
Amin Dawwas | ORCID: 0000-0002-1443-8711
Department of Private Law, Qatar University College of Law
amin.dawwas@gmail.com; a.alattrash@qu.edu.qa

Abstract

This article deals with the law tacitly chosen by the parties to govern their international commercial contracts. It shows the method by which The 2015 Hague Principles on Choice of Law in International Commercial Contracts and Arab laws refer to tacit choice, whether directly or indirectly. In addition, it tackles the level of strictness in tests for tacit choice and its criteria under both The Hague Principles and Arab laws. It concludes that, in order to achieve more predictability and legal certainty, the Legislatures in Arab states should reform the legal provisions on choice of law applicable to the contract with foreign element(s) according to the best practice followed by The Hague Principles in this regard.

Keywords


1 Introduction

The Hague Principles on Choice of Law in International Commercial Contracts\textsuperscript{1} (hereafter: HP) govern the law or rules of law chosen by the parties only; they

do not regulate the applicable law in the absence of the parties' choice. In addition to the parties' choice as to the applicable law or rules of law, (most) Arab laws\(^2\) directly govern the law applicable to international commercial contracts in the absence of the parties' choice.\(^4\)

The parties may express their intentions regarding the law or rules of law applicable to contracts in different methods. They may make an express or tacit (implied) choice. The parties normally make an express choice through an express choice of law clause in the main contract\(^5\) or in a separate agreement;\(^6\)

\[\text{Note 1}\]

\(^1\) Indeed, Arab laws generally speak about the parties' choice of 'law' only; as an exception, the Bahraini formulation expressly allows the parties to select a law or rules of law. By the way of interpretation, however, it is concluded that, under all Arab laws, the parties may choose rules of law to apply to their contract. See A. Dawwas, ‘Palestinian Perspectives on the Hague Principles’, in D. Girsberger, T. Kadner Graziano and J.L. Neels (eds.), Choice of Law in International Commercial Contracts: Global Perspectives on The Hague Principles (Oxford: Oxford University Press, 2021) para. 33-25.


\(^2\) This paper is confined to the Arab conflict-of-laws rules normally applied by the courts; it does not tackle Arab arbitration laws.


the parties may also agree on the applicable law during the court proceedings. In this regard, the HP Commentary says that,

An express choice of law agreement may be made before, at the same time as, or after the conclusion of the main contract. The term “main contract” refers to the contract for which the choice of law is made. Choice of law agreements are usually included as an express clause in the main contract. The use of particular words or phrases is not necessary. Phrases such as the contract is “governed by” or “subject to” a particular law meet the requirements of an express choice.

The tacit choice will exist if the contract terms or the circumstances surrounding the contract point to a particular law or rules of law. To put it in the words of the HP Commentary,

To qualify as an effective choice of law under Article 4, the choice must be a real one although not expressly stated in the contract. There must be a real intention of both parties that a certain law shall be applicable.

Unlike the express choice, the tacit choice may cause a threat to the party autonomy principle. The court may conclude an arbitrary tacit choice, i.e., a

7 The Jordanian Court of Cassation, decision no. 2854 of the judicial year 2007, dated 26 February 2007, available online at https://qistas.com (accessed 2 January 2022) (instead of the applicable Canadian law stated in the contract, the parties agreed before the court to apply Jordanian law). However, it should be noted that, in another case (the Jordanian Court of Cassation, decision no. 4154 of the judicial year 2020, dated 10 December 2020, available online at https://qistas.com (accessed 2 January 2022), the same court did not recognize the parties’ choice of law. A Jordanian citizen and a Cyprus Company made a labor contract in Jordan. Clause 2 of the same says that “the labor relationship shall be governed by the laws of Cyprus; interpretation of all aspects shall be according to these laws.” The court indicated that “the Jordanian law shall apply because the contract was made in Jordan and any agreement by the parties to the contrary shall be null and void because the rules on jurisdiction belong to public policy as repeatedly reaffirmed by the court (decision no. 3917/2012, dated 18 December 2012 and decision no. 839/2003, dated 19 May 2003).” Obviously, the court here mixes the parties’ choice of law with the international court jurisdiction: According to the decisions referred to by the court, the parties may not agree that the (competent) Jordanian court(s) may not have jurisdiction and, instead, grant the competence to foreign courts. In contrast, Article 20(1) Jordanian Civil Code clearly permits the parties to agree on the law applicable to their contract.

8 HP Commentary, supra note 1 at 4.3.

9 Monsenepwo, supra note 5 at 177.

10 HP Commentary, supra note 1 at 4.6.
choice that the contract parties did not intend. This explains the different positions of national laws on tacit choice. Some laws expressly prohibit the tacit choice. Others recognize it with different restrictions.

In order to prevent any arbitrary result in this regard, the HP and Arab laws recognize tacit choice of law or rules of law and ensure that such a choice reflects the actual will of the parties. The principle of party autonomy requires that the contracting parties have effectively exercised their will to choose the applicable law, although tacitly. Tacit choice of the applicable law or rules of law shall be inferred from the contract terms or circumstances

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12 The same rules apply to the modification of the law or rules of law chosen by the parties. Article 4 (first sentence) HP. HP Commentary, supra note 1 at 4.16. Monsenepwo, supra note 5 at 177; Salama, supra note 2 at 1088, 1099. As for the choice of the private international rules of the chosen law, Article 8 HP permits the express choice only; thus, this provision would be an exception to Article 4 HP. In contrast, Arab Laws generally reject renvoi; the parties may not agree on renvoi. Dawwas, supra note 2 at 33.48 and 29.49.


16 Lmahoud, supra note 15 at 191.
surrounding the contract.17 Although falling short of an express choice, tacit (unexpressed) choice of the applicable law is equivalent to a real choice.18

Thus, tacit choice differs from the hypothetical choice, i.e., the choice that the parties would have plausibly made, had they thought about choice of law.20 Such a presumed intention, imputed to the parties, does not suffice in this regard.21 Otherwise, the conflict-of-laws rules in Arab countries applicable


21 HP Commentary, supra note 1 at 4.6; Pertegás and Marshall, supra note 19 at 987; Albornoz & Martin, supra note 11 at 443. Alsamdan, supra note 18 at 177; Riyad and Rashed, supra note 20 at 325. Cf. Abdallah, supra note 18 at 432, 440; Shawqi, supra note 20 at 443. Akai Pty Limited v The People’s Insurance Company Limited, Insurance (1996) 188 CLR 418 23 December 1996, n 71, “It is not a question of implying a term as to choice of law. Rather it is one of whether, upon the construction of the contract and by the permissible means of construction, the court properly may infer that the parties intended their contract to be governed by reference to a particular system of law.” See https://jade.io/article/67971 (accessed 13 June 2022).
in the absence of the parties’ choice would be undermined, or the HP’s rules on choice of law would apply to situations beyond the subjective scope of HP, as the case may be.

