶ The judges

¹¹⁵ See supra notes 217, 218, 219 and 231.

¹¹⁶ See the theories of Prof. Cook and Prof. Currie, supra

are expected to know their own law better and they tend to apply the same whenever possible. In two similar cases, two courts (English and U.S. courts) interpreted contracts in question in such a manner that they could apply their own law.¹¹⁷

On the one hand, a multinational corporation with its tentacles spread all over the world has the skills to gather, understand and interpret laws and policies of different fora, in order to ascertain the one with laws most advantageous to it. On the other hand, a comparatively smaller firm may not have the requisite skills to analyse such material. This is particularly true in technology transfer transactions where there is, usually, on one side, a huge multinational corporation and, on the other, a small or medium-sized firm.

Hence, if a fixed rule of law as to proper forum, based on the objective method is established, it would give certainty to the outcome of disputes. For example, if there exists a rule of law that, in the case of technology transfer transactions, recipients' states should be the proper fora, then the evils of forum-shopping may be mitigated and parties may be able to ascertain beforehand the policies of those states. Also, if a particular forum is granted the subject matter jurisdiction, the parties can look at the precedents in such courts and can fairly ascertain how their

notes 110 and 118.

¹¹⁷ See supra note 148.

dispute may be resolved in such forum. True, a developing host state may not have a fair number of precedents, but they will evolve over a period of time. This may lead to more predictability than if the prevalent subjective method is allowed to continue.

6.1.2 (2) Unreasonableness-

One of the purposes of settlement of disputes is to bring about reasonableness of result and do justice to parties.

Use of the objective method would lead to a reasonable result, as the proper forum thus determined would have some connection with the transaction. One might argue that parties are not granted an absolute freedom of choice and that an unreasonable choice would always be held invalid. For example, one might argue that, if the choice of a forum is unreasonable, the forum thus chosen may hold itself to be a forum non conveniens. But the important question is which forum is going to decide the 'unreasonableness' of such a choice? It would be the chosen forum or the forum where the action is brought. The substantially connected forum, if the action is not brought there, is not given the power to determine the reasonableness of the choice. Hence, in technology transfer transactions, host states' policies and interests may be completely ignored when these limita-

tions are imposed by the forum. This problem may be resolved by establishing some general criteria for the determination of the reasonableness:

Suppose that A of State X and B of State Y enter into a contract to transfer technology to State Y. They choose the law of State M and the forum of State N.

If, in this case, A brings an action against B in State M, its court may declare itself to be a forum non conveniens and thus dismiss the suit or require the suit to be brought in State N. To come to such a conclusion, the court in State M may look at its own law and policy and the facts of the case in order to ascertain if it has any connection with the transaction. The Restatement Second states that, 'whether a suit should be entertained or dismissed under the rule of this Section (Section 64-forum non conveniens) depends largely on the facts of the case and is in the sound discretion of the trial judge'.¹¹⁸ It may not look at the policies of State X, State Y or State N.

Suppose further that the suit is now brought, accordingly, in State N. The court in State N may look at its policies and rules of law to decide as to whether to take jurisdiction or not. If it does take jurisdiction, its own public policy and the chosen law of State M may be applied. Policies of State Y, the recipient's state, and even those of State X, the supplier's state, may be held to be irrelevant. Is such a decision justifiable? Should pri-

¹¹⁸ See Restatement Second, 1971, supra note 115, at 251.

vate interests be given such undue importance? If the court in State N also holds itself to be a forum non conveniens, e.g. if it does not have any other connection with the transaction, and dismisses the suit, then objective method may be followed.

Hence, defendant B may have to defend itself in two foreign courts before any objective determination of the proper forum is made. And then too, there is no guarantee that the interests of the recipient's state would be considered. Again, it would depend entirely on A as to where to bring the action. Recipient's state cannot force parties to submit to its jurisdiction, even if it has a positive law to that effect.

But if there had been an internationally-agreed upon fixed rule of law all such unnecessary delay could have been avoided. It would also have been much cheaper for parties to bring a suit in the forum which is granted jurisdiction under an universally accepted rule. And for the purpose of establishing a fixed rule of law, an universal agreement on the point is required. Then there may be more certainty in the matter.

