Private International Law: Law Reform in Miscellaneous Matters

A paper presented for the consideration of the Law Reform Division, Attorney-General's Chambers

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1. Introduction

[1] This paper provides a survey of selected aspects of private international law which, in the opinion of the author, merit consideration as to the desirability of reform. The focus is on issues of general and commercial application.

2. International Litigation Issues

2.1. Jurisdiction

2.1.1. *In Personam* Jurisdiction over Foreign Companies

[2] It comes as something of a surprise that the rules for obtaining *in personam* jurisdiction over foreign companies doing business in Singapore are unclear. There are two potentially applicable sets of rules.

[3] As the High Court is created by statute, its rules of jurisdiction derive entirely from statute.[1] Under the Supreme Court of Judicature Act,[2] section 16, *in personam* jurisdiction may be founded where the defendant has been served in Singapore in accordance with the Rules of Court,[3] or where the defendant has been served outside Singapore as authorised by the Rules of Court,[4] or where the defendant has submitted to the jurisdiction of the Singapore court,[5] or where jurisdiction has been founded under the provisions of any other written law.[6] Section 17(c) then provides that the High Court's jurisdiction includes such jurisdiction that is conferred by any written law relating to Companies. It is not clear that section 17 includes *in personam* jurisdiction, for it while "*in personam*" qualifies the jurisdiction conferred by section 16(1), there is no mention of "*in personam*" jurisdiction in section 17, and the matters explicitly referred to could conceivably be interpreted to be confined to jurisdiction over specific subject matter and causes. However, section 16(2), stating that section 17 applies without prejudice to the generality of section 16(1), suggests strongly that section 17 is broad enough to include *in personam* jurisdiction.

[4] Thus, the basis of *in personam* jurisdiction may first be sought in the Companies Act.[7] It provides for the registration of foreign companies when it is carrying on business or has a place of business in Singapore in accordance with the Act.[8] Provision is made in section 376 for the service of documents on such registered foreign companies. However, there are two problems. First, while the Supreme Court of Judicature Act, section 17(c) paves the way for the Companies Act to confer *in personam* jurisdiction on the Singapore High Court, it is unclear that the Companies Act actually does so.

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1 *Indo Commercial Society (Pte) Ltd* v *Ebrahim* [1992] 2 SLR 1041, 1056.
2 Cap 322, 1999 Rev Ed.
3 Section 16(1)(a)(i).
4 Section 16(1)(a)(ii).
5 Section 16(1)(b).
6 Section 16(2).
7 Cap 50, 1994 Rev Ed.
8 Sections 366, 368.

On the face of it, section 376 only provides for the service of documents; nothing is mentioned about founding jurisdiction. Secondly, even if the Companies Act is a source of jurisdiction, a lacuna arises because section 376 only applies where the foreign company is registered under the Act;[9] it does not apply where the foreign company fails to register, or is no longer registered.

[5] Secondly, recourse may be made to the general rules on *in personam* jurisdiction. Jurisdiction may be obtained over foreign companies in accordance with service under or authorised by the Rules of Court. Thus, leave of court may be obtained under Order 11 for service of process outside the jurisdiction against foreign companies. Moreover, an agent of a foreign company may be served in Singapore where authorised by the court in accordance with Order 10 Rule 2.[10] Where the foreign company is present [11] in Singapore, it might be thought that it would be straightforward to serve on the company in Singapore. Order 62 Rule 4 provides that service on an officer of a corporate body is good service on the corporate body, as a necessary exception to the general rule in Order 10 Rule 1 of personal service on the defendant. However, Order 62 Rule 4 applies only where provision is not made in other written laws for the service of documents on such a corporate body, and provision for service is indeed provided for in section 376 of the Companies Act.

[6] It may be argued that the Singapore Companies Act provides the procedure for service of process while the nexus for jurisdiction may sought from the Supreme Court of Judicature Act, section 16(1)(b), because the defendant has submitted to the jurisdiction of the Singapore court, the registration under the Companies Act being an act of submission to the jurisdiction of the court of the forum. There is a difficulty with this argument, however, as it can be argued that the registration is by legal compulsion and thus cannot amount to a voluntary submission.

[7] In contrast, the position in England is clear because under the common law, the *in personam* jurisdiction of the English court is founded on service of process, and so it is easy for the English court to conclude that service on a company in accordance with the English Companies Act 1985 is the foundation of *in personam* jurisdiction over the company.[12] Moreover, the English Companies Act 1985 provides better protection for those who deal with the foreign company in two ways, because it provides, firstly, for the service of documents on a foreign company which has failed to register, provided the company has a place of business within the jurisdiction at the time of service, and secondly, for the service of documents on a company that has given notice to the Registrar of Companies that it was no longer carrying on business in the jurisdiction, so long as the names to be served remain on the files of the Registrar.[13] The latter has been recognised to be somewhat exorbitant where the action has no relation to the business carried on by the company while it was within the jurisdiction.[14]

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9 Section 365.

10 *Bank of Central Asia* v *Rosenberg* [1995] 1 SLR 490.

11 Applying the common law test of presence – whether the company has carried on business for a substantial period of time from fixed premises – to determine whether the company is "in Singapore" for the purpose of section 16(1)(a)(ii).

12 *The Theodohos* [1977] 2 Lloyd's Rep 428.

13 Companies Act 1985, s 695 (See **Annex A**); *Rome v Punjab National Bank (No 2)* [1989] 1 WLR 1211.

14 Same reference, 1221.

[8] In respect of the last point, it is noted that the Singapore Companies Act, section 376, provides for service on a foreign company which has ceased to maintain a place of business in Singapore, by postal means to its registered office in the place of its incorporation. However, since the division in which it is contained applies only to a foreign company that "is registered" as a foreign company under the statute,[15] it appears to be confined to situations where the company remains registered but has ceased to maintain a physical place of business in Singapore.

[9] As more and more international transactions occur in Singapore, and more foreign companies come to Singapore for business, it is important that the rules of jurisdiction be clear. It is recommended that it should be clarified that service under the Companies Act on foreign companies provides a legal basis for *in personam* jurisdiction. One way of achieving this is by deeming service under the Companies Act to be service under the Rules of Court for the purpose of satisfying the Supreme Court of Judicature Act, section 16(1). Another is to state expressly that the Companies Act *does* confer *in personam* jurisdiction.

[10] The service provisions should also be reviewed, and it is recommended that it be expanded to follow the English provision to allow for service on foreign companies that are registrable but which have failed to register, at least where there is an existing place of business to effect service of process. It is suggested that it is also desirable that the service be permissible even where the company has been deregistered, at least where the action relates to business transacted while it was carrying on business as a registrable company.[16] These recommendations will not increase the cost of doing business in Singapore, as the substantive provisions for registration are already extant.

[11] Recommendations:

(1) That there should be legislative clarification that service of process under the Companies Act provides a legal basis for *in personam* jurisdiction over that company.

(2) That the service provision should be expanded to include cases of foreign companies that are registrable but have failed to register, at least where there is an existing place of business to effect the service of process.

(3) That the service provision should also be expanded to include cases of foreign companies which have been deregistered because it has ceased its business in Singapore, provided the action relates to business transacted in Singapore while the defendant was carrying on business or maintaining a place of business in Singapore.

2.1.2. *In Personam* Jurisdiction over Locally Incorporated Companies

[12] While the English common law premise of service as the foundation of jurisdiction enables it to say with confidence that service on a locally incorporated company is a sufficient nexus for the assumption of jurisdiction over the company,[17] the different starting point in Singapore[18] means that the mere provision for service under the Companies Act, section 368, for companies incorporated in Singapore is a less secure

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15 Section 365.

16 Service may be effected in such cases by the means mentioned in [8].

17 *The Theodohos*, above note 12.

18 See [3] above.

basis for jurisdiction. Even if the company is present in the jurisdiction (which it may not, because it may be incorporated in Singapore for the purpose of doing business entirely overseas), service cannot be effected on its officers under Order 62 Rule 4, as provision for service has been provided for under another written law. If the Companies Act does not confer jurisdiction, then the claimant would be left to the cumbersome process under Order 10 Rule 2 which may or may not be satisfied on the facts. It may be that incorporation must also mean submission to the jurisdiction, but the same point made in [6] above may be made here.

[13] There is much to be said for the simple rule that incorporation in Singapore must mean that the Singapore court is entitled to assert *in personam* jurisdiction over the company, and that it should be unnecessary to seek justification for jurisdiction elsewhere. For this reason, it is recommended that there be a legislative amendment clarifying that service of process under the Companies Act is a basis of *in personam* jurisdiction in respect of locally incorporated companies.[19]

[14] Recommendation: That there be legislative clarification that service of process under the Companies Act on a locally incorporated company is a basis of *in personam* jurisdiction.

2.1.3. Choice of Law in a Question of Jurisdiction in Order 11, Rule 1

[15] The Supreme Court of Judicature Act allows the court to authorise the service of process outside of the jurisdiction in accordance with the Rules of Court. Under Order 11, leave may be granted if there is a good arguable case that the plaintiff's case falls within one of the jurisdictional heads (or nexus),[20] Singapore is the appropriate forum for the trial, and the plaintiff establishes a serious issue to be tried on the merits of the claim.[21]

[16] When an issue arises whether there is an arguable case that a claim falls within Order 11, Rule 1 and the head of jurisdiction is defined with reference to a cause of action, eg, contract, tort or restitution, there are several possible approaches that one can take towards the interpretation of such a reference: (a) by reference purely to the meaning of the concept under the domestic law of the forum; (b) by reference to the choice of law rules of the forum applicable to that legal concept; (c) by reference to domestic law of the foreign law alleged to govern the claim; (d) by reference to the choice of law rules of the foreign law alleged to govern the claim; or (e) by reference not to any definitions of any specific system of law, but by relying on the technique of characterisation used in the forum's choice of law rules.