Article 4 (first sentence) HP explicitly acknowledges the tacit choice. Some Arab laws also recognize the tacit choice directly (like, Egyptian law), while others accept it indirectly by the way of silence (like, Jordanian one). This paper focuses on two countries (Egypt and Jordan), which represent the two main trends as regards the need of a legislative direct reference to tacit choice. The Egyptian and Jordanian laws have had a significant historical legal influence in the conflict-of-laws rule concerning contract in several other Arab countries.

In particular, the indirect approach raises difficulty and diversity in interpretation and application. In order to define the exact meaning of tacit choice, this study will therefore discuss the different judicial applications of all related legal texts.

The main purpose is twofold; namely to analyse and compare related legal texts on tacit choice and to reveal to which extent the Arab legal texts at issue cope with the good practices embodied in HP. This article will first examine how the HP and Arab Laws refer to the tacit choice: explicitly or implicitly (Section 2). Section 3 will explain the level of strictness of the test for tacit choice. Section 4 will present the criteria for determining the tacit choice. The Conclusion (Section 5) will include some recommendations to reform the related Arab legal texts on parties’ tacit choice of applicable law.

2 Explicit or Implicit References to Tacit Choice

When stating the party autonomy principle, the legal provision may refer to the tacit choice directly or indirectly. Article 2(1) HP expressly adopts the general principle on party autonomy. It says that, ‘A contract is governed by the law chosen by the parties’. This already reveals that there are no limitations on


23 HP Commentary, supra note 1 at 4.17.

24 HP Commentary, supra note 1 at 1.5: “The Principles can be seen both as an illustration of how a comprehensive choice of law regime for giving effect to party autonomy may be constructed and as a guide to “best practices” in establishing and refining such a regime.”
the parties’ freedom to choose the applicable law; this choice may be express or tacit. Besides, Article 4 (first sentence) HP explicitly speaks about the parties’ tacit choice. It says that, “A choice of law [...] must be made expressly or appear clearly from the provisions of the contract or the circumstances” (emphasis added).

In the absence of either choice (explicit or tacit), HP do not regulate the law applicable to the contract. According to the HP Commentary,

If the parties’ intentions are neither expressed explicitly nor appear clearly from the provisions of the contract or from the particular circumstances of the case, there is no choice of law agreement. In such a case, the Principles do not determine the law governing the contract.  

Like HP, some Arab Laws regulate tacit choice directly; other Arab Laws accept it indirectly. The Egyptian law (Article 19(1) of the Egyptian Civil Code No. 131 of 1948) is the prominent one that regulates tacit choice of law directly; many other Arab Civil Codes have followed it. Article 19(1) of the Egyptian Civil Code states that,

Contractual Obligations are governed by the law of the domicile when such domicile is common to the contracting parties and in the absence of a common domicile by the law of the place where the contract was concluded. These provisions are applicable unless the parties agree, or the circumstances indicate that it is intended to apply another law. (emphasis added)

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26 HP Commentary, supra note 1 at 4.17.
27 For instance, see Article 27(1) Qatar Civil Law no. (22) of 2004, Article 19(1) UAE Civil Transactions Law no. (5) of 1985, Article 20(1) Syrian Civil Code no. (84) of 1949, Articles 59(1) and (61) Kuwaiti Law no. (5) of 1961 regulating the legal relationships with foreign elements, Article 19(1) Libyan Civil Code of 1954, Article 19(1) Somali Civil Code no. (37) of 1973, Article 17(a) Bahraini Law no. (6) of 2015 regulating the conflict of laws in civil and commercial matters with foreign element, Article 25(1) Iraq Civil Law no. (40) of 1951, and Article 25(1) West Bank Civil Law Draft (published by the Palestinian Authority in 2003) / Gaza Civil Code no. (4) of 2012 (enacted by Hamas Authorities in Gaza). In the same sense, Article 13(1) Moroccan Law of 12 August 1913 on the civil status of French and foreigners in Morocco says: “The essential terms and effects of the contracts shall be determined by the law to which the parties expressly or implicitly intended to submit them”. Obviously, it explicitly allows the parties to choose the law applicable to their contract, expressly or tacitly. However, unlike the Arab texts cited above, it does not state that tacit choice shall result from the “circumstances”.

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This provision does not only explicitly recognize the tacit choice but also provides the criteria for determining such a choice.

Unlike HP, this provision (as well as other Arab provisions at issue) governs not only the parties’ choice of the law applicable to international commercial contracts but also the objective choice by the court. However, the first rule is to consider the parties’ (express or implicit) choice of the applicable law. The court shall determine whether a tacit choice of law exists, before moving to the objective determination of the applicable law. According to the Egyptian Court of Cassation, the provision of Article 19(1) of the Egyptian Civil Code makes it clear that the law applicable to contracts is the chosen law. Only if the parties did not make an express or implicit choice, the law of the parties’ common domicile shall apply and if there is no such domicile the law of the place, where the contract was concluded.

One of the Arab laws that refer to tacit choice of law indirectly is the Jordanian one. Article 20(1) of the Jordanian Civil Code No. 43 of 1976 says that, the contractual obligations are governed by the law of the state, in which the parties have their [common] domicile. If they have a different domicile, it is governed by the law of the state, in which the contract was concluded. This rule is not applicable if the parties have agreed on another applicable law. (emphasis added)

This Article of the Jordanian Civil Code is a leading one in this regard; some Arab civil codes have copied it.

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28 See also Qatari Court of Cassation, decision no. 426/2017 (civil and commercial matters), 26 December 2017, available online at http://eservices.sjc.gov.qa/Portal_1/ahkam/DetailAhkam.aspx?gcc=1&slno=2702&lawcode=1 (accessed 2 January 2022), “the provision of Article 27(1) Qatari Civil Law indicates that the legislature basically adopts the parties’ will, whether explicit or tacit, as a connecting factor to determine the law applicable to their contractual obligations; in absence of such will, the law of the parties’ common domicile or, otherwise the law of the place of making the contract shall apply”; Abu Dhabi Court of Cassation, decision no. 922/2018 (commercial), 11 December 2018, available online at https://www.adjd.gov.ae/sites/eservices/AR/Pages/Judgements.aspx (accessed 2 January 2022).