Another advantage of a fixed rule of law would have been that, in the above example, the courts in State M and State N would not have had to determine on a preliminary basis whether they had jurisdiction or not. At present, there are some states such as England, whose courts are

overburdened with litigation between foreign nationals, in cases involving transactions having no connection or only a remote connection with these states. Their courts have to make a preliminary ruling as to whether they can entertain the suits or not. However, if fixed rules of law are established to determine the states which may have judicial jurisdiction to decide disputes in different types of transactions, then such rules should be welcomed by these states.

It is advisable to discard the subjective method, as it may lead to erroneous consequences. However, from the practical point of view, subjective approach may be preferable in transactions involving sale of goods. But the very fact that public interests of states are involved in technology transfer transactions should preclude determination of the proper forum by subjective method.

6.2 2. Establishment of a Fixed Rule of Law-

A question was posed earlier - how should one give universal recognition to the statutory regulations of states so that the states which want to enact statutes to regulate technology transfer transactions would be able to enforce them effectively. One plausible answer to this may be to establish a fixed rule of law with the help of the objective method.

A rule of law has to be established. It should be such that the state having the most substantial connection with transactions will have judicial jurisdiction to decide disputes arising out of them.

Such a fixed rule of law may be established in either of two ways, viz., by means of uniform national legislation or by an universal or an international agreement. Uniform national legislation may become customary international law over a period of time, or an internationally accepted rule of law may be implemented by individual states through national legislation. Let us look at each of them separately.

6.2.1 (1) National Legislation-

Developing recipient states have a large stake in technology transfer transactions and hence, they have tried to regulate them. Some of these states like Mexico, Nigeria, Peru, etc., have tried to restrict freedom of choice as to forum which is available to parties.

(i) Mexico-

²¹⁹ See supra page 134.

As mentioned earlier,¹¹⁹ Mexico has enacted a law dealing with transfer of technology.¹²⁰ Its article 16(IV) reads as follows:

"Article 16. The acts, agreements or contracts referred to in the Second Article will not be registered either in the following cases:

IV. When the knowledge or the resolution which may arise in connection with the interpretation of fulfillment of the acts, agreements or contracts submitted to foreign courts, except in cases of exportation of Mexican technology or of express submission to private international arbitration, ..."¹²¹

However, how can Mexican authority control parties who may want to choose a foreign forum? If they bring an action in a foreign forum after a dispute has arisen, Mexican authorities may not be able to do anything. It would largely depend on the forum where action is brought as to whether to entertain the action or to dismiss it. Mexican court cannot force parties to its jurisdiction.

(ii) Nigeria-

Nigeria is another state which has restricted parties' freedom of choice as to forum, in recent years. Its Decree No. 70 of 24 September, 1979,¹²² deals with transfer of technology. Its article 6(2)(r) reads as follows:

¹²⁰ See Compilation, supra note 24, at 98; See also, supra, note 195.

¹²¹ See Compilation, id. at 103.

¹²² See Compilation, id. at 120-131.

"6(2) The Director shall not register any contract or agreement where he is satisfied that it falls within any of the following specifications, that is to say,

(r) where the transferee is obliged to submit to foreign jurisdiction in any controversy arising for the decision concerning the interpretation or enforcement in Nigeria of any such contract or agreement or any provisions thereof."²³

In Nigeria, as in Mexico, the law has a negative aspect, - i.e. parties have to refrain from choosing any forum, as the laws of Nigeria and Mexico will automatically apply.

Though the government agencies may screen transfer agreements and weed out choice-of-forum clauses from such agreements, this may not be effective, because parties may still have a gentleman's agreement as to forum in which any dispute between them may be brought. When dispute arises, they may submit themselves to a foreign forum and thus be outside the jurisdiction of the states which enacted these statutes. Nigerian courts may be able to assume jurisdiction in cases where the foreign judgement is to be enforced in Nigeria.

(iii) Peru-

Peru has also enacted a law placing a limitation on parties' freedom of choice. Its 'Rules for establishing the precise rights and obligations of the licensors and

²³ See Compilation, id. at 123.

licensees of foreign technologies, marks and patents' of 23 October, 1981,¹²⁴ deal with the applicable forum, in article 16(f) which is as follows:

"Article 16.