[17] The first solution was advocated by the English High Court in *The TS Havprins*,[22] in respect of the English equivalent of Order 11, Rule 1(d) but its reasoning is not convincing. The court held that as the English court was interpreting a piece of English legislation, it had to apply English notions to the concepts mentioned in the legislation. It also reasoned that any issue that precedes the application of foreign law to determine the merits of the dispute must be resolved by the law of the forum.

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19 See discussion in paragraph [9] above on suggestions on how this may be done.

20 *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438; *Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd* [2000] 1 SLR 673.

21 Same references.

22 [1983] 2 Lloyd's Rep 356.

[18] However, the first argument fails to take sufficient account of the objective of the jurisdictional legislation to allow the forum to hear disputes, whatever the governing law of the substantive merits of the case may be, whenever jurisdictional policies justify that conclusion. Thus, for example, the plaintiff may base his claim on an agreement that is made in Singapore, but is governed by Italian law under which consideration is not required for enforcement, and no consideration is provided under Singapore law. On this approach the Singapore court has no jurisdiction. Order 11, Rule 1 tells us that there is good reason to assume jurisdiction to hear disputes relating to contracts made in Singapore. It seems to defeat the purpose to say that it only extends to disputes relating to contracts recognised as such under Singapore domestic law; it imputes to the lawmakers the failure to recognise the large body of choice of law jurisprudence. Another example is where acts committed abroad amount to a tort by foreign law but not the law of the forum, in circumstances where the Singapore court would apply the foreign law exclusively.[23] In such a case, the Singapore court ought to have jurisdiction to hear the case if, for example, significant damage is suffered in Singapore, but on the domestic interpretation of "tort", it is not possible to authorise service out of jurisdiction. The requirement for the plaintiff to comply with concepts of domestic law of the forum at the jurisdictional stage in addition to the normal choice of law requirements at the trial effectively imposes a kind of double actionability on the plaintiff before he can succeeds in a Singapore court. It would be odd, at a time when several significant jurisdictions have abolished the forum law requirement for choice of law purposes[24] that a similar obstacle is placed before the plaintiff at the jurisdictional stage.

[19] The second argument oversimplifies the relationship between the law of the forum and the law governing the substantive claim, and overlooks the significance of choice of law considerations in questions of jurisdiction. The search for the appropriate governing law must necessarily start with the law of the forum, but it does not necessarily mean utilising only the domestic concepts of the forum. Thus, it is recognised that characterisation, the first step in the choice of law process, is no doubt governed by the law of the forum, but it is not a process relying purely on the concepts found within the domestic law of the forum. Just as the court must look beyond its own domestic law even at the beginning of the choice of law process, it ought also do so, for the reasons given in the preceding paragraph, in jurisdictional questions.

[20] The second approach appears to be supported by the English Court of Appeal decision in *Metall und Rohstoff v Donaldson Lufkin & Jenrette Inc*,[25] in respect of the English equivalent of Order 11, Rule 1(f).[26] The court held that to establish a case for service out of jurisdiction, the plaintiff had to show a good arguable case that a claim in tort had been made out under the choice of law rules of the forum. It is not clear whether

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[23] *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190; *Parno v SC Marine Pte Ltd* [1999] 4 SLR 579.

[24] United Kingdom, Canada and Australia.

[25] [1990] 1 QB 391.

[26] The wording was somewhat different under the (then) English O 11, r 1(1)(f): "the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction." It may be argued that the emphasis on the foundation of the claim on the tort required the court to examine the choice of law question; a step that may be unnecessary under the Singapore rule, where the language is not so emphatic. However, the references to "tort" in the Singapore provision does raise the same issue whether choice of law rules are relevant to its interpretation.

the court was referring to the issue whether the jurisdictional nexus was satisfied, or whether it was referring to the issue whether there was sufficient merit[27] in the case to constitute a proper case for leave to be given for service out of jurisdiction, but the interpretation as choice of law in a head of jurisdiction is defensible, on the basis that the court should not waste its time if it is going to turn out that the forum is going to apply a choice of law rule under which the plaintiff has no case at all. For example, the plaintiff may be able to make out a tort, committed in a foreign country, under Singapore law, but applying the double actionability rule in tort the plaintiff cannot show any civil liability under the law of the place of the commission of the tort, then the court is merely wasting its time in assuming jurisdiction. On the other hand, the issue of sufficiency of merits is already the subject of a different test[28] in the process of service out of jurisdiction, and there is no reason to duplicate the function of that test. Moreover, at the jurisdictional stage, there may be considerable doubt as to what the applicable law would ultimately be as many factors which may have an impact on its selection may still be in dispute.

[21] There is no direct support in the case law for the third or fourth approaches. The argument for the fourth solution was rejected by the English High Court in *The TS Havprins*.[29] If the purpose of the fourth solution is to replicate the result that would have been achieved by a court sitting in the country of the law which governs the claim, the objective of the exercise would be misconceived. The question before the court is not how to resolve the dispute as such, but whether there is sufficient connections in the case with the forum to justify the assumption of jurisdiction by the *court of the forum*. Another argument is similar to that raised in the preceding paragraph: that if the court is ultimately going to apply the law governing the claim, including, sometimes, the choice of law rules of that law,[30] then there is a case for saying that that law should be applied to determine whether such a claim exists for jurisdictional purpose. For example, the application of foreign law would resolve the problem mentioned in the example in paragraph [18] above. However, the application of foreign law at this stage appears to be unnecessarily complicated; not only in terms of the difficulty of ascertainment of the applicable law at that stage given that it is likely that many facts are still in dispute, some of which may have a bearing on the question of the applicable law, but also additional burden of importing the difficulties of proving foreign law into the jurisdictional stage.

[22] None of the above solutions appear satisfactory. The first because it filters out cases which the forum ought to hear; the rest because it introduces elements of forum choice of law rules, foreign domestic law, and foreign choice of law rules which could make the process of establishing jurisdiction rather unwieldy. The jurisdictional threshold should be a simple one focussing on jurisdictional issues and policies. Choice of law considerations should only be relevant in establishing whether the plaintiff has a serious issue to be tried, the mirror image of striking out a claim as having no foundation in the case of jurisdiction established by service within jurisdiction.

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[27] At that time, it was thought that the test for merits was a "good arguable case", and not merely a "serious issue to be tried".

[28] Text to note 21 above.

[29] Note 22 above.

[30] Where *renvoi* is applicable.

[23] The fifth solution has not be applied by any courts. It borrows from the technique of characterisation used in the initiation of the choice of law process itself. The court needs to characterise the issue into an established category (eg, contract, tort, etc) in order to determine the relevant connecting factor pointing towards the applicable law. In doing so, it starts inevitably with its own notions of classification, but always with regard to possible differences in foreign systems of law, for example, that foreign contracts may not require consideration. So forum concepts are a guide to, but do not control, characterisation. Thus, Auld LJ said:

> [The] classification of an issue and rule of law …, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the *lex fori*, or that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the *lex fori* which may not be applicable under the other system [31]

[24] Translated into the jurisdictional context, once the pleaded claims throws up issues, claims, or defences which fall within what could in the broad and international sense be seen as, for example, contract, the jurisdictional head should be regarded as having been satisfied, without reference to whether there is a contract by the law of Singapore, by the alleged foreign governing law of the contract, or the choice of law rules of either.

[25] It may be argued that this approach would lead to more uncertainty, as characterisation is not a process dictated or bounded by strict rules, and lead to longer and more litigation on whether the head of jurisdiction is satisfied. This does not follow. Practically, the characterisation method is likely to be more fuzzy in the inclusive sense than in the exclusive one; additional litigation is more likely to be about bringing within jurisdiction cases which otherwise would have been excluded on the domestic interpretation than it is to increase uncertainty about cases which would already be within the jurisdiction on the domestic interpretation. In any event, the court is entitled to proceed on conceptions of Singapore domestic law unless parties bring up evidence of differences of legal conceptions in foreign legal systems. Some uncertainty will result; but it is not too high a price to pay if the result is greater consistency between service within[32] and service outside jurisdiction and a more rational approach towards jurisdiction problems.

[26] Another argument is that, once we depart from any specific legal system as a frame of reference, it is impossible to determine the connecting factors for taking jurisdiction, for example, where the contract is made[33] or where the breach took place.[34] There are two possible responses to this argument. First, it could be argued that since the jurisdictional rules should not be biased towards or against any particular domestic systems of law, the meanings of the connecting factors must be ascertained against a neutral standard that does not form part of any such domestic legal system.[35] In other

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31 *Macmillan Inc v Bishopsgate Investment Trust plc* [1996] 1 WLR 387, 407.

32 Where there is no requirement that the plaintiff's claim be maintainable under the domestic law of Singapore.

33 O 11, r 1(d)(i).

34 O 11, r 1(e).

35 This is not unlike the "autonomous" interpretation of the European Conventions on jurisdiction and choice of law given by the European Court of Justice.

words, the connecting factors are interpreted according to the objectives sought to be achieved by the jurisdictional rules rather than by the technical rules of any domestic law. There is merit in this approach, but it is liable to cause uncertainty until the interpretation of the various connecting factors become settled law. A second response is that practically, the Singapore court can only work from what the plaintiff has pleaded in his claim, and accordingly determine whether the connecting factors are satisfied accordingly. Thus, for example, if the plaintiff is arguing his claim in tort governed exclusively by Indonesian law, the location of the damage would be determined by the law governing the tort. Practically, as many claims may not raise all the relevant differences of foreign law from the law of the forum at this stage, the court will end up applying the law of the forum.