See also Article 18 Algerian Civil Code of 1975.
Like Article 19(1) of Egyptian Civil Code, Article 20(1) of the Jordanian Civil Code requires in the first place the consideration of the parties’ choice of the applicable law. Only if there is no express or implicit choice by the parties as to the governing law, the court may apply the law of common domicile, and if there is no such domicile, the law of the place of making the contract.\(^{31}\)

There is debate on whether a tacit choice of law should exist in Jordanian (and other similar Arab) private international law. According to one Arab legal writer,

The comparison of Article 18 Algerian Civil Code [equitable to Article 20 Jordanian Civil Code] with its counterpart in Arab Codes reveals that it does not include the paragraph calling for the consideration of tacit choice in the absence of an explicit one. This means that the Algerian legislature, unlike other Arab legislatures who expressly provides for tacit choice [like Egyptian one], recognizes explicit choice only.\(^{32}\)

However, the prevailing opinion\(^{33}\) understands the provision of Article 20 of the Jordanian Civil Code (and other similar Arab provisions) as allowing for

\(^{31}\) It should be noted that the Jordanian Court of Cassation, in one of its decisions, puts the law of the parties’ common domicile in the first place. Only if there is no such common domicile, the court says, the law chosen by the parties shall apply, and in the absence of such choice the contract shall subject to the law of the country in which this contract was made. Decision no. 67 of the judicial year 1988, dated 28 February 1988, available online at https://qistas.com (accessed 2 January 2022). The court later ignored this ruling and frequently applied Article 20 properly: It firstly looks for the chosen law, if any and in the absence of such a law, the court applies the law of the country in which both parties are domiciled or otherwise the law of the country in which the contract was made. For instance, see the Jordanian Court of Cassation, decision no. 4536 of the judicial year 2003, dated 11 May 2004; the Jordanian Court of Cassation, decision no. 314 of the judicial year 2006, dated 19 February 2007; the Jordanian Court of Cassation, decision no. 2732 of the judicial year 2010, dated 22 January 2012; the Jordanian Court of Cassation, decision no. 4793 of the judicial year 2014, dated 15 March 2015; and the Jordanian Court of Cassation, decision no. 802 of the judicial year 2021, dated 25 March 2021, available online at https://qistas.com (accessed 4 January 2022).


tacit choice of law. Indeed, this provision clearly recognizes party autonomy, *i.e.*, the parties’ freedom to choose the law applicable to their contract. It clearly admits but does not necessarily require express choice of law. Rather, it implicitly accepts tacit choice of law.

As the formulation of this provision is general, it encompasses not only express choice but also the tacit one. The Memorandum of Article 20 of the Jordanian Civil Code makes it clear that this provision enables the parties to select the law applicable to their contract, explicitly or tacitly.34

Besides, it is well established under many national laws and international instruments that the parties may tacitly choose the applicable law to their contract.35 The prevailing opinion of jurists follows this trend, too.36 Since Article 25 of the Jordanian Civil Code states that the principles of private international law shall apply in the absence of a relevant provision governing the conflict of laws, the court shall enjoy a wide power of discretion to deduce the parties’ tacit choice of the applicable law.37

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36 Ali and Salima, *supra* note 36 at 57.

The Jordanian Court of Cassation applied Article 20 of the Jordanian Civil Code in one hundred fourteen cases. However, the court did not expressly deal with the question of tacit choice of law. Instead, the courts in Jordan generally ignore the determination of a tacit choice of law and immediately move to the objective choice. Once the parties do not expressly choose the applicable law, the court will check the availability of the other connecting factors stated in the same Article, namely the parties’ common domicile or the place of making the contract.

In one case, however, the Jordanian Court of Cassation implicitly recognized the tacit choice. In a dispute between an Egyptian banker and an Egyptian Bank working in Jordan and Palestine, the claimant (the regional director of the bank) asked for wages, end-of-service gratitude, and legal interest. The court found that the parties have expressly agreed, in Clause 12 of the labour contract, on “the application of the Regulations in force in Jordan to the end of service gratitude”. As for the wages and other rights of the worker (the claimant), Clause 5 of the same provides for “the application of the Regulations in force in the Bank in Jordan”. The court generally indicated that, based on Article 20(1) of the Jordanian Civil Code, the parties have agreed on the application of the Jordanian Laws and Regulations to their labour contract. Since Clause 5 refers to the (Egyptian) Bank Regulations only, it seems that the court extended the reference in Clause 12 to the Jordanian law regarding the end-of-service gratitude to other rights of the claimant. By doing this, the court eventually recognized that the reference by the parties in one contract clause to Jordanian law (regarding the end of service gratitude) indicates their will to apply this law to the claimant wages and legal interest. By doing this, the court eventually adopted the jurisprudential opinion that, the parties’ choice of law to govern only some aspects of the contract indicates the parties’ tacit will to apply this law to the entire contract.

In any event, the court would not have applied the chosen Bank Regulations to the wages once they are in contradiction with the (applicable) Jordanian labour law; laws prevail over regulations.

Article 20(1) of the Jordanian Civil Code (and all other similar Arab texts that do not explicitly speak about tacit choice of law) does not state the indicia according to which the law tacitly chosen by the parties shall be determined.

39 See, supra, note 31.
41 Al-Masri, supra note 33 at 197.
42 Cf. Gama, supra note 25 at 342.
However, the determination of the existence of tacit choice is a matter of interpretation of the parties’ will that the court shall do. According to the Egyptian Court of Cassation, the trial judge has a discretionary power to understand the facts and circumstances of the case. Thus, the understanding of the statement in the rental charter and bill of lading under consideration to reflect the parties’ agreement to apply English law exclusively falls within the judge’s own discretion. Thus, tacit choice shall be admitted as long as there are elements and circumstances that clearly demonstrate it.

3 Level of Strictness of Test for Tacit Choice

Article 4 (first sentence) HP states that the tacit choice shall “appear clearly from the provisions of the contract or the circumstances”. The HP Commentary says that, “One has to take into account both the terms of the contract and the circumstances of the case. However, either the provisions of the contract or the circumstances of the case may conclusively indicate a tacit choice of law.”