Every contract shall contain at least clauses dealing with the following:

(f) Express submission to the laws and courts of Peru."¹²⁵

Peru seems to have taken a positive attitude towards restriction of the choice of forum. Whereas Mexico and Nigeria bar any choice-of-forum clauses, Peruvian law requires parties to expressly submit to its jurisdiction. This provision may reduce the effect of any gentleman's agreement which may exist between them, though the law may not be completely effective. Even though there may be an express clause containing a submission to Peruvian jurisdiction, parties may still bring an action in a foreign forum. But, in this case, there are more chances that the foreign forum where action is brought may dismiss the action, than in the case of either the Mexican or Nigerian law.

Thus, it is evident that in the case of contracts, which are a part of the realm of private law, states seem to be powerless to bring technology transfer agreements into conformity with their national policies and priorities.

¹²⁴ See Compilation, id. at 135-141.

¹²⁵ See Compilation, id. at 138.

It is evident that states cannot control technology transfer transactions through their national legislation. Hence, the alternative would be to bring about uniformity through an international agreement.

6.2.2. (2) International Legislation (Agreement)-

International agreement seems to be the only means for the establishment of a fixed rule of law. Let us look at some of the attempts to establish such a rule.

(i) Andean Pact-

As seen earlier,³²⁶ the Andean Group of states seem to be in the forefront of the development of such a law, though regionally. In Decision 24 of the Commission,³²⁷ its article 51 deals with the proper forum. It reads, inter alia, as follows:

" Article 51. No instrument pertaining to investment or to transfer of technology may contain a clause removing disputes or conflicts from the national jurisdiction and competence of the recipient country, or permitting subrogation by States of the rights and actions of their national investors."³²⁸

³²⁶ See supra pages 138-139.

³²⁷ See Compilation, supra note 24, at 227-232.

³²⁸ See Compilation, id. at 231.

However, this agreement is between developing states and hence, it would not be effective on the international level where developed states would be the states of the investors/suppliers of technology.

(ii) The Hague Conference on Private International Law-

The Hague Conference on Private International Law has concluded a Convention on the Choice of Court.¹²⁹ The said Convention, under its Article 1, grants the right to parties to expressly choose the forum. It states,

"In the matters to which this Convention applies and subject to the conditions which it prescribes, parties may by an agreement on the choice of court designate, for the purpose of deciding disputes which have arisen or may between them in connection with a specific legal relationship, either -

- (1) the courts of one of the contracting States, the particular competent court being then determined (if at all) by the internal legal system or systems of that State, or
- (2) a court expressly named of one of the contracting States, provided always that this court is competent according to the internal legal system or systems of that State."¹³⁰

Its Article 6, however, allows the excluded court to take jurisdiction in certain cases listed therein. But, this can be done if either party sues in its court in con-

¹²⁹ Le Bureau Permanent de la Conference (ed.), Conference de la Haye de Droit International Prive, Recueil des Conventions (1951-1977) (1977), at 96-105 (hereinafter cited as Recueil, 1977).

¹³⁰ See Recueil, 1977, id. at 97.

travention of the choice-of-forum clause. The said article reads as follows:

Every court other than the chosen court or courts shall decline jurisdiction except -

- (1) where the choice of court made by the parties is not exclusive,
- (2) where under the internal law of the State of the excluded court, the parties were unable, because of the subject-matter, to agree to exclude the jurisdiction of the courts of that State,
- (3) where the agreement on the choice of court is void or voidable in the sense of article 4,¹¹¹
- (4) for the purpose of provisional or protective measures.¹¹²

The excluded court does not have the authority to force parties to its jurisdiction even when it has an internal law to the effect. Whether or not it may have jurisdiction will ultimately depend on the court where action is brought. Such court will have the discretion to entertain the suit or dismiss it. Hence, such type of an international agreement will not assist in the establishment of a rule of law. It has been mainly concluded by developed states and so, developing states are not obliged to abide by it.

¹¹¹ See Recueil, 1977, id. at 96. The last paragraph of article 4 states, "The agreement on the choice of court shall be void or voidable under article 4, if it has been obtained by an abuse of economic power or other unfair means."