[27] Recommendation: that it is clarified that for the purpose of determining whether a sub-rule in Order 11, Rule 1 (setting out the circumstances for the court in Singapore to authorise service of process outside the jurisdiction) has been satisfied, if the sub-rule makes reference to any legal concept or institution, then any question which arises as to whether the facts raise any issue relating to any such legal concept or institution, shall be answered by Singapore law in accordance with the principles of characterisation in private international law.

2.1.4. Denying the Existence of a Contract under Order 11, Rule 1(d)

[28] The heads of jurisdiction for service of process outside jurisdiction are quite wide already, and are probably adequate to capture many types of contractual disputes likely to arise over which the Singapore courts have justification for asserting jurisdiction. In recent times, a problem as arisen in the context of the equivalent English provision that can have an adverse impact on the jurisdiction of the Singapore courts. Does Order 11 Rule 1(d)[36] apply when the plaintiff is asking the Singapore courts for a declaration that a contract does not exist between the plaintiff and the defendant? A cloud of obscurity surrounds this question in English law; a cloud dispelled by an amendment to the English rules of procedure which we have yet to follow.

[29] In *Finnish Marine Insurance Co Ltd v Protective National Insurance Co*,[37] where the dispute related to whether the plaintiff's agent had authority to contract with the defendant, the High Court held that the plaintiff could not deny the existence of the contract while asserting that his claim fell within the English equivalent of Order 11, Rule 1(d). This was because the rule presupposes that the plaintiff is claiming relief in respect of an existing contract between the parties. Another High Court tried to distinguish the decision subsequently in the *The Olib*,[38] where the claim was that the contract was void[39] for duress, on the basis that a claim that a contract was void for duress was not the same as a claim that a contract had not come into existence. However, as it was pointed out in a third High Court decision, *DR Ins Co v Central*

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[36] 1. "service of an originating process out of Singapore is permissible with the leave of the Court if in the action — … (d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which –" [there follows a list of factors connecting the claim to Singapore].

[37] [1990] 1 QB 1078.

[38] [1991] 2 Lloyd's Rep 108.

[39] This seems a odd, as no foreign law was relied upon, and under English law, the contract would just have been voidable and not void, and therefore not have raised the *Finnish Marine Insurance* issue at all.

Nat Ins Co,[40] the distinction is not a satisfactory one because in the *Finnish Marine Insurance* case it was not disputed that there was an agreement in fact, the question was whether the plaintiff was a party by the principles of agency law. In *DR Ins Co*, the claim was that a contract between the parties was void and unenforceable for illegality. The court thought that *Finnish Marine Insurance* was indistinguishable and declined to follow it. However, it would seem that the conclusion was not inevitable, because a claim that a contract never came into existence *between the parties* appears to be different from a claim that a contract that has come into existence between the parties had no legal effect; and this may have been the true point intended to be made in *The Olib*. Be that as it may, the position in the English law was uncertain.

[30] This debate is now academic in the United Kingdom, where a new sub-rule was inserted into the English rules of procedure to clarify that the court does have jurisdiction to try cases where the plaintiff is denying the existence of the contract.[41] However, the issue is still a live one under Singapore law. It does appear to be taking an unduly narrow approach towards Order 11, Rule 1(d) to exclude claims where the plaintiff is disputing the existence of a contract between himself and the defendant. No doubt the plaintiff's denial will often arise in the context of seeking a declaration of non-liability from the Singapore court, but the previous judicial statements[42] about the undesirability of such declarations and hostility to such claims in considerations of jurisdiction have since given way to an understanding that negative declarations are a legitimate strategic tool in international litigation.[43] It is often a matter of chance whether the plaintiff or defendant is denying the existence of a contract in any contractual dispute.[44] As Moore-Bick QC, Dy J, said in *DR Ins Co*:

> If there is a genuine dispute as to the legal effect of an apparent contract which falls within the scope of sub-par. (d)(i)-(iii) it is just as desirable in principle that the Court should have the power in an appropriate case to give leave for service out of the jurisdiction as it is in the case where there is a dispute whether a contract originally valid and effective has been discharged by frustration or rescission.

[31] As a matter of principle, it is artificial to distinguish between the case where the plaintiff is denying the existence of the contract from one where the defendant is doing the denying. As a matter of policy, the contract head of jurisdiction should be broad enough to capture all kinds of contractual disputes, including disputes involving the existence of the contract. Although no reported case has arisen yet raising this issue, it is suggested that proactive steps be taken to prevent its occurrence. It is therefore suggested that the position in Singapore be clarified with a new head of jurisdiction allowing for service out of jurisdiction even where the plaintiff is denying the existence of a contract.

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40 [1996] 1 Lloyd's Rep 74.

41 Now CPR 6.20(7): "In any proceedings to which rule 6.19 does not apply, a claim form may be served out of the jurisdiction with the permission of the court if - … (7) a claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in paragraph (5)." Paragraph 5 is the equivalent of Singapore's O 11 r 1(d).

42 *The Volvox Hollandia* [1998] 2 Lloyd's Rep 361.

43 *Messier Dowty Ltd v Sabena SA* [2000] 1 WLR 2040.

44 There is no doubt as to jurisdiction when the defendant denies the contract: *The Ines* [1993] 2 Lloyd's Rep 492.

[32] Recommendation: That it is clarified with a new sub-rule under Order 11 Rule 1 that the courts can grant leave for service out of jurisdiction under Order 11, Rule 1(d), even when the plaintiff is denying the existence of the contract.

2.1.5. Timing of Stay Applications

[33] An application to stay proceedings on natural forum principles is not a challenge to the jurisdiction,[45] unlike an application to set aside the service of process under Order 12 Rule 7. A challenge on natural forum principles in the case of service of process outside jurisdiction is limited to the period allowed for the serving a defence,[46] while the same challenge[47] in the case of service of process within jurisdiction has no time limitation. The only reason for this distinction lies in the difference of procedure: a challenge in the case of service out of jurisdiction is made pursuant to Order 12 Rule 7, but the challenge in the case of service within jurisdiction invokes the inherent procedure of the court.

[34] It may well be that there is no practical difference, if it is accepted that an application to stay proceedings may be made when the service of process out of jurisdiction has not been challenged. It is not unusual in Singapore for counsel to apply to set aside the service of process outside of jurisdiction, and to ask for a stay in the alternative, on natural forum principles,[48] but it has not been authoritatively resolved whether a stay application could be considered in the alternative if the challenge on the setting aside has failed. Indeed, Cheshire and North indicates that: "In cases where the court has exercised its discretion to allow service out of the jurisdiction under Order 11 of the Rules of the Supreme Court, the court has already decided that England is the most appropriate forum for trial. It follows that a stay of proceedings will not be granted subsequently on the basis of *forum non conveniens*."[49]

[35] There is a tension between two policy considerations. On one hand, jurisdictional challenges should be made and resolved as soon as possible, so that the court and all parties concerned can get on with the trial of the merits without further jurisdictional distractions, wherever that trial is to take place. On the other hand, appropriateness of forum is a state of affairs that is susceptible to changes of circumstances over time. Thus, as a matter of practical justice, courts consider the factors for determining the natural forum at the time of the hearing.[50]

[36] Thus, the reason for the statement in Cheshire and North cited in paragraph [34] above is not the principle of *res judicata* as such, but that of abuse of process. The same principle ought to apply not only when the defendant has failed in the challenge to the service of process out of jurisdiction on natural forum grounds, but also when the defendant has failed to make a challenged in the time allowed for such challenge. On the other hand, it is not an invariable rule that the defendant is precluded from

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45 *The Messiniaki Tolmi* [1984] 1 Lloyd's Rep 266.

46 O 12 r 7(1).

47 It is made clear in *The Spiliada* [1987] AC 460, and accepted in *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1998] 1 SLR 253 (CA) that the same substantive principles apply subject to differences in the allocation of the burden of proof.

48 See, eg, in *Transniko Pte Ltd v Communication Technology Sdn Bhd* [1996] 1 SLR 580, and *Bhojwani v Bhojwani* [1997] 2 SLR 682.

49 North and Fawcett, Cheshire and North: Private International Law (13th ed, 1999), 340 (footnotes omitted).

50 *Mohammed v Bank of Kuwait* [1996] 1 WLR 1483

further challenges; there may be changes of circumstances which would justify a late application to stay. This is a factor that doctrine of abuse of process is flexible enough to handle.

[37] Under recently changed procedural rules in England the rules for challenging the appropriateness of the forum for both service and within and without jurisdiction were consolidated,[51] and an application to stay has to be made within the period for the filing of a defence, and the defendant has to apply to the court for an extension of time if the application is late.[52] It may be argued that such a limitation is unnecessary, as the court can always take into consideration the delay in an application as a factor against the applicant for a stay. In one local example, the application for stay on principles of natural forum was made by the defendant (and heard by the court) four years after service of the writ out of the jurisdiction.[53] The court considered the delay as a factor against the stay of proceedings. On the other hand, there is a strong policy reason in the conservation of judicial resources to confine jurisdiction arguments to the early stages of the litigation,[54] so that a stronger position may need to be taken against late applications, for example, allowing stay applications outside that period only with the leave of the court in accordance with rules for applications for extensions of time. This will send out a strong signal to litigants to raise jurisdictional arguments as early as possible.