43 Ibid, 337; Mansour and Al-Njouz, supra note 4 at 423; Salama, supra note 2 at 1063, 1101; Abdallah, supra note 18 at 431. Cf. Albornoz & Martín, supra note 11 at 444.
44 B. Abd-Elkarim, ‘Law Chosen under Article 18 of the Algerian Civil Code: Before and After Amendment in 2005’, Algerian Journal of Law and Political Science 47 (2010): 368 (in Arabic). Cf. akai pty limited v the people’s insurance company limited, supra note 21 at n 70, “What is involved in inquiring whether the parties have exercised their liberty to select a governing law is the ascertainment of that which, in truth, the parties are to be taken to have agreed. This may be discerned from a direct statement in a formal written contract. On the other hand, or even in such a case of a formal written contract, it may be necessary to construe the contract as a whole in the manner we have described. In addition, there may be real difficulty in ascertaining, by the drawing of inferences from the evidence, the existence of the express terms of the contract. The terms of the contract may be something to be gleaned from a number of documents, conversations or business dealings over a period of time.”
46 Ibid. Bashabsheh et al., supra note 40 at 372.
47 HP Commentary, supra note 1 at 47. Cf. Court of Justice of the European Union – Judgment of the Court (First Chamber) of 15 July 2021, n 36, under Article 3 Rome 1, “the choice of the applicable law can be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. That choice must be clearly apparent from the contractual provisions or the circumstances of the case.” See https://www.stradalex.com/en/sl_src_publ_jur_int/document/cjeu2021_C_152_20_57 (accessed 13 June 2022).
Arab Laws explicitly recognizing tacit choice (like, Egyptian law) require that it shall “become apparent from the circumstances”, i.e., evident from the circumstances. Under other Arab laws that implicitly accept the tacit choice, the court may infer the parties’ tacit choice from surrounding circumstances.

Obviously, HP and Arab laws use different formulations in this regard. One writer argues that the HP test is very strict; surely, it is stricter than the law that only requires the choice to be simply evident. The latter test may allow the court to infer tacit choice from one single factor, like the forum selection clause. For example,

Party A and Party B conclude a contract and include a choice of court agreement designating the courts of State X. In the absence of other relevant provisions in the contract or particular circumstances suggesting otherwise, this will be insufficient to indicate a tacit choice of the law of State X.

The present writer opines that the “appear clearly” HP-test is equivalent to the Arab-test of being evident, i.e., “become apparent”. According to the HP Commentary, “[a] tacit choice of law must appear clearly from the provisions of the contract or the circumstances. This means that the choice must be evident as a result of the existence of strong indications for such a choice”.41

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49 Gama, supra note 25 at 343. Cf: Bouwers, supra note 17 at 175–176.

50 HP Commentary, supra note 1 at 4.11 (Illustration 4–6).

In the Arab countries, a prominent Egyptian law professor says that, “the parties’ tacit will should be deduced by the judge from the surrounding circumstances; [...] the judiciary very often considers more than one factor to ascertain the parties’ will”.

Another Arab legal writer concludes that, “the judge, when deducing the parties’ will to connect the contract with a particular law, should have regard to many factors and circumstances”.

The case law also indicates that strong evidence for the existence of a tacit choice of law should exist. For instance, the Qatari Court of Appeal found that “the same parties of two labour contracts are of the same nationality, and the contracts are to be performed in the State of Qatar and to be interpreted according to English law”. However, the Court affirmed that there are differences between the two contracts that lead to the difference in the law tacitly chosen by the parties to govern each of them. The first contract was concluded in London with the principal place of business of the appellee. This contract did not include any provision regarding the appellant’s end-of-service bonus since the appellant was covered by the pension scheme, an optional contribution system that applies to Britons working at home or abroad. The second labour contract was concluded for a later period in Doha with the appellee’s branch in Qatar. It stipulated that the salary include all the rights of the appellant under Qatari labour laws. Accordingly, the court concluded that the parties tacitly agree to apply English law to their first labour contract and the Qatari law to the second one.

In another dispute over a labour contract, the UAE Federal Supreme Court established that “Abu Dhabi city is the parties’ common domicile, the place of business of the worker and the place where the case was filed before its competent court”. The Court also found that neither the agreement establishing the Fund nor its regulations of employees governing the working relationship between the parties include any provision on the statute of limitations of the rights arising from that relationship. Therefore, the court concluded that the 1985 UAE Federal Civil Transactions Law is applicable in this regard. The Court continued to say that, since the contested decision indicated that UAE laws could not apply to the contractual relationship between the parties without

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52 Abdallah, supra note 18 at 431.
53 Al-Haddawi, supra note 4 at 150. See also Riyad and Rashed, supra note 20 at 324; Shawqi, supra note 20 at 442.
being aware of the provisions of Article 19(1) of the Civil Transactions Law, this decision should be overturned.55

Article 19(1) UAE Civil Transactions Law, like other Arab legal provisions in this regard, subject the contract to the law expressly or tacitly chosen by the parties. In the absence of such choice, the contract shall be governed by the law of the parties’ common domicile and if there is no such domicile by the law of the place of making the contract. The labour contract at issue did not include an express choice of the applicable law. The court, it seems, deduced from the said circumstances (namely, the facts that Abu Dhabi city is the parties’ common domicile, the city in which the place of business of the worker is situated, and the place where the action was brought) that the parties have tacitly chosen the UAE Law to govern their contract. Had the court intended to apply the objective choice (i.e., the law of the parties’ common domicile); it should not have mentioned other circumstances that indicate the application of the UAE law.

The test for tacit choice adopted by both HP and Arab laws is a narrow one;56 there shall be a clear and real intention by the parties as to the law governing the contract.57 As stated above, “a tacit choice of law must result from the existence of strong indications for such choice”.58 Accordingly, this test promotes predictability and legal certainty.59 Since it avoids unexpected and arbitrary results,60 it may not surprise any of the contract parties.61

Tacit choice should be inferred from the circumstances of the case (and contract terms).62 The determination of the tacit will of the parties as to the applicable law is a matter of interpretation;63 the court shall deduce it from all circumstances surrounding the conclusion of the contract. Thus, this test

56 Dawwas, supra note 2 at para. 33-29.
57 Dawwas, ibid, para. 33-30. Abdallah, supra note 18 at 431.
58 Monsenepwo, supra note 5 at 177.
59 Gama, supra note 25 at 343.
60 Bouwers, supra note 17 at 176.
61 Dawwas, supra note 2 at para. 33-30.
62 Alenezzi, supra note 17 at 391.
63 Cf. AKAI PTY LIMITED v THE PEOPLE’S INSURANCE COMPANY LIMITED, supra note 21 at n 69, “[i]n ascertaining an intention of the parties from the terms of the contract ..., the court applies the ordinary rules of the common law relating to the construction of contracts. That requires consideration of the terms and nature of the contract and ‘the general circumstances of the case’ ... in the sense explained, with reference to contractual construction".
enables the court to draw the line between cases in which the parties have really chosen the applicable law and others in which they have not made such a choice.\(^6^4\)

## 4 Indicia of Tacit Choice

The existence of tacit choice may be deduced from different sources.\(^6^5\) Under Article 4 (first sentence) HP, the criteria for determining the tacit choice include “the provisions of the contract or the circumstances”.