¹¹² See Recueil, 1977, id. at 99.

(iii) U.N. Conference on Code of Conduct on Transfer of Technology-

Regional agreements may be a good beginning for the unification of laws and for the establishment of fixed rules of law, but, in the end, there should be an international agreement between various groups of states, if the rule of law is to be effective in its implementation. This was contemplated in the U.N. Conference on Code of Conduct on Transfer of Technology. The Group of 77 proposed that courts of recipient states should be given jurisdiction to decide the disputes between parties to technology transfer contracts. However, Group B (western developed states) took a different approach. They are the staunch advocates of parties' freedom of choice.

Developing recipient states are interested in technology transfer transactions and protection of their nationals, whereas developed supplier states are not interested, at least not to the same extent, which is evident from the fact that they are prepared to leave it to the parties to choose the forum.

The conference seems to have reached an impasse and there does not seem to be any resolution of the problem of settlement of disputes.

If national legislation, unsupported by any international agreement to the effect that it must be recognized

elsewhere, cannot be completely effective and if there cannot be an international agreement, in the near future, the status quo will continue. Parties will continue to choose a forum which may be more convenient and more beneficial and states, even those with statutory regulations to the contrary, will not be able to force parties to submit to their jurisdiction. Hence, some kind of agreement should be reached, as soon as possible.

6.3 3. Connection Between the Objective Bases of Jurisdiction and the States-

At present, there is no international agreement on the establishment of a fixed rule of law. But if a fixed rule of law is to be established, which state - the supplier's state or the recipient's state - should have jurisdiction which will be effective in forcing parties to submit to it? The same will be examined in the light of various objective bases.

6.3.1 (1) Supplier's State-

The supplier's state may assume jurisdiction on the basis of its being a forum loci contractus, i.e. it may be the state where contract may have been entered into. But

such forum may be accidental and transitory¹³³ and should be discarded as a relevant basis for the exercise of jurisdiction.

The supplier's state may be the place of performance of the recipient if the recipient is to make payment there, but this is not guaranteed. Recipient may pay royalties in his own state. The place of payment is not fixed. And, in case he does not make any payment, Savigny has suggested that the action should be brought in the forum domicilii of the debtor, i.e. the recipient's state, if he enters into an obligation there,¹³⁴ as it may be easily enforceable against him, there.

The supplier's state would normally be the forum domicilii of the supplier, if it is transacting through an unincorporated branch or an agent in recipient's state. Hence, supplier's state has personal jurisdiction over the supplier, if he is the defendant in an action. And any judgement rendered against him would be easily enforceable therein. But if the supplier is the plaintiff in an action, he would be precluded (in the absence of an express choice) from bringing an action against the defendant recipient over whom supplier's state has no personal jurisdiction (unless the recipient voluntarily submits or is present there or if he designates an agent to accept any service of process). Also, the recipient cannot be deemed to be doing any act or

¹³³ See Savigny, 1880, supra note 97, at 198.

¹³⁴ See Savigny 1880, id. at 205.

any business within the supplier's state, unless he has some place of business there.

Thus, the supplier's state, not having any other contacts with the transaction, may be able to take jurisdiction only in a few limited cases. Its judgement will be enforced in limited cases. Hence, a fixed rule of law conferring judicial jurisdiction on supplier's state is not desirable.

6.3.2 (2) Recipient's State-

A contract may be concluded in the recipient's state. But, as mentioned earlier,¹¹⁵ this place is not relevant to the outcome of a dispute.

Secondly, the recipient's state is the place where the major part of the performance is fixed. Supplier cannot change the place of his performance, unless the contract involves a bare licensing of technology. As Savigny has put it, the seat of a legal relationship is the place where the expectations of the parties are directed.¹¹⁶ The recipient's state seems to fulfil the requirement.

Supplier can be deemed to be doing an act in the recipient state and would be present therein, in case he has contracted to render any services there, e.g., building a

¹¹⁵ See supra page 211-212.

¹¹⁶ See Savigny, 1880, supra note 97, at 199.

plant, managing it, etc. So, the recipient's state would not have any difficulty in establishing personal jurisdiction over him. Such state being the domicile and the residence of the recipient, its jurisdiction over the recipient is already established in law. Hence, both, the supplier and the recipient, may be able to sue each other in recipient's state and the judgement rendered therein would be recognized and enforced in other states.