[38] Recommendation: That the rules of procedure be modified so that, as a general rule, applications for stay of proceedings on natural forum principles should be made within a fixed limited period from the time of the service.

2.1.6. Interim Relief to Assist Foreign Litigation

[39] The idea of the plaintiff obtaining an interlocutory injunction to prevent the defendant from dissipating his assets in order to defeat the plaintiff's judgment (a "*Mareva*"[55] injunction, or an asset-freezing order) is a familiar one in domestic litigation. While the Singapore court clearly has the power to grant this type of asset-freezing order,[56] the issue of when it jurisdiction to do so in international cases is less clear, because of the requirement inherent in the ancillary nature of the injunction that the substantive cause of action be justiciable in the Singapore court.[57]

[40] Little difficulty is caused if the jurisdiction is obtained as of right, but the position deserves to be stated to understand the attitude of the law in such cases. Where jurisdiction has been obtained as of right over the defendant, but the action is stayed because another forum is the more appropriate forum, the court of the forum remains seised of the proceedings, and continues to have *in personam* jurisdiction over the defendant. Thus, the cause of action remains justiciable in the court for the purpose of the *Mareva* injunction. In *House of Spring Gardens Ltd* v *Waite*,[58] the plaintiff had

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51 CPR Rule 11.

52 Dicey and Morris: The Conflict of Laws (13th ed, 2000), [12-032]; *Montrose Investments Ltd v Orion Nominees* [2002] ILPr 267.

53 *Datuk Hiew Min Yong v Dow Jones Publishing Co (Asia) Inc* 10 September 1993.

54 In England, the time period is 14 days generally, but 28 days in the Commercial Court (CPPR r 58.7), after the filing of the acknowledgement of service.

55 *The Mareva* [1975] 2 Lloyd's Rep 509.

56 Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed), s 18(2), Sch 1, para (5). See also Civil Law Act (Cap 43, 1999 Rev Ed), s 4(10); *Art Trend Ltd* v *Blue Dolphin (Pte) Ltd* [1983] 1 MLJ 25, 29.

57 *The Siskina* [1979] AC 210.

58 [1984] FSR 277, 283.

commenced proceedings in both Ireland and England, but chose to proceed with the Irish action. The defendant's application to discharge the English *Mareva* injunction was refused. Vinelott J stated:

> It not infrequently happens that a plaintiff starts proceedings against the same defendants on the same causes of action in more than one jurisdiction because, for instance, he wants to obtain *Mareva* injunctions wherever the defendants have assets. He must then choose in which jurisdiction to pursue his claim; if he pursues all the actions simultaneously he is likely to face an application to stay some or all of them on the ground that his conduct of the litigation is oppressive. But the fact that the plaintiff has allowed the action in, for instance, England to go to sleep while he seeks to establish his claim in another jurisdiction is not a ground for denying him the protection of a *Mareva* injunction pending judgment in that other jurisdiction."

[41] The position is similar for international arbitration. Under the International Arbitration Act,[59] where parties have agreed to international arbitration,[60] legal proceedings must, subject to limited exceptions, be stayed.[61] Where the arbitration proceedings are to take place abroad, judicial interim remedies may still be obtained from the Singapore court.[62] Where a mandatory stay is granted under the statute, the cause of action remains potentially justiciable in the court as the court's jurisdiction is taken away by statute only upon the application of the party, and only conditionally, and that is enough for a *Mareva* injunction to be sustained.[63]

[42] The position is different if the jurisdiction can only be obtained over the defendant by leave of court for service of process out of the jurisdiction. In *The Siskina*,[64] the House of Lords had held that, where the plaintiff has no other head of jurisdiction to rely on to sue upon the substantive cause of action in England, the plaintiff could not rely on the (then) English equivalent[65] of Order 11, Rule 1(b)[66] to bring the defendant within the jurisdiction in order to obtain a *Mareva* injunction over the defendant's assets. This was because the equivalent of Order 11, Rule 1(b) presupposed an injunction to give effect to substantive rights, and a *Mareva* injunction was only ancillary in nature; its only function is to support the litigation in which the

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59 Cap 143A, 1995 Rev Ed.

60 For the distinction between international and domestic arbitration, see same reference, s 5(2).

61 Same reference, s 6(2).

62 In the Model Law, Sch 1, International Arbitration Act, same reference, Art 9 states: "It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure." It is confined by Art 1(2) to cases where the arbitration proceedings are to take place in the forum. However, it does not positively prohibit the granting of judicial remedies in cases of foreign arbitration. S 7 of the Act, giving the court the power to preserve security for the plaintiff's claim in spite of the stay, shows that the scheme of international arbitration is not inconsistent with judicial remedies to assist in foreign arbitration proceedings.

63 *Channel Tunnel Group Ltd* v *Balfour Beatty Construction Ltd* [1993] AC 334.

64 Above, note 57.

65 RSC O 11 r 1: "(1)... service of a writ, or notice of a writ, out of the jurisdiction is permissible with the leave of the court in the following cases... (*i*) if in the action begun by the writ an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of the failure to do or the doing of that thing);..."

66 "… service of an originating process out of Singapore is permissible with the leave of the Court if in the action … (b) an injunction is sought ordering the defendant to do or refrain from doing anything in Singapore (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);…"

substantive rights are being vindicated. This interpretation was upheld by a majority of the Privy Council in *Mercedes Benz v Leiduck*.[67]

[43] Even if the substantive cause of action of action can theoretically be heard in Singapore under one of the heads of Order 11, Rule 1, Singapore may not be the natural forum. In this case, leave would not be granted at all, and unlike the case of a stay of proceedings in an action begun by service within jurisdiction,[68] so the cause of action is not justiciable within the forum. In *Baidini* v *Baidini*,[69] matrimonial proceedings were taking place in Michigan, where the court had made an interlocutory order against the husband in respect of his foreign assets. The wife came to England to freeze his assets there. The Court of Appeal affirmed the High Court's refusal to grant leave for service of process on the defendant out of jurisdiction, since Michigan was the proper forum to hear the case. Plaintiff's counsel had argued that the only purpose of the application was to get a *Mareva* injunction, and the plaintiff did not intend to take substantive action in England. The Court of Appeal rejected the argument, and distinguished *House of Spring Gardens Ltd* v *Waite*[70] on the technical ground that in that case, proceedings had been properly instituted while in the present case no proceedings had begun. It is not even possible, it seems, to get around this objection by staying the action after the service of writ. In *A/A D/S Svendborg* v *Maxim Brand*,[71] the Court of Appeal discharged a *Mareva* injunction that had been granted, when it held that leave should not have been given in an Order 11 case. Kerr LJ remarked that there was no ground for acceding to the "extraordinary" argument that a *Mareva* injunction could be sustained if leave had been denied for service out of jurisdiction in respect of the underlying cause of action.

[44] It is not possible for the plaintiff to argue that the forum should grant a *Mareva* injunction in anticipation of his obtaining a foreign judgment for the purpose of enforcement within the jurisdiction under Rule 1(m); no judgment has been given yet.[72] Nor can reliance be placed on an anticipated cause of action (the common law action of enforcement of a foreign judgment) arising in Singapore under Rule 1(p);[73] the cause of action has not yet arisen. In any event, an anticipated cause of action, no matter how probable, cannot sustain a *Mareva* injunction.[74]

[45] Can the position in Singapore be distinguished? The English provision under consideration contains the key words "in an action begun by writ", which the House of Lord considered to require a substantive cause of action; an application for a *Mareva* injunction was not an "action".[75] The wording in the Singapore provision, on the other hand, requires only that "an injunction is sought", but the entire of Order 11 Rule 1 presupposes the service out of an "originating process". An "originating summons" is defined as "means every summons other than a summons in a pending

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67 [1996] 2 AC 284.
68 Paragraph [40] above.
69 [1987] FLR 463.
70 *Supra*, note 58.
71 Unreported, 23 January 1989.
72 *Mercedes Benz AG v Leiduck* [1996] 1 AC 284.
73 O 11 r 1(p).
74 *The Veracruz I* [1992] 1 Lloyd's Rep 353.
75 Even after the change of wording in the English rules to require only a "claim" (CPR 6.20), the English approach so far is to continue to require the vindication of substantive rights: *Cool Carriers AB v HSBC Bank USA* [2001] 2 Lloyd's Rep 22.

cause or matter".[76] The ordinary understanding of an application for a Mareva injunction is that it is in the course of a pending cause or matter, since it is not a cause or matter in itself.

[46] The position in Singapore is also arguably different because Order 11, Rule 1(a), which has no equivalent in England, provides for a basis for service out of jurisdiction where the defendant has assets in Singapore. However, Singapore may not be the natural forum for the substantive trial, in which case, all the difficulties discussed in paragraph [43] above will arise.

[47] The restrictive interpretation in *The Siskina* does not do any harm in England anymore. First, UK legislation has made it clear that the forum can and should assist foreign litigation with interlocutory remedies where appropriate, by extending the judicial power, first conferred on the courts in the context of European jurisdictional regulations,[77] to cases where litigation is taking place outside the convention countries.[78] Secondly, a separate procedure exists for the service out of jurisdiction accordingly,[79] bypassing the difficulty created by *The Siskina*.

[48] In Singapore, we need to address three questions in this context. The first is a question of policy: whether the court should provide assistance of an interlocutory nature to litigation taking place elsewhere. The second is whether legislative intervention is necessary. The third question is, if such intervention is necessary, how the rules of jurisdiction may be expanded.