With the exception of Moroccan law, all Arab laws (that explicitly refer to the tacit choice) require that tacit choice be inferred from “the circumstances” only.\(^6^6\) This also applies to Arab laws that indirectly refer to tacit choice. The determination of the existence of tacit choice under these laws is equally considered a question of interpretation. In order to ascertain the true common intention of the contract parties\(^6^7\) as to the law tacitly chosen, the court should eventually have regard to all surrounding circumstances. Since the term ‘circumstances’ is general in nature, it encompasses parties’ conduct as well as contract terms.\(^6^8\)

In Morocco, Article 13(2) of the Law of 12 August 1913 on the civil status of French and foreigners states that, if there is no express choice by the parties, tacit choice as to the applicable law may be inferred from “the nature of the contract, their relative condition, [or] from the place of the property”.

\(^{64}\) Gama, *supra* note 25 at 343–344.
\(^{66}\) As stated earlier, Article 13(1) Moroccan Law of 12 August 1913 on the civil status of French and foreigners in Morocco permits the parties to choose the law applicable to their contract, whether expressly or tacitly. Unlike other Arab texts that explicitly refer to tacit choice, it does not state that this choice shall result from the “circumstances”. Instead, Article 13(2) says: “If the determination of the applicable law, in case of silence of the parties, does not arise from the nature of the contract, their relative condition, nor from the place of the property, the judge shall have regard to the law of their common domicile, in the absence of a common domicile, the law of their common nationality, and if they have no common domicile nor common nationality, to the law of the place of making the contract.”
\(^{67}\) Marshall, *supra* note 19 at 516.
\(^{68}\) Dawwas, *supra* note 2 at para. 33.30; Dawwas, *supra* note 2 at para. 29.27; Mansour and Al-Ajouz, *supra* note 4 at 423–431.
Therefore, under HP and all Arab laws at issue, the court shall take into consideration all circumstances,\(^6\) including the contract terms\(^7\) when determining the existence of a tacit choice. However, such tacit choice may conclusively be inferred from either inner elements (contract terms) or external elements (outside the scope of the contract).\(^8\) The HP Commentary expressly says: “A tacit choice of law must appear clearly from the provisions of the contract or the circumstances. ... However, either the provisions of the contract or the circumstances of the case may conclusively indicate a tacit choice of law.”\(^9\)

4.1 Inner Elements (Contract Terms)

Neither HP nor Arab laws define the contract terms that may indicate the tacit choice. The HP Commentary says that,

A choice of law is found to appear clearly from the provisions of the contract only when the inference drawn from those provisions, that the parties intended to choose a certain law, is strong. There is no fixed list of criteria that determines the circumstances under which such an inference is strong enough to satisfy the standard that a tacit choice must “appear clearly”; rather, the determination is made on a case-by-case basis.

However, the HP Commentary and legal writers provide some examples.\(^10\) These include the following.

4.1.1 A Standard Form known to be governed by a Particular System of Law\(^11\)

According to Article 13(2) Moroccan Law of 12 August 1913 on the civil status of French and foreigners in Morocco, “the nature of the contract” may indicate the tacit choice by the parties as to the law governing their contract. The

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\(^6\) Abdallah, supra note 18 at 43; Mansour and Al-A’jouz, supra note 4 at 423; Salama, supra note 2 at 1100; Bashabsheh et al., supra note 37 at 372; Riyad and Rashed, supra note 20 at 34.

\(^7\) Monsenepwo, supra note 5 at 177; Albornoz and Martín, supra note 11 at 445; Al-Haddawi, supra note 4 at 150.

\(^8\) Gama, supra note 25 at 342; Pertegáis and Marshall, supra note 19 at 987; Salama, supra note 2 at 1101; Mansour and Al-A’jouz, supra note 4 at 424; Bashabsheh et al., supra note 37 at 368.

\(^9\) HP Commentary, supra note 1 at 4.7.

\(^10\) HP Commentary, supra note 1 at 4.8–4.10; Gama, supra note 25 at 344 es seq; Aldawoudi, supra note 33 at 218–219.

\(^11\) Gama, supra note 25 at 345; Salama, supra note 2 at 1100.
choice by parties of a contract form known to be governed by a certain law may signal the parties’ intent to apply this law to their contract.\(^{75}\)

In *Amin Rasheed Corporation v Kuwait Insurance*, the House of Lords implied a choice of English law because the contract was based on the standard form of the Lloyd’s marine policy; the contract had been interpreted according to the English Marine Insurance Act 1996. Lord Diplock concluded that, the Standard Form of English Marine Policy together with the appropriate Institute Clauses attached, was widely used on insurance markets in many countries of the world, other than those countries of the Commonwealth that have enacted or inherited statutes of their own in the same terms as the Marine Insurance Act 1906. The widespread use of the form in countries that have not inherited or adopted the English common law led both Bingham J. and Robert Goff L.J. to conclude that the Standard Form of English Marine Policy and the Institute Clauses had become internationalised.\(^{76}\)

According to the HP Commentary, “[w]here the contract is in a standard form which is generally used in the context of a particular system of law, this may indicate that the parties intended the contract to be governed by that law, even though there is no express statement to this effect.”\(^{77}\) To illustrate further, the HP Commentary gives the following example:

Party A and Party B conclude a marine insurance contract in the form of a Lloyd’s policy of marine insurance. Because this contract form is based on English law, its use by the parties may indicate that the parties intend to subject the contract to English law.\(^{78}\)

In the aforementioned English case, the standard form alone led to the conclusion that the contract is governed by English law. Under Arab laws and HP, in contrast, the standard form known to be governed by a particular system of law may be one of the factors considered when determining the existence of tacit choice.

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\(^{75}\) Abd-Elkarim, *supra* note 44 at 370; Lando, *supra* note 5 at 134; Al-Masri, *supra* note 33 at 197.


\(^{77}\) HP Commentary, *supra* note 1 at 4.9.

\(^{78}\) HP Commentary, *supra* note 1 at 4.9 (Illustration 4–4).
4.1.2 A Reference to Specific Provisions or Legal Institutions Peculiar to a Particular Law or Rules of Law

If the contract contains “terminology characteristic of a particular legal system or references to national provisions” (e.g., German Civil Code) or certain rules of law (e.g., UNIDROIT Principles of International Commercial Contracts), the court may infer their clear intent to subject their contract to that law or rules of law. The writing of the contract in the same (official) language of the said law or rules of law also supports this conclusion. To illustrate further on this issue, the HP Commentary gives the following examples:

Party A and Party B conclude a contract that uses the legal language characteristic of the law of State X. This may indicate that the parties intend their obligations to be determined according to the law of State X.