As mentioned in the earlier chapter,¹¹⁷ transfer of technology involves property to be built on land. Thus, it may be deemed to be a contract involving property and the forum situs would be the proper forum. And, the recipient's state would be the forum situs.

Recipient's state will have jurisdiction to decide disputes in almost all cases.

6.4 4. Concluding Comments-

Both, the supplier's state and the recipient's state, have some contacts with a transaction and either of them may be able to assume jurisdiction over any dispute which may be brought before their courts. It would depend on the parties as to where to bring the disputes. Irrespective of parties' choice, some standard should be laid down to determine a proper forum. The U.S. courts have estab-

¹¹⁷ See supra page 193-194.

lished certain standards to determine the proper forum, in the absence of a choice of forum, which is the basis of hypothesis in this thesis.

In International Shoe Co. v. Washington (1945),³³⁸ the U.S. Court held that, 'in order to subject a defendant to a judgement in personam, if he is not present within the territory of the forum, he must have certain minimum contacts with it, such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."³³⁹

In Shaffer v. Heitner, (1977),³⁴⁰ the same 'minimum contacts' standard was upheld.

In World-Wide Volkswagen Corp. v. Woodson, (1980),³⁴¹ it was held that the defendant's conduct and connection with the forum 'were such that he should reasonably anticipate being haled there. It also held that these contacts must make litigation in the state 'foreseeable'.³⁴²

First of all, it would be proper to say that, instead of the 'minimum contacts' standard, the 'most significant relationship' standard should be followed in order to determine the proper forum. In any given transaction, there may be many states having some contact with the trans-

³³⁸ 326 U.S. 310, 90 L Ed 95 (1945).

³³⁹ 326 U.S. 310, at 316, 90 L Ed 95, at 102.

³⁴⁰ 433 U.S. 186.

³⁴¹ 444 U.S. 286, 62 L Ed 2d 490, 100 S.Ct. 559.

³⁴² 444 U.S. 286, at 297, 62 L Ed 2d 490, at 501.

action. But there would be only one state having the most significant relationship with the transaction³⁴³ and justice would demand that such state be deemed the proper forum.

In technology transfer transactions, besides the recipients' states and the suppliers' states, there may be some states, e.g., the states where contracts may have been negotiated, the states where contracts may have been concluded, the states where raw materials may have been bought or delivered, etc., which may have minimum contacts with the transactions. But these states do not have the most significant or even substantial contacts with the transactions. A higher standard should be adopted in order to eliminate the improper fora. Even between the recipients' and the suppliers' states, the former have more significant contacts than the latter.

However, the 'foreseeability' criterion is a reasonable one. Parties can normally foresee in which state disputes may be brought. In technology transfer transactions, suppliers are doing acts/business in recipients' states, and can reasonably foresee their submission to the forum there. But recipients cannot expect a reverse case.

In the Copperweld case,³⁴⁴ the U.S. District Court held that the German corporation had expanded its horizons into the United States. Hence, it should have been able to

³⁴³ See Restatement Second, 1971, supra note 115, at 651; See also, supra note 144.

³⁴⁴ See supra note 258.

foresee that it may have to defend itself in the U.S. courts, whereas the U.S. corporation had not contracted outside the U.S. and hence, it could not have foreseen any action in the German courts.

In the event, it is fairly clear that recipient's state has the most significant contacts with the transaction and it also fulfils the criterion of 'foreseeability'. Among recipient's and supplier's states, the former has more interest in deciding disputes and also has the means of delivering an enforceable judgement in almost all disputes arising from technology transfer transaction.

As such, it may be concluded that a fixed rule of law should be established and recipient's state should be granted judicial jurisdiction to decide disputes arising out of technology transfer transactions.

Chapter VII

GENERAL CONCLUSION

Transfer of technology has become a key ingredient in the developmental process of any state. And every state is making an effort to import the technology not available therein.

There are a number of disparities in the economic and developmental situation in developed and developing states.

In the case of developing states, almost all technology has to be imported³⁴⁵ from developed states.³⁴⁶ But in the case of developed states, most technology is internally generated. Developing states are very much dependent on developed states.