[49] The common law position is that it is proper to support litigation abroad.[80] The problems discussed above arise because of technical limitations of jurisdictional rules. It is consistent with developments in the concept of the natural forum that in cases where the Singapore court would have heard the case but for the fact that another forum is more appropriate (whether the action is commenced by service within or outside the jurisdiction), the Singapore court is justified in acting to protect the plaintiff's claim to interlocutory protection from potential dissipation of the defendant's assets. Moreover, in an era where cross-border fraud is rampant, the Singapore court should be seen to be doing its part to fight this malaise. The problem is not a serious one where interlocutory relief is available in the foreign court hearing the case, and the defendant has assets in that jurisdiction, but it can be very serious if the defendant has no assets in the natural forum, and substantial assets in Singapore which the orders of the foreign court for some reason or other cannot or will not reach. This type of situation was stated very succinctly by Lord Nicholls in his dissenting judgment in *Mercedes Benz AG v Leiduck*:

> The first defendant's argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court

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76 RC O 1 r 4.

77 Brussels Regulation, Article 31 (**Annex B**).

78 The Civil Jurisdiction and Judgments Act 1982, section 25, originally provided for interim measures to be granted in respect of litigation in a Brussels/Lugano Convention country. Section 25 was amended by the Civil Jurisdiction and Judgments Act 1991 (c 12), Schedule 2, paragraph 12, and extended by SI 1997/302, so that the leave could be obtained in respect of injunctions to support proceedings in any country (**Annex B**).

79 CPR 6.20(4) (**Annex B**).

80 See *House of Spring Gardens Ltd v Waite*, above note 67, discussed above in paragraph [40]. See also *Chartered Bank v Daklouche* [1980] 1 WLR 107; *Société Générale de Paris* v *Dreyfus Bros* (1885) 29 Ch D 239.

> cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable.[81]

[50] It should be noted, however, that the Jersey court had managed the reach the same position as England without any judicial intervention. It did so in two steps. First, it held, following the dissenting view of Lord Nicholls in *Mercedes Benz AG v Leiduck*, that the court had the power to grant *Mareva* injunctions independently of any substantive cause of action justiciable within the jurisdiction;[82] it is not "ancillary" to any cause of action. Secondly, as the injunction is a free-standing one, service out of jurisdiction could be made under its equivalent of Singapore's Order 11, Rule 1(b).[83] However, the first step in the analysis is questionable: the *Mareva* injunction was thoroughly examined by the High Court of Australia recently, and it concluded that it was a court order intended to protect against the abuse of process of the court.[84] Secondly, to say that the *Mareva* injunction is not ancillary and can be granted independently of any substantive proceedings before the court is a matter going to the *power* of the court; even if that is right, it does not follow that the court will have *jurisdiction* over the defendant for the purpose of exercising that power, if the provision for service out nevertheless requires an underlying claim for the vindication of substantive rights.

[51] It is therefore suggested that legislative reform is desirable. Two things will need to be done. First, it must be stated or made clear that the *power* to grant the *Mareva* injunction notwithstanding that the substantive underlying cause of action is not justicable in the forum. Secondly, to close the jurisdictional gap, the jurisdictional rules for service outside jurisdiction should be expanded along the lines of English law to allow the courts to assume jurisdiction in cases where the substantive cause of action is not going to be heard in Singapore, either because the Singapore court has no jurisdiction, or because Singapore is not the appropriate forum for the resolution of the substantive dispute.

[52] Reform along these lines will not be seen as overstretching the jurisdiction of the Singapore court. It is merely the rationalisation in respect of service out of jurisdiction what can effectively be done already in cases of service within jurisdiction. It is a different question altogether whether the court thinks that it is the appropriate forum for granting the *Mareva* injunction. It may not think so, for example, if there are no assets in Singapore and the plaintiff is seeking a world-wide injunction from the Singapore court. It is also a different question whether the court would consider the circumstances to be appropriate for the grant of a *Mareva* injunction; and for this reason, it would probably be more willing to protect the plaintiff if the foreign court would have been willing and able to provide the interlocutory remedy had the property been within its jurisdiction than in the case if the foreign law under which

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81 Note 72 above, at 305.

82 *Solvalub Ltd v Match Investments Ltd* [1998] ILPr 419.

83 Service of Process (Jersey) Rules 1994: 7. Service out of the jurisdiction of a summons may be allowed by the court whenever – … (b) an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of the doing of or failure to do that thing);"

84 ie, to prevent the defendant from frustrating the judicial process: *Cardile v LED Builders Pty Ltd* [1999] HCA 18; 162 ALR 294.

the adjudicating court is operating finds some constitutional or legal objections to this type of orders. These are matters that can be left to judicial development.

[53] This discussion has not addressed the question whether and when the *Mareva* injunction can be granted against parties who are not the defendants in the substantive action.[85] It is part of the law of *Mareva* injunctions, whether there are international elements involved or not, so no specific clarification or reform is proposed in this respect.

[54] The discussion above has focussed on the *Mareva* injunction as the paradigm case of providing assistance to litigation occurring in a foreign court. The issue is wider than that, and can apply to other interlocutory orders of the court.[86]

[55] Recommendation: It is recommended that the law be reformed so that (a) interim relief may be granted by the Singapore court in accordance with the law even where the substantive proceedings are not justiciable within the jurisdiction; and (b) there is a new ground in Order 11 Rule 1 for the court to assume jurisdiction over defendants abroad where an interim remedy is sought in respect of proceedings occurring elsewhere.

2.2. Foreign Judgments

[56] Foreign judgments may be enforceable or recognised in Singapore under common law rules, the Reciprocal Enforcement of Commonwealth Judgments Act,[87] or the Reciprocal Enforcement of Foreign Judgments Act.[88] The basic principle is that an *in personam* foreign judgment is enforceable against the defendant if it is for a fixed or ascertainable sum of money, final and conclusive on the merits of the case, and the foreign court had international jurisdiction over the defendant and no relevant defences apply. The foreign court has international jurisdiction against the person the judgment is held conclusive against if that person is present or resident in the foreign jurisdiction, or has submitted to the foreign jurisdiction which from the judgment originated.

2.2.1. Presence of Individuals as Basis of International Jurisdiction

[57] Presence or residence of corporations in the foreign jurisdiction at the time the foreign court assumed jurisdiction is clearly a basis of international jurisdiction, since there is no real difference between the two tests – both depend on the company carrying business within that jurisdiction for a sufficient period of time.[89] The position for individuals is less clear. In English common law that mere presence is enough,[90] provided that it has not been induced by compulsion, fraud or duress.[91] However, there is an old local authority holding that mere temporary presence of an individual in the foreign country assumed jurisdiction was not a basis of international

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85 See, eg, *C Inc Plc v L* [2001] 2 Lloyd's Rep 459.

86 Eg, the *Anton Piller* (search) order: *Cook Industries Inc v Galliher* [1979] Ch 439; *Altertext v Advanced Data Communications Ltd* [1985] 1 WLR 457. Other orders may include interlocutory injunctions to preserve *status quo* in the forum pending the outcome of litigation abroad, eg, in cases litigated abroad of infringements of intellectual property rights in Singapore.

87 Cap 264, 1985 Rev Ed.

88 Cap 265, 2001 Rev Ed.

89 *Adams v Cape Industries plc* [1990] Ch 433.

90 *Carrick v Hancock* (1895) 12 TLR 59.

91 Above, note 89, 517-518.

jurisdiction.[92] But more recently, the Singapore High Court has suggested that mere presence is enough.[93] Authorities aside, the following arguments may be considered in respect of presence as a ground of jurisdiction.

[58] First, it may be argued that presence is a basis for the Singapore court to assume jurisdiction,[94] so it should be acceptable as a basis for international jurisdiction when it comes to foreign judgments. However, that analogy is in appropriate for two reasons. First, it does not take adequate account of the principles of natural forum; the court is likely to stay the proceedings if the case has no other connections with Singapore. Secondly, whatever may have been the historical links between what the common law court conceived of as grounds for assuming jurisdiction for itself and what it thought of as appropriate bases of "international" jurisdiction, today it is clear that the two are different. For example, the grounds for the court to assume jurisdiction in international cases has expanded considerably by statute,[95] but it does not follow that international jurisdiction should be expanded accordingly.

[59] Secondly, it may be argued that other common law countries[96] accept temporary presence of individuals, and as a matter of consistency and reciprocity, the position in Singapore should be the same. The consistency argument does not, however, carry very far, as there are already divergences in the laws of different countries.[97] Nor, apart from statute, is the issue of recognition or enforcement of foreign judgments one based on reciprocity.

[60] Casual presence as a ground of jurisdiction is criticised in Cheshire and North: *Private International Law*[98] providing an insufficient connection between the defendant and the foreign jurisdiction to compel the defendant to obey the judgment. Dicey and Morris: *The Conflict of Laws*[99] also criticises casual presence as a basis of jurisdiction in the absence of any other connections of the case with the foreign country. It is to be noted that mere presence is insufficient for registration under the Reciprocal Enforcement of Commonwealth Judgments Act,[100] nor is it a basis for registration under the Reciprocal Enforcement of Foreign Judgments Act.[101] *Carrick v Hancock*,[102] the leading case in English common law on mere presence as an adequate basis of international jurisdiction, is not a good example of the proposition it sought to illustrate, as the defendant had submitted to the jurisdiction of the foreign court. Its recent affirmation in *Adams v Cape Industries plc*[103] is only an observation as the case only dealt with corporation, for which presence has no real meaning, and the real test is one of carrying on business.

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92 *RMS Veerappa Chitty v MPL Mootappa Chitty* (1894) II SSLR 12. It is noted, though, that this was decided before *Carrick v Hancock*, above note 90, was reported.