Party A and Party B conclude a contract drafted in the language of a certain State. The contract, however, does not use legal terminology characteristic of that State’s legal system. In the absence of other circumstances, the use of the particular language would not be sufficient to establish a tacit choice of law.

The Egyptian Council of State made an important fatwa (i.e., advisory opinion) concerning tacit choice under Article 19(1) Egyptian Civil Code. Firstly, the Council of State indicated that the American University in Cairo is an American body established in America to practice its educational activity in Egypt, i.e., a foreign body whose main management centre is actually abroad and operates its main activity in Egypt. The foreign professors working at the University in Cairo have a direct contractual relationship with the main centre of this body abroad. This means that the parties’ common domicile is the United States of America. The parties have also concluded the contracts in the USA. Obviously, this alone justifies the application of the American law to these contracts.

79 Aldawoudi, supra note 33 at 218; Riyad and Rashid, supra note 20 at 324; Martiny, supra note 6 at 640.
80 Gama, supra note 25 at 345.
81 HP Commentary, supra note 1 at 4.10.
82 Abd-Elkarim, supra note 44 at 369; Shawqi, supra note 20 at 442.
83 Majdi, supra note 4 at 221. Cf. Al-Masri, supra note 33 at 197; Shawqi, supra note 20 at 442.
84 HP Commentary, supra note 1 at 4.10 (Illustration 4–5).
85 HP Commentary, supra note 1 at 4.14 (Illustration 4–9).
However, the Council of State continued to say that, “the provisions of these contracts require part of the salary, as well as the end-of-service bonuses, to be paid in dollars. These contracts regulate the provisions of contracting and social security based on the USA laws, too. This makes the Council of State conclude that the will of the contractors is to subject the contract in question to American law”.

Accordingly, the Council of State refused to apply the Egyptian law to these contracts.

In a dispute over a labour contract between a Kuwaiti company (the Plaintiff) and a Saudi person (the Respondent), the Kuwaiti Court of Cassation found that the labour contract states that the worker shall enjoy all rights and privileges of the Kuwaiti labour law and this shall be guaranteed by the Plaintiff. The court indicated that this implies the parties’ agreement to apply the Kuwaiti law to all disputes that may arise between them from their labour contract.

In another dispute between a French company and a US company, the ICC Arbitral Tribunal found that the contract between the parties was silent as to the applicable law. Upon the Arbitral Tribunal’s initiative to the parties to make their submissions on the issue of the law governing the merits, one party pleaded for the application of French law and the other party for the application of the law of the State of Illinois. Both pleaded, as a subordinate alternative, for the application of “general principles of law”. Therefore, the Arbitral Tribunal decided not to apply any particular domestic law but rather applied, inter alia, “the general principles of law resulting from the UNIDROIT Principles”.

The Tribunal, after recalling that several ICC cases have considered the UNIDROIT Principles of International Commercial Contracts as the best approach to apprehend the general principles of law, concluded that the parties’ agreement to the application of “general principles of law” tacitly implies the application of the UNIDROIT Principles.

4.1.3 Choice of Forum or Arbitral Tribunal

Forum selection, whether exclusive or non-exclusive, is different from choice of law. A forum selection clause is procedural in nature, whereas choice...
of law clause covers the substantive law applicable to the contract.\textsuperscript{93} The HP Commentary says that, “[t]he fact that the chosen court, under the applicable private international law rules, may apply a foreign law also demonstrates the distinction between choice of law and choice of court.”\textsuperscript{94}

Article 4 (second sentence) HP explicitly says: “[a]n agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law.”\textsuperscript{95} As an illustration, the HP Commentary gives the following examples:

Party A and Party B conclude a contract and include a choice of court agreement designating the courts of State X. In the absence of other relevant provisions in the contract or particular circumstances suggesting otherwise, this will be insufficient to indicate a tacit choice of the law of State X.\textsuperscript{96}

Party A and Party B conclude a contract under which they agree that all disputes arising out of, or in connection with, the contract are to be submitted exclusively to arbitration in State X under the rules of the ABC Chamber of Commerce. In the absence of other relevant provisions in the contract or particular circumstances suggesting otherwise, this will be insufficient to indicate a tacit choice of the law of State X.\textsuperscript{97}

Arab Laws are silent in this regard. There is controversy on whether a tacit choice of law should exist in cases of forum selection. Some writers equate the forum selection to the choice of law: they say that the forum clause will lead to the inference that the parties intended to govern their contract by the law of that place.\textsuperscript{98} Riyad and Rashed clearly state that, “the judge […] will infer the parties’ tacit choice from the fact that they have subjected the contract

\textsuperscript{93} Gama, supra note 25 at 346.
\textsuperscript{94} HP Commentary, supra note 1 at 4.11. See also HP Commentary, supra note 1 at 4.12: “An agreement between the parties to confer jurisdiction on a specified arbitral tribunal to resolve disputes under the contract is not the same as a choice of law. According to the second sentence of Article 4, the choice of such an arbitral tribunal is also not a sufficient indicator, in itself, of the parties’ tacit choice of law. The parties may have chosen a tribunal because of its neutrality or expertise. The tribunal may also apply a foreign law pursuant to applicable rules of private international law or the chosen arbitration rules.”
\textsuperscript{95} Article 4 (first sentence) HP.
\textsuperscript{96} HP Commentary, supra note 1 at 4.11 (Illustration 4–6).
\textsuperscript{97} HP Commentary, supra note 1 at 4.12 (Illustration 4–7).
\textsuperscript{98} Abd-Elkarim, supra note 44 at 370; Alfiatlawi and Mohameed, supra note 15 at 131–132; H. Al-Haddawi, Conflict-of-Laws and Its Provisions in Kuwait Private International Law, 2nd edn. (Kuwait: Kuwait University, 1974) 194 (in Arabic); Mansour and Al-A’jouz, supra note 4 at 426; Aldawoudi, supra note 33 at 218; Bashabsheh et al., supra note 37 at 372.
disputes to the jurisdiction of the courts of a particular state; this shall mean that the parties intended to subject the contract to the law of that state”. 99

However, the present writer argues that, the existence of a forum selection clause in a contract cannot be indicative of a tacit choice of law under Arab laws. As with HP, the arbitration agreement that refers certain disputes to a clearly specified forum or the court selection clause may be just one of the criteria to be considered when determining the existence of a tacit choice of law, 100 but it should not be conclusive of a tacit choice under Arab laws. 101 The parties may have selected a particular jurisdiction or an arbitral tribunal for its convenience, neutrality, experience, or expertise 102 and not for its national law. 103