If there is to be global economic and social development, transfer of technology has to be promoted and encouraged. The advantages of development in developing states would not be experienced by them in isolation. In

³⁴⁵ However, some of the more developed of the developing states may have indigenous skills resources required for the generation of technology in some sectors.

³⁴⁶ However, there is an international movement towards interdependence between the developing states themselves - technical co-operation among the developing states is being promoted.

the long-run, its effect would also be felt by developed states.¹⁴⁷

Such promotion and encouragement of transfer of technology have also been accepted by developed states.¹⁴⁸ However, one of the problems confronting states is the creation of a legal atmosphere which is free from ideological tensions and differences, for the transfer of technology.

On the one hand, developed Western states seem to put more stress on party autonomy. They do not seem to have any interest in the regulation of technology transfer transactions so long as there is competition in the market-place. On the other hand, developing states take a broader over-all view of the matter in the interest of their whole economy. There are undercurrents not only between developed and developing states but also between private and public interests which they seem to promote. Prima facie, it seems that there may be no reconciliation between the two conflicting approaches. However, a compromise has to be sought.

The conclusion arrived at in this thesis is that the rules of law in technology transfer transactions should be changed and such change should be in favour of the developing states. It would be proper to note here that a fixed rule of law should be established, as the prevalent subjective method of choosing the law and the forum does not seem to be adequate to meet the special needs of developing

¹⁴⁷ See supra pages 31-33.

¹⁴⁸ See Draft Code, supra note 5, at 1, (The Preamble).

states in this type of transaction.

A rule of law has to be established.

Flexible theories like governmental-interest analysis, centre-of-gravity, etc., evolved by modern American jurists, may be taken as the base and rules of law established. At this moment of time, a broad rule of law may be created for all technology transfer transactions. Later on, specific rules may be developed for each type of such transaction, e.g. a different rule for a simple licensing agreement, a management contract, turn-key project, etc.

Compared to supplier's state, recipient's state has more contacts or the most significant relationship with a technology transfer transaction. Such a transaction affects its economic and social development. Hence, it should be granted a right to regulate it.

Such a general rule may be established by national legislation or by an international agreement. The former is not plausible because such national legislation may take a long time to be uniform. In the meantime, parties will continue to choose a law and a forum favourable to them. Also such national legislation is inadequate to force parties to its jurisdiction. At present, parties can escape its jurisdiction and laws by choosing another forum and law. This practice has to be stopped.

The law of the recipient's state should govern these transactions, and this state should be granted juris-

diction to decide any disputes arising between its nationals/residents and foreigners. For an effective exercise of judicial jurisdiction, it should also be granted legislative jurisdiction under international law.

Developing states have perceived a need to regulate technology import and, in the absence of an international agreement, they may not be deterred from enacting stricter and stricter national legislation even though such legislation may not have the required effect, i.e. the restriction of freedom of choice. If parties manage to evade these laws, by submitting to a foreign jurisdiction through a gentleman's agreement, developing states may deem it necessary to penalise them for such evasion. For example, if a recipient national evades a self-limiting statute of developing State X, this State may levy a fine on such national for such evasion. This may have an adverse effect on the national if such national intends to enter into another similar contract with, either the same or another supplier. The government of State X may not give such national its approval at the negotiation of a new contract. These penalties may be effectively imposed on the recipient because the developing state would have personal jurisdiction over such recipient. State X may also be able to levy a fine on a foreign supplier if such supplier has some assets in its territory. In this manner, parties may suffer from these adverse effects.

If enactment of such national legislation is to be avoided, an effort has to be made on the international level. The process of such agreement may be started at a bilateral level, and then enlarged to a regional level. Ultimately, an agreement may be adopted universally. There is a considerable difference between what ought to be and what will actually be. For example, there ought to be a successful international conference in the matter of transfer of technology; there ought to be some universally accepted rules of law in this matter; there ought to be a relegation of private interests to a subordinate level vis-a-vis public interests of states. But this will not actually happen, in the near future. The U.N. Conference on Code of Conduct on Transfer of Technology presents a good example. The purpose of the Code may have been to change the rules of law to those which ought to have been, but to date, it has not happened. An universal agreement on a fixed rule of law may not be easily possible. But still, an effort has to be made.