93 *United Malayan Banking Corporation Bhd* v *Khoo Boo Hor* [1996] 1 SLR 359, 362.

94 Supreme Court of Judicature Act, s 16(1)(a)(i), RC Order 10 r 1. As in the common law: *Maharanee of Baroda v Wildenstein* [1972] 2 QB 283.

95 Supreme Court of Judicature Act, s 16(1)(a)(ii), RC Order 11.

96 Eg, England: above note 90; Canada: Castel, *Canadian Conflict of Laws* (3rd ed, 1994) 260; Australia: Nygh, *Conflict of Laws in Australia* (6th ed, 1995) 138.

97 Eg, Canadian rules have diverged considerably from traditional common law views. English rules are now much affected by European Regulations and Conventions.

98 (13th ed, 1999) 409.

99 (13th ed, 2000) 490-491.

100 S 3(2)(b).

101 S 5(2)(a)(iv).

102 Above, note 90.

103 Above, note 89.

[61] Residence would provide a more secure basis of international jurisdiction.[104] As the position in Singapore has not yet been authoritatively stated, the question is whether this is a matter best left to judicial development, or whether it is a matter for which legislative clarification is desirable. The fact that there is yet to be any case to test the point in Singapore law since 1874[105] may indicate the lack of practical significance of the point. However, as the significance and awareness of international litigation increases, it may only be a matter of time before the case is tested. However, if international litigation issues comes under scrutiny in a general law reform exercise, it may be a good opportunity to clarify this issue. This will not affect the position under the two enforcement statutes, nor should it affect the issue of international jurisdiction over corporate bodies.

[62] Recommendation: That the ground of presence as a basis of international jurisdiction for the purpose of recognition or enforcement of foreign judgments at common law be abolished.

2.2.2. Fraud

[63] In the interest of finality, local judgments cannot be impeached for fraud without the production of newly discovered evidence that could not have been presented to the court at the time of the trial, and the evidence is so strong that it could be said that had it been presented it would have affected the outcome of the proceedings.[106] It does not matter whether the fraud is extrinsic (eg, suborning witnesses or the use of force outside the courtroom) or intrinsic (the deception of the court itself during the trial).

[64] Under English common law, foreign judgments are not treated in the same way. Although a foreign judgment which satisfies the requirements of recognition or enforcement is conclusive as to the merits determined in the judgment,[107] nevertheless a foreign judgment may be challenged for fraud, whether extrinsic or intrinsic, whether or not there has been any newly discovered evidence of the fraud not reasonably discoverable at the time of the trial which could have been presented to the foreign court, and even if the same evidence used in the challenge in the forum had been presented and rejected in the foreign court.[108]

[65] On the other hand, it is unclear how much of this fraud defence has been undercut by the jurisdiction in abuse of process; an application to challenge the recognition or enforcement of a foreign judgment for fraud can certainly be dismissed if no cogent evidence of fraud is produced at all. It is less clear, however, to what extent the abuse of process jurisdiction can be invoked if the arguments of fraud had already been argued before and rejected by the foreign court.[109] In theory at least, if the substantive rule of law is that foreign judgments can be re-opened on the merits on an allegation of fraud even if the same arguments have been heard and dismissed by the foreign court, it is difficult to see why it can an abuse of process merely for a party to take advantage of this rule. In any event, a subsequent finding by another foreign court that

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104 See, eg, *RMS Veerappa Chitty v MPL Mootappa Chitty*, above, note 92.
105 Above, note 92.
106 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529.
107 *Godard v Gray* (1870) LR 6 QB 139.
108 *Abouloff v Oppenheimer* (1882) 10 QBD 295; *Vadala v Lawes* (1890) 25 QBD 310; *Syal v Heyward* [1948] 2 KB 433; *Owens Bank Ltd v Bracco* [1992] 2 AC 443.
109 *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44; *Jet Holdings Inc v Patel* [1991] 1 QB 241, 254.

an earlier judgment had not been procured by fraud can raise an estoppel on the issue to bind the parties.[110]

[66] The English common law has been strongly criticised by academics. The reasoning underlying the older authorities that the issue whether the judgment had been obtained fraud could not possibly have been before the foreign court so that the foreign court was incapable rendering any decision on that point, has been acknowledged to be simply a technical one.[111] It is to be noted foreign judgments enforceable in England under the Brussels Regulation cannot be challenged for fraud in the same way. The House of Lords in *Owens Bank Ltd v Bracco*[112] acknowledged the criticisms against the common law position, but in an important decision relating to a fraud challenge to a judgment enforceable under the Administration of Justice Act 1920, it held that the statute had incorporated the common law understanding at the time of the enactment, and to change the common law would produce inconsistent results depending on whether the action was under statute or the common law. Accordingly it declined the opportunity to review the common law position.

[67] In an important decision, the Singapore Court of Appeal has rejected the English common law position. In *Hong Pian Tee v Les Placements Germain Gauthier*,[113] the Court of Appeal held that in the case of intrinsic fraud (where the defendants had argued that the plaintiffs had failed to make material disclosures in the foreign court), a challenge that the foreign judgment was obtained by fraud had to be supported by newly discovered evidence not reasonable discoverable at the time of the foreign trial. Three policy considerations were taken into consideration. First, finality of litigation favoured making it more difficult to re-open the merits of a foreign judgment.[114] Secondly, foreign judgments should not be treated differently from domestic judgments.[115] Thirdly, the forum should not be seen as acting the role of a court of appeal for foreign courts.[116] The court also observed that the position was consistent with Australian and Canadian authorities.[117] The Court of Appeal did not have its attention drawn to more recent Australian authorities signalling a retreat to the English common law position,[118] but its observation on the Canadian position appears to be supportable, even if the Canadian position itself cannot be regarded as settled.[119]

[68] While the Singapore Court of Appeal decision is groundbreaking, and a welcome development in international litigation,[120] there are two outstanding issues.

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110 *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241.

111 *Vadala v Lawes*, note 108 above. It has been said to be "illogical" in *Westacre Investments Inc v Jugoimport SDPR Holding Co Ltd* [1999] QB 740, 782.

112 Note 108 above.

113]2002] 2 SLR 81.

114 Same reference, at [27], [30].

115 Same reference.

116 Same reference, at [28], [30].

117 Same reference, at [30].

118 Eg, *Close v Arnot*, NSW, 21 November 1997; *Yoong v Song* [2000] NSWSC 1147. This point is noted in Daniel Tan, "Enforcement of Foreign Judgments – Should Fraud Unravel All?" [2002] SJICL (forthcoming).

119 See Daniel Tan, same reference, text to note 42.

120 Daniel Tan, same reference, argues that the decision was wrong. However, it is suggested that ultimately the decision rests on a defensible policy balance between finality and international comity on one hand, and possible injustice and inconvenience caused by dubious foreign justice systems on the other. Tan's strongest argument is that the plaintiff has chosen his forum to obtain his judgment, and so the defendant is entitled to choose his forum to defend. It is suggested, however, that this battle ought

[69] First, the *scope* of the holding is unclear. The holding itself is clear:

> [W]here an allegation of fraud had been considered and adjudicated upon by a competent foreign court, the foreign judgment may be challenged on the ground of fraud only where fresh evidence has come to light which reasonable diligence on the part of the defendant would not have uncovered and the fresh evidence would have been likely to make a difference in the eventual result of the case.[121]

[70] Two comments may be made of this holding.

[71] First, on its terms, it is unclear whether the holding is confined to a situation where the same arguments already made in the foreign court are being repeated in the forum. If so, then it would not apply to a case where the defendant is reserving the arguments to the enforcing forum.[122] The tenor of the court's judgment suggests, however, that it would have taken the same position in such a case.

[72] Secondly, it is not clear whether the fresh evidence rule also applies in cases of extrinsic fraud. Such a case was not before the court, and naturally it did not pay much attention to it. However, the Court of Appeal did say that it was adopting the "Canadian-Australian" approach.[123] The court also noted the distinction in the Canadian authorities between extrinsic and intrinsic fraud, that "a court should only look into the merits of a foreign judgment if extrinsic fraud was alleged or if the defendant had discovered evidence of intrinsic fraud after the foreign judgment was passed."[124] Such a distinction is not drawn in the Australian case[125] mentioned in the judgment, and the Court's endorsement of the "Australian-Canadian" approach was only for the purpose of arriving at the holding in the case before it of intrinsic fraud. So the position so far as extrinsic fraud is concerned remains an open question, although the policy considerations behind the holding again suggests that the court may apply the same approach to both intrinsic and extrinsic fraud.

[73] It is suggested that these two issues be left to judicial consideration and development.

[74] The second issue is the more problematic one of the interaction between the present Singapore common law position and position under the relevant Singapore statutes, especially in view of the House of Lords decision in *Owens Bank Ltd v Bracco*.[126] As a point of statutory interpretation, the argument that Parliament had intended "fraud"[127] to have the common law meaning at the time of the enactment[128] of the statutes is difficult to overcome. Even if the purposive approach of the Interpretation Act,[129] section 9A is invoked, it is likely to be difficult to find any evidence in support of the argument that Parliament had intended to track the *changes* in the common law. On the other hand, if *Owens Bank Ltd v Bracco* is correct, the very problem which the House of Lords sought to avoid will afflict Singapore law: that different outcomes may occur depending on whether the party relying on the foreign judgment seeks to

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to be fought at the jurisdictional and not judgments stage; though this counter-argument depends on the rationalisation of the rules of submission (see Section 2.2.3).