In this regard, it makes no difference whether the court selection clause is exclusive or non-exclusive in nature. However, the non-exclusive jurisdiction clause shall be given less weight than the exclusive one. 104 Bringing proceedings in the forum selected is just optional in the former case, whereas it is obligatory in the latter one. 105

The Qatari Appellate Court indicated, in general, that there is no correlation between the court selection and the applicable law. As the rules on choice of law of court jurisdiction differ from conflict-of-laws rules, the court selected may apply a foreign law. 106

The same Court decided another dispute over a maritime contract of carriage represented in a bill of lading; the shipper was Japanese, the carrier was English and the consignee was Qatari. The Court found that the bill of lading

99 Riyad and Rashid, supra note 20 at 324–325.
100 HP Commentary, supra note 1 at 4.11; Dawwas, supra note 2 at para. 33.31; Al-Masri, supra note 33 at 197; Neels and Fredericks, supra note 22 at 108; Gama, supra note 25 at 346–347; Pertegás and Marshall, supra note 19 at 987.
101 Martiny, supra note 6 at 649; Bouwers, supra note 17 at 178; Girsberger and Cohen, supra note 13 at 323; van Hecke, supra note 18 at 19; Marshall, supra note 19 at 521; Lando, supra note 5 at 135; Abdallah, supra note 18 at 431; Alenezi, supra note 17 at 391; Alsamdan, supra note 20 at 176–177; Salama, supra note 2 at 1100; Ali and Salima, supra note 33 at 57.
102 HP Commentary, supra note 1 at 4.11; Bouwers, supra note 17 at 178; Martiny, supra note 6 at 649.
103 Dawwas, supra note 2 at para. 29.32; Neels and Fredericks, supra note 22 at 107–108; Bouwers, supra note 17 at 178.
104 Inter-American Juridical Committee (CJ1), supra note 14 at para. 268; Shawqi, supra note 20 at 442.
stipulated that Hague Rules (the 1924 Brussels Convention) must govern the maritime contract of carriage from start to end. The Court also found that the jurisdiction clause in the bill of lading states that “the contract of carriage represented in this bill shall be governed by the English law and disputes shall be adjudicated in England [...] in accordance with English law”. The Court further indicated that Japan has acceded to the 1924 Brussels Convention and has issued domestic legislation containing the same provisions of this Convention. The English law on the carriage of goods by sea, issued on 1 August 1924, is also in line with the provisions of the same convention. Therefore, the Court concluded that, “based on the rule of parties’ freedom of contract, the provisions applicable in the current case are the provisions of the 1924 Brussels Convention, which were codified in the provisions of domestic Japanese and English laws”.

By doing so, the court did not recognize any correlation between the court selection clause and the chosen law. Besides, the court did not approve the negative enforcement of the forum selection (i.e., choice of English courts): the court jurisdiction clause did not prevent the competent Qatari court to see the dispute.

4.2 External Elements (Circumstances Other Than the Contract Terms)

Many external elements may help the court to reveal the parties’ real, but tacit, intent. Both HP and Arab laws do not specifically state such circumstances. However, HP Commentary and legal writers offer some examples. The most important ones include the followings:

4.2.1 An Express Choice Made in a Prior Course of Dealings or in a Related Transaction

The parties may have systematically made an express choice of the law of a particular state to govern their contracts in previous dealings. The court may deduce that the parties intended to govern the contract at issue by the law of the same state previously chosen, if the circumstances do not indicate any

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108 HP Commentary, supra note 1 at 4.13: “The particular circumstances of the case may indicate the intention of the parties in respect of a choice of law. The conduct of the parties and other factors surrounding the conclusion of the contract may be particularly relevant. This principle may also apply in the context of related contracts.”

109 Marshall, supra note 19 at 523.

110 Gama, supra note 25 at 349; Pertegás and Marshall, supra note 19 at 987–988; Ali and Salima, supra note 33 at 57.
different intention by them. To illustrate on this issue, the HP Commentary gives the following example:

In the course of their previous dealings, Party A and Party B have consistently made an express choice of the law of State X to govern their contract. If the circumstances do not indicate that they intended to change that practice in the current contract, a court or arbitral tribunal could conclude from these circumstances that the parties clearly intended to have the current contract governed by the law of State X even though such an express choice does not appear in that particular contract.

The same may also apply to an express choice of law made in a related transaction (e.g., a frame contract) between the same parties.

In both situations, a practice has been established between the contract parties. Such a practice shall be taken into account when determining the parties’ common intention as to the law applicable; otherwise, “the honesty and confidence that should prevail between the parties” will be endangered.

4.2.2 Conduct of the Parties

The conduct of the parties may indicate their intention in respect of a choice of law. The HP Commentary expressly says that, “[t]he particular circumstances of the case may indicate the intention of the parties in respect of a choice of law. The conduct of the parties and other factors surrounding the conclusion of the contract may be particularly relevant.”

For instance, if the contract parties do not agree on the place of performance and they later choose to perform in a particular state, this fact may indicate the parties’ indirect (tacit) intent to apply the law of that state to their contract.

In addition, the tacit choice may be inferred from the parties’ silence about the application of the foreign law designated by the related conflict-of-laws rules (of the HP or a particular Arab country). If both parties’ pleadings refer...
to the national law of the forum, the court may apply this law as the parties have implicitly chosen it.\textsuperscript{120}

4.2.3 Validation and Other Circumstances

Neither Article 4 HP nor the HP Commentary expressly mention this circumstance. However, taking into account the general term “circumstances” stated by Article 4 HP, a court may infer tacit choice from the validation argument. If the court has to choose between two laws, and one of them validates the contract while the other does not, it may choose the former. It is quite difficult to imagine the parties choose a law to govern their contract that invalidates this contract.\textsuperscript{121}

Likewise, this circumstance falls within the scope of the case circumstances that shall be considered under Arab laws when determining the existence of a tacit choice of law. In this sense, the Egyptian Court of Cassation found that the bill of lading at issue stated that, “the ship is not liable for any loss or damage to goods however caused which can be covered by insurance.” The court concluded that “this reveals the tacit intent of the parties to exclude the application of Article 212 of the Syrian Maritime Law that invalidates agreements on exemption from liability.”\textsuperscript{122}

In all events, the court may also consider other extrinsic indicia,\textsuperscript{123} like the parties’ places of business, the parties’ common nationality, domicile or place of incorporation, the place in which the contract is concluded, notarized, performed or to be performed etc.\textsuperscript{124}