In the end, whether states agree to an international process or not, may depend on the comity between them. Such comity between legislators of developed and developing states may be one way of establishing fixed rules of law.

Such fixed rules of law should also be welcomed by parties to technology transfer transactions. These rules

may bring more certainty and security to their transactions. When parties know which law would apply and which forum would have jurisdiction to decide disputes between them, they can arrange their transactions accordingly. At present, even though they may choose a law and a forum, they may not be sure that disputes may be decided under the law and in the forum chosen by them. Such indecision may increase the costs to both, the supplier and the recipient, as they may have to be prepared for all eventualities.

Suppose that parties A and B of States X and Y respectively, enter into a contract to transfer technology to State Y. They choose the law of State Z and the forum of State F for settling any disputes which may arise between them. However, they may not be sure as to whether their choice will be upheld by the forum where an action may be brought. If A sues B in the forum of State Z, he still will not be sure whether forum Z will entertain his suit or not. Hence, while calculating his costs, he will have to consider the fact that he may have to go to State Y to bring an action against B. B will also have to take similar considerations into account. This may increase their costs.

Such a fixed rule of law should also be welcomed by judicial authorities. They may not have to make a preliminary ruling as to whether they have the competence to decide a dispute or not. Under a fixed rule of law, they would know which court will have judicial jurisdiction.

Also, there would not be any uncertainty as to which law is applicable.

It may be said that from many points of view, a fixed rule of law will be an improvement over the prevailing practice of party autonomy, and some action should be taken on the international front to remedy the present situation. In the long-run it may be beneficial to all.

ANNEX I

Table 2.

Principal issues in regulatory practices of selected countries
concerning imports and use of technology

Principal Issues	Countries
I. <u>Limitations on field of activity and ownership by external enterprises</u>	
1. Exclusion of some areas of the economy from direct foreign investment	Algeria, Argentina, India, Indonesia, Mexico, Sri Lanka, Andean Pact countries, Portugal
2. Nationalization in some areas of the economy	Algeria, Chile, Guinea, Guyana, Iraq, Libyan Arab Republic, Syria, United Republic of Tanzania, Venezuela
3. Promotion of joint venture arrangements	Argentina, India, Indonesia, Mexico, Afghanistan, Yugoslavia, Andean Pact countries, Hungary, Romania
4. Acquisition of control of national enterprises by foreigners	Argentina, India, Mexico, Andean Pact countries, Canada
5. Guarantees given by investor's country in cases of nationalization, expropriation or other measures adopted in receiving country	Australia, Canada, Denmark, Germany (Fed. Rep. of), Japan, Netherlands, Norway, Portugal, Sweden, Switzerland, United States of America
II. <u>Policies on controlling costs</u>	
6. Ceiling on remittances arising from foreign direct investments	Algeria, Argentina, Brazil, India, Paraguay, Andean Pact countries
7. Ceiling on remittance of royalties	Argentina, Brazil, India
8. Limitations regarding payment of royalties between subsidiary and parent company	Brazil, India, Andean Pact countries
9. Technological contributions entitled only to royalties and cannot be registered as capital contributions	Andean Pact countries
10. Control on payments for unused patents	Andean Pact countries
11. Control on package licensing	Japan, Germany (Fed. Rep. of), Spain, United States of America

Table 2 (cont'd)

12.	Control on the payment of royalties during the entire duration of manufacture of a product, or the application of the process involved without any specification of time, or excessively long terms of enforcement	Mexico, Spain
13.	Control on price fixing practices	Japan, Spain, United States of America, Argentina, Mexico, Andean Pact countries
14.	Control on excessive prices of technology	Spain, Argentina, Mexico
15.	Control on improper or discriminatory royalties	United States of America
III.	<u>Abusive practices either deemed to be illegal or otherwise controlled</u>	
(a)	<u>Territorial restrictions</u>	
16.	Territorial restrictions on exports	Japan, Spain, Argentina, Brazil, Mexico, Andean Pact countries
(b)	<u>Restrictions on purchases, output or sales</u>	
17.	On sources of supply of raw materials, spare parts, intermediate products, capital goods and/or competing technologies	Australia, Ireland, Japan, New Zealand, Spain, United Kingdom, United States of America, European Economic Community, Argentina, Brazil, India, Mexico, Malawi, Zambia, Andean Pact countries
18.	On pattern of production	Japan, Spain Mexico, Andean Pact countries
19.	On sales and/or distribution	Japan, Spain, United States of America, Brazil, Mexico, Andean Pact countries
(c)	<u>Post-expiration effects</u>	
20.	Limitations on or payment for the use of a patented invention even after the patent has expired	New Zealand, Spain, United Kingdom, United States of America, India, Malawi, Zambia
21.	Limitations on or payment for the use of related know-how even after the agreement has expired	Spain