121 Note 113 above, at [30].

122 Eg, in *Syal v Heyward* [1948] 2 KB 443.

123 Note 113 above, at [27], [30].

124 Same reference, at [21].

125 *Keele v Findley* (1990) 21 NSWLR 444.

126 Discussed above in paragraph [66].

127 RECJA, s 3(2)(d); REFJA, s 5(1)(a)(iv).

128 1921 and 1959 respectively.

129 Cap 1, 1999 Rev Ed.

rely on the common law or the statute. Thus, legislative clarification may be desirable to avoid this anomaly.

[75] Recommendation: That the meaning of "fraud" in the Reciprocal Enforcement of Commonwealth Judgments Act and the Reciprocal Enforcement of Foreign Judgments Act be clarified, tracking the recent Singapore Court of Appeal decision in *Hong Pian Tee v Les Placements Germain Gauthier,* to refer to the same principles that apply to the setting aside of domestic judgments for fraud.

2.2.3. Submission

[76] Submission to the jurisdiction of the foreign court is an important basis of international jurisdiction, for the purpose of the recognition and enforcement of foreign judgments. One significant aspect of this is submission by agreement, as in the case of jurisdiction clauses. Equally important is the issue of when steps taken in connection with the foreign proceedings will be considered to be submission to the foreign court. It is in this latter respect that the common law has taken an undesirable turn.

[77] The question whether there has been submission for this purpose is determined by the law of the enforcing court, although reference may be made to the rules of procedure of the foreign court to determine the nature of the actions taken by the allegedly submitting party in the foreign court. In *Harris v Taylor*,[130] the plaintiff had obtained leave from the Manx court to serve the writ on the defendant in England. The defendant applied to set aside the writ on the grounds, among others, that the service out of jurisdiction was not authorised under Manx rules and that no cause of action arose within the jurisdiction of the Manx court. The court disagreed with both arguments and dismissed the application. The defendant took no further part in the proceedings. The plaintiff obtained default judgment and sought to enforce it in England. The English Court of Appeal affirmed the High Court judgment that the defendant had voluntarily submitted to the jurisdiction of the Manx court.

[78] In *Henry v Geoprosco International Ltd*, [131] a Canadian resident plaintiff had served obtained leave of the Alberta court to serve a writ on his former employer, the defendant, in Jersey. The defendant was a Jersey company with its head office in London. The claim was for damages for unfair dismissal, and the contract of employment contained an arbitration clause. The defendant applied to the Alberta court to set aside the service of process, and in the alternative, to stay the action because of the arbitration clause. One of the reasons argued by the defendant for setting aside the service of process was that the Alberta court was not the natural forum. The defendant's application was refused, and after its subsequent appeal failed, it took no further part in the Alberta proceedings.

[79] The Court of Appeal left open the question whether, if all the defendant had one was to protest against the jurisdiction of the foreign court, he would have submitted to the foreign court, since it was found that the defendant had gone beyond that. However, it did point out that *Harris v Taylor* is not authority that a protest against the foreign court's jurisdiction, without more, constituted submission to the foreign court. Roskill LJ, delivering the court's judgment, said:

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130 [1914] 3 KB 145.
131 [1976] QB 726.

> [T]he defendant went much further than protesting against the jurisdiction. It is plain that he was also inviting the Isle of Man High Court not to exercise the discretionary jurisdiction which it undoubtedly possessed under its own local law to allow the order for service out of the jurisdiction to stand – a submission which by implication accepted that there was jurisdiction in that court which it was entitled to exercise if it thought fit to do so.[132]

[80] On the stay argument, the court held that as the defendant had argued that the arbitration agreement was in the nature of a *Scott v Avery*[133] clause, ie, one that provided that no cause of action arose between the parties until the matter in dispute has been referred to and determined by an arbitrator, the argument necessarily engaged the merits of the case, and so the defendant had thereby acknowledged the court's jurisdiction to determine the merits and so had voluntarily submitted to the foreign court. On the defendant's argument that the Alberta court was not the appropriate forum to adjudicate the dispute, the court held: "if [the] defendant voluntarily appears before [the] foreign court to invite that court in its discretion not to exercise the jurisdiction which it has under its own local law."[134]

[81] The common law position left by *Henry v Geoprosco* is unsatisfactory. First, the law as to whether mere contesting a foreign court's jurisdiction amounts to submission is left unclear. Secondly, the decision on the arbitration clause depends too much on the specific technical linkage between jurisdiction and merits in the *Scott v Avery* clause. Thirdly, the decision that an invitation to foreign court not to exercise its jurisdiction amounts to a stay also rests on a technical distinction, and fails to take into consideration relevant policy considerations.

[82] Although it is technically correct to say that a person who asks the court not to exercise jurisdiction to determine the merits of the case which it undoubtedly has is acknowledging that the court has such jurisdiction, this is a very narrow conception of jurisdiction. We learn from *The Spiliada*[135] that the exercise of the jurisdiction is as much a principle of jurisdiction as the existence of the jurisdiction itself, and both precede the actual determination of the merits. There is a difference between the court's jurisdiction to determine the merits of the case and the court's jurisdiction to determine whether it has jurisdiction to determine merits, and it is recognised that a submission to the latter is not a submission to the former.[136] In the modern context, appealing to the court's jurisdiction to determine whether it should exercise its jurisdiction to determine merits should not be regarded as voluntary submission to the court's jurisdiction to determine merits, because the argument presented to the court is that the court should not proceed to the merits stage.

[83] On a practical level, jurisdictional battles today are legitimately fought on both grounds of existence and exercise, and at neither stage does the defendant wish the foreign court to hear the case. It is strange, and unfair, to hold on that basis that the defendant is then bound to obey the judgment of the foreign court. Moreover, the technical distinction between existence and exercise of jurisdiction is a feature of common law systems; some other jurisdictions simply use the technique of existence of jurisdiction, which incorporates the policies which common law courts would

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132 [1976] QB 726, 747.
133 (1885) 5 HL Ca 811.
134 Same reference, at 748.
135 [1987] AC 460.
136 *Williams and Glyns Bank plc v Astro Dinamico Cia Naviera SA* [1984] 1 WLR 438.

consider at the stage of exercise of jurisdiction.[137] A principle of law which may or may not apply depending on the accident of jurisdictional techniques of foreign courts is not a satisfactory one. The arguments apply with greater force where the objection o the foreign court's jurisdiction or exercise of jurisdiction is based on the parties' agreement not to sue in that court.

[84] The position in Singapore is unclear, apart from the Reciprocal Enforcement of Foreign Judgments Act stating that merely contesting jurisdiction does not amount to submission.[138] *Henry v Geoprosco* was not regarded with much enthusiasm by the Singapore High Court recently in *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka*,[139] and the court noted the criticisms that have been made against it. However, it was content to assume that it was the law in Singapore for the purpose of the decision. On the facts of the case, *Henry v Geoprosco* could not apply anyway because the application of the defendant objecting to the foreign court's jurisdiction on basis of an arbitration agreement had the result under the foreign law that the court had no jurisdiction.

[85] Another anomaly in the common law rules of submission is that if the defendant appears in the foreign court solely to obtain the release of property seized by the foreign court, it is not submission,[140] but if the defendant appears in the foreign court to prevent his property from being seized, this may be regarded as submission.[141] It is suggested that this distinction is not justified, and in both cases, the person who appears in a foreign court to protect his assets, whether already seized or about to be seized, should not be regarded as having submitted to the foreign court. The practical result of this suggestion is that a Singaporean who appears in a foreign court, whether to obtain a release of his assets, or to prevent his assets there from being seised in judicial proceedings, will not thereby immediately puts his Singapore assets at risk. This is already the position under the Reciprocal Enforcement of Foreign Judgments Act,[142] and this recommendation will extend that rule to all cases of recognition or enforcement of foreign judgments.

[86] It is therefore recommended that legislation along the lines of the Civil Jurisdiction and Judgments Act 1982 (UK), section 33,[143] to circumscribe the common law rules of submission.

[87] Recommendation: That legislation should make clear that, for the purpose of satisfying the test of international jurisdiction in the recognition or enforcement of foreign judgments, a person is not to be taken to have submitted to the jurisdiction of a foreign court merely by contesting the jurisdiction, by asking the court to dismiss proceedings or not to exercise its jurisdiction because the case should be heard in another forum or because the parties have agreed not to have the case tried in that court, or by appearing to protect or prevent property that has been seized or is about to be seized by the foreign court.

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137 An example is jurisdiction under the Brussels Regulation in the European Union.
138 S 5(2)(a)(i).
139 [2002] 3 SLR 603.
140 *Henry v Geoprosco International Ltd* [1976] QB 726, at 746-747.
141 *Voinet v Barrett* (1885) 55 LJ QB 39.
142 S 5(2)(a)(i).
143 **Annex C**.

2.2.4. Breach of Agreement

[88] When faced with a foreign exclusive jurisdiction clause, the Singapore courts are likely to stay proceedings, or not exercise jurisdiction in the case of an application for leave to serve process outside the jurisdiction, unless strong cause can be shown otherwise.[144] The common law position when a foreign judgment, obtained in breach of an exclusive jurisdiction clause, is sought to be enforced or recognised in Singapore is not clear. There is no specific breach of contract defence to the recognition or enforcement of foreign judgments in the common law, or in the Reciprocal Enforcement of Commonwealth Judgments Act. However, oddly enough, the defence appears in the Reciprocal Enforcement of Foreign Judgments Act.[145] Thus, the position in Singapore law is not consistent.