In this regard, Article 13(2) Moroccan Law of 12 August 1913 on the civil status of French and foreigners in Morocco says that “the relative condition” of the parties and “the place of the property” may indicate a tacit choice of the law applicable to the contract. The relative condition of the parties may refer to their places of business, common nationality or domicile, place of incorporation […] etc. In contrast, it is unclear how the place of the property, \textit{i.e.}, the place in which the subject matter of the contract is situated would indicate the law governing the international commercial contracts.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{120} Dawwas, \textit{supra} note 2 at para. 29.30.
\item\textsuperscript{121} Alenezi, \textit{supra} note 17 at 391.
\item\textsuperscript{122} Egyptian Court of Cassation, decision no. 1114, \textit{supra} note 21.
\item\textsuperscript{123} Dawwas, \textit{supra} note 2 at para. 29.29; Bouwers, \textit{supra} note 15 at 33–34.
\item\textsuperscript{124} Dawwas, \textit{supra} note 2 at 33.31; Mansour and Al-Ajouz, \textit{supra} note 4 at 423–431; Alfatlawi and Mohameed, \textit{supra} note 15 at 132; Aldawoudi, \textit{supra} note 36 at 218–219; van Hecke, \textit{supra} note 23 at 19; Alosaimi, \textit{supra} note 4 at 111–112.
\end{enumerate}
\end{footnotesize}
Truly, Arab laws subject the contract relating to the immovable to the law of the place in which the immovable is situated.\footnote{For example, Article 19(2) Egyptian Civil Code. Article 20(2) Jordanian Civil Code.} Possession, ownership and other real rights as regards immovable (or movable) are governed by the law of the place in which the immovable (or movable) is (or was) situated.\footnote{For example, Article 18 Egyptian Civil Code. Article 19 Jordanian Civil Code.} However, the place of the property has no significance in determining the law applicable to the personal rights resulting from international commercial contracts on goods (or services); the Arab Legislatures do not even use it as an objective connecting factor to determine the law applicable to these contracts.

The legislature or judicature may also use the aforementioned factual factors to determine the law applicable in the absence of the parties’ (express or tacit) choice. Again, this may make the distinction between tacit choice and hypothetical choice difficult.\footnote{Marshall, supra note 19 at 525, 526.} An Arab legal writer opines that the material connecting factors adopted by the (Algerian) Legislature to determine the applicable law in the absence of choice by the parties (e.g., parties’ common domicile or nationality, or place of making the contract) reflect the parties’ tacit intent.\footnote{Abd-Elkarim, supra note 44 at 36.}

The present writer does not share this opinion. Such factors actually reflect the hypothetical intent of the parties, which the legislature presumed in the absence of the parties’ choice.\footnote{Alkhafaji et al., supra note 20 at 79.} The parties’ tacit intent regarding the applicable law shall be inferred from the circumstances surrounding the conclusion of the contract.\footnote{Ibid, 80.}

In general, none of the aforementioned indicia would alone indicate the tacit choice.\footnote{Salama, supra note 2 at 1100; Marshall, supra note 19 at 526; Bouwers, supra note 15 at 40.} The more the elements refer to a certain law or rules of law, the more likely the court will recognize a tacit choice of this law or rules of law.\footnote{Dawwas, supra note 2 at para. 33.31; Dawwas, supra note 2 at para. 29.29; Abdallah, supra note 18 at 431. Cf. van Hecke, supra note 20 at 19.}

The Bahraini Court of Cassation indicated that “the law of the country which both parties have its nationality and in which the contract is concluded and partially performed” should govern the labour contract; however, the regulatory aspect of this contract should subject to the law of the place of implementation. The court considers the parties’ common nationality (i.e., the Pakistani nationality), the place of contract conclusion (Pakistan) and the place of its

\footnote{Dawwas, supra note 2 at para. 33.31; Dawwas, supra note 2 at para. 29.29; Abdallah, supra note 18 at 431. Cf. van Hecke, supra note 20 at 19.}
execution (Pakistan) as factors indicating the will of the parties as to the law governing their contract (the Pakistani law).133

Generally, Arab courts ex officio apply the conflict-of-laws rules. After the court characterizes the dispute according to national law, it will apply the related conflicts rule and the substantive law it designates.134 However, some Arab courts consider the application of foreign law (implicitly chosen by the parties) a matter of fact; this foreign law should be established by the party basing his / her claim on it.135 In the above stated case, the Bahraini Court of Cassation rejected the application of the Pakistani law because the respondent did not submit to the trial judge the provisions of this foreign law in order to verify whether it guarantees him more rights than the Bahraini labour law.136

5 Conclusion

The parties may manifest their agreement as to the law applicable to their contract expressly or tacitly. Express choice leaves no doubt about the law governing the contract; the court must respect it. However, tacit choice shall amount to the express one if properly deduced by the court from the contract terms or the circumstances.

As stated earlier in this paper, both HP and Arab laws acknowledge tacit choice. The HP formulation in this regard is better than the Arab one. HP “can guide the reform of domestic law on choice of law”.137 Accordingly, Arab laws (particularly those that recognize tacit choice indirectly, like in Jordan) should be reformed to conform more closely to HP.

134 Dawwas, supra note 2 at 29-33.
135 Other Arab courts will reject the application of the even explicitly chosen foreign law if the interested party did not ascertain it. For instance, the Dubai Court of Cassation indicated that, despite clause 7 of the loan contract at issue says that it is made under Austrian law this foreign law shall be considered a matter of fact that needs to be ascertained by the parties. Since the parties did not submit to the court an official translation of this law, the Court applied to the contract the UAE law. Decision no. 350/2012 (civil circuit), dated 13 February 2014, available online at https://www.eastlaws.com/ (accessed 17 February 2022). See also the Dubai Court of Cassation, decision no. 228/2009 (commercial circuit), dated 12 January 2010, available online at https://www.eastlaws.com/ (accessed 17 February 2022). The Kuwaiti Court of Cassation, decision no. 439/95, dated 31 March 1996, available online at http://ccda.kuniv.edu.kw (accessed 17 February 2022).
137 HP Commentary, supra note 1 at 1.8.
The test for the existence of tacit choice is very strict under HP and Arab laws so that it reduces the discretion given to the court. While this is clearly stated by Article 4 (first sentence) HP, it is established by the way of interpretation under the Arab legal provisions that refer to tacit choice directly (Egypt) or indirectly (Jordan). The case law also indicates that strong evidence for the existence of a tacit choice of law should exist. In order to achieve more predictability and legal certainty, however, Arab laws should make it clear that “the tacit choice must appear clearly from the contract terms or the circumstances.”

Arab laws are silent on the extent to which the forum selection is evidence of an intention to choose a particular law to govern. They may add a provision governing the role of forum selection in determining the law tacitly chosen by the parties. In light of divergent interpretations of this contract clause by Arab legal writers, the legislature should make it clear that “forum selection does not in itself reflect the tacit choice of the law of that forum.”