Table 2 (cont'd)

(d) <u>Limitations affecting the dynamic effects of the transfer</u> 22. Control on the purchase of technology already available in the country 23. Limitations on field of use 24. To use staff designated by the supplier 25. Grant-back provisions 26. Limitations imposed on the management of the recipient enterprise 27. Limitations on the research or technological development of the recipient enterprise (e) <u>Other practices</u> 28. Not to contest validity of patents 29. Authentic text of contract in foreign language	Spain Argentina, India, Mexico United States of America Mexico, Andean Pact countries Japan, Spain, United States of America Argentina, Brazil, Mexico, Andean Pact countries Spain Mexico Spain Mexico United States of America Spain Argentina
IV. <u>Patent policies</u> 30. Patents protected provided they are in the social interest 31. Patents granted, as a general policy, to ensure that new inventions are worked in the country 32. Compulsory licences, revocation or expropriation of patents are recognized for reasons other than non-working	Peru Canada India Austria, Canada, Denmark, France, Finland, Germany (Fed. Rep. of), Ireland Norway, Sweden, United States of America Czechoslovakia, Hungary, Poland, Romania, Soviet Union Algeria, Brazil, Colombia, India, Iraq, Israel, Nigeria, Peru

Table 2 (cont'd)

33. Regulations on employees' inventions	Denmark, Finland, Germany (Fed. Rep. of), Norway, Sweden
34. Recognition of inventors' certificates notwithstanding the grant of patents	Bulgaria, Czechoslovakia, German Democratic Republic, Poland, Romania, Soviet Union, Algeria
V. <u>Promotion of national technological capabilities</u>	
35. Incentives to export-oriented activities	Algeria, Argentina, Brazil, India, Mexico, Philippines, Republic of Vietnam, Sri Lanka, Yugoslavia, Romania
36. Provision regarding training of national personnel in foreign collaboration agreements	Algeria, Argentina, Central African Republic, Egypt, Gabon, Ghana, India, Indonesia, Kenya, Liberia, Libyan Arab Republic, Madagascar, Nigeria, Philippines, Somalia, Uganda
37. Preferential schemes for national supply of goods and/or services from national sources	Argentina, Gabon, India, Andean Pact countries
38. Measures to facilitate absorption and diffusion of foreign technology and development of indigenous technology.	Brazil, India, Peru, Republic of Korea
VI. <u>Settlement of disputes</u>	
39. Specific reference in recent regulations to national jurisdiction	Argentina, Mexico, Andean Pact countries

For sources and methodology: See annex

GLOSSARY

Forum Conveniens	The convenient forum.
Forum domicilii	The court of the state where a person is domiciled.
Forum habitatis	The court of the state where a person lives.
Forum loci contractus	The court of the state where a contract is made.
Forum loci solutionis	The court of the state where a contract is performed.
Forum negotiarii	The court of the state where a contract is negotiated.
Forum non conveniens	The inconvenient forum.
Forum situs	The court of the state where a property is located.
Lex fori	The domestic law of the court where an action is brought.
Lex loci contractus	The law of the state where a contract is made.
Lex loci solutionis	The law of the state where a contract is performed.
Lex originis	The law of the state where a person is born.
Lex situs	The law of the state where a property

	is located.
Lex validitatis	The law that validates a contract.
Locus contractus	The state where a contract is made.
Locus negotiatio	The state where a contract is negotiated.
Locus solutionis	The state where a contract is performed.
Ubi contractus est	Where a contract is made.

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