[89] There are two opposing policy considerations. On one hand, there is a powerful argument in favour of upholding what in the view from the choice of law rules of the forum is the parties' bargain. Thus, today it is recognised that the injunction to restrain a contracting party from instituting or continuing foreign proceedings in breach of contract is readily granted to protect the contractual bargain.[146] It is also clear that it will be against public policy to recognise or enforce a foreign judgment obtained in contravention of an anti-suit injunction granted by the forum.[147] In the latter case, there is a distinct defence based on a clear public policy where there has been contempt of court.[148] On the other hand, breach of agreement by itself appears to be only *partially* recognised in Singapore law as a distinct defence,[149] so signal from Parliament on the strength of the breach of agreement defence is at best equivocal.

[90] On the other hand, considerations of international comity and the general attitude towards the conclusiveness of foreign judgments require the Singapore courts to respect the determination of the foreign court as to the existence, validity and enforceability of the jurisdiction agreement. The foreign court may have a different view as to the existence, validity, construction or enforceability of the jurisdiction clause. The foreign court may have exercised jurisdiction only on the same "strong cause" principles that the Singapore court would itself have applied when faced with the same situation. There are jurisdictions that do not regard the jurisdiction clause as truly contractual, and treat the matter as simply one of procedure.[150] Breach of agreement in itself cannot fall within the public policy defence. Indeed, if the defendant in the foreign proceedings had attempted to ask the foreign court not to exercise jurisdiction, he is, on current common law principles,[151] regarded as having

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144 *Bambang Sutrisno v Bali International Finance Ltd* [1999] 3 SLR 140.

145 Section 5(3)(b).

146 *The Angelic Grace* [1995] 1 Lloyd's Rep 87; followed in Singapore in *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603.

147 *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka*, same reference, following *Phillip Alexander Securities and Futures Ltd v Bamberger* [1997] ILPr 73.

148 It is contempt of the forum court even to act lawfully in a foreign country if its effect is to contravene the forum decree: *Langford v Langford* (1835) 5 LJ (NS) Ch 60; *Bhojwani v Bhojwani* [1996] 2 SLR 686. The normal consequence of contempt of court is that any applications to court by the party in contempt cannot be heard until the contempt is purged (*Hadkinson v Hadkinson* [1952] P 285).

149 See paragraph [88].

150 This is the main reason why agreements on jurisdiction were left out of the Rome Convention on the law applicable to contracts.

151 Above, Heading 2.2.3.

submitted to the foreign court's jurisdiction, and may well also be taken to have waived the breach of the jurisdiction clause.

[91] The English Parliament extended the breach of agreement defence, originally found in the Foreign Judgments (Reciprocal Enforcement) Act 1933,[152] to one of general application,[153] in the Civil Jurisdiction and Judgments Act 1982, section 32.[154] According to Dicey and Morris:

> [T]he principal object of section 32 is to counteract those systems of law which disregard arbitration clauses or clauses providing for the jurisdiction of the English courts on the ground (for example) that an exchange of telexes or faxes or printed forms incorporating an arbitration or jurisdiction clause is not in "writing".

[92] Another relevant consideration is the possibility of the availability of damages for breach of jurisdiction or arbitration agreement: it is possible under English common law to recover, as damages for breach of contract, the costs of a stay application made abroad when the plaintiff in the foreign court had commenced proceedings in breach of agreement,[155] and the principle may be extended to damages[156] recovered in foreign proceedings commenced in breach of agreement, provided the party claiming the damages is not prevented from claiming by an issue estoppel on the validity and construction of the agreement or by a waiver of the breach. Thus, if the foreign judgment has been obtained in breach of an exclusive jurisdiction clause in favour of Singapore, and the judgment debtor can show that the judgment creditor would have lost the case in Singapore, then damages may be an adequate remedy for the judgment debtor, without recourse to a defence of non-enforcement. In this example, non-enforcement is actually more efficient as it avoids the circuity of enforcement and counter-claim. In a situation where the judgment creditor would also have won in the Singapore court, but less than in the foreign court, then if there is no defence of breach of contract to the enforcement, the judgment creditor may be subject to a counterclaim for the difference, but if there is a defence the judgment creditor can still sue for the sums due under the original transaction in the Singapore court. Again the availability of the defence appears to bring about the more efficient outcome. However, the issue of availability of damages for breach of jurisdiction agreements goes beyond the issue of enforcement of foreign judgments within the Singapore. Even if the foreign judgment is not enforceable in Singapore, the judgment debtor may still claim against the judgment creditor for damages for breach of contract if the foreign judgment is successfully enforced in other countries. Nevertheless, in terms of the outcomes *in the forum*, the breach of contract perspective suggests that non-enforcement rule is more efficient.

[93] Ultimately, whether there should be a breach of agreement defence to recognition or enforcement a policy question whether to give greater weight to the parties' agreement, or to considerations of international comity. It is to be noted that the forum's decision on enforceability is limited to its own territory. The judgment may be enforced elsewhere. Nor is the forum casting any aspersions on foreign proceedings. All that such a defence requires the forum to say is that it is enforcing an agreement between the parties. If the parties had expressly agreed in the contract not

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152 S 4(3)(b).
153 But not where European rules apply.
154 **Annex D**.
155 *Union Discount Co Ltd v Zoller* [2001] EWCA Civ 1755, [2002] 1 WLR 1517.
156 *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 Lloyd's Rep 425.

to enforce any foreign judgments obtained in breach of the jurisdiction clause, it is likely that an injunction would lie to enforce that agreement, at least within the forum.[157] It is a short step from that to say that where the parties had agreed not to bring proceedings in a forum, they should not be allowed to rely on the product of those proceedings.

[94] For the reasons above, it is suggested that the breach of agreement defence similar to that in the Reciprocal Enforcement of Foreign Judgments Act be made available generally. On the other hand, if the judgment debtor has chosen to go beyond the jurisdiction challenge to defend the merits of the case in the foreign jurisdiction, it would not seem unfair to recognise or enforce the judgment. This is not necessarily because the party had chosen to *waive* the breach of contract, but because the party had chosen to *submit* to the jurisdiction of the foreign court to determine the merits. Waiver is an issue between the contracting parties. Submission is a matter between the party and the foreign court. Where the party has submitted to the jurisdiction of the court, he is not in a position to complain about being bound by the judgment, even if he reserves his right to claim damages from the other party. On the other hand, submission should be understood in the narrow sense as discussed under Heading 2.2.3 above.

[95] Recommendation: That a foreign judgment obtained in breach of a jurisdiction agreement should not be recognised or enforced in Singapore unless the party against whom the recognition or enforcement is sought has submitted to the foreign court.

2.2.5. Non-Merger

[96] The doctrine of merger precludes a person in whose favour a judgment has already been given from subsequently recovering another judgment for the same civil relief on the same cause of action against the same party. It is a plea of former recovery. While estoppel prevents the contradiction of decided causes of actions and issues in a prior judgment, merger prevents the recovery of the same relief already given in a prior judgment from the court. Under the common law, although estoppel has been applied to foreign judgments recognised in the forum, the doctrine of merger has not.[158] This common law rule applies in Singapore,[159] and is not precluded by the two statutory regimes for the enforcement of foreign judgments. Thus, a party who has won on a judgment overseas can sue the same defendant in Singapore afresh on the same cause of action even if, had the plaintiff chosen to rely on the judgment, the defendant would have been bound by it.

[97] In light of the policy consideration highlighted in the Singapore Court of Appeal decision in *Hong Pian Tee v Les Placements Germain Gauthier*[160] of the treating domestic and foreign judgments as equally conclusive, this calls for a reconsideration of the non-application of the merger doctrine to foreign judgments. The historical and technical reason is that, unlike in a domestic case where the cause of action merges

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[157] Though it is less likely that the forum would grant a *world-wide* anti-enforcement injunction: *Ed & F Man (Sugar) Ltd* v *Yani Haryanto (No 2)* [1991] 1 Lloyd's Rep 429.

[158] *Hall v Odber* (1809) 11 East 118; *The Bank of Australasia v Nias* (1851) 16 QB 717.

[159] *JM Lyon & Co v Meyer* (1893) 1 SSLR 19; *Malaysia Credit Finance Ltd v Chen Huat Lai* [1992] 2 SLR 859.

[160] Note 113 above.

into the higher remedy of the court order,[161] foreign courts were never regarded as courts of record, so there was no merger of a cause of action into a higher remedy.[162] Moreover, it was not until the mid nineteenth century that foreign judgments were given conclusive effect to,[163] but by then, the non-merger rule was already firmly established.

[98] The policy considerations underlying the merger doctrine, the finality of decisions in the interest of the community, and the promotion of private justice in the interests of the actual litigants in preventing one party from harassing another, apply to foreign judgments also.

[99] That the non-merger rule gives way to different policy considerations if there has been satisfaction of the judgment also undermines the rule itself. The judgment creditor cannot sue on his original cause of action if the foreign judgment has been satisfied, even if the forum would have given the plaintiff higher damages on the original cause of action. This apparently has nothing to do with merger or the absence of it. According to Jelf J in *Taylor v Hollard*,[164] the principle is based on the plaintiff's *election* between two inconsistent courses of conduct. To receive satisfaction for the foreign judgment, and to sue for the residue in the forum "would be to approbate and reprobate, or, in more homely language, to blow hot and cold, which neither law nor common sense will allow."[165] This doctrine is based on an unequivocal act of the plaintiff registering a choice between two inconsistent courses of conduct. From the perspective of finality of international litigation, it could be argued that suing to judgment in one jurisdiction should be conclusive selection of a jurisdiction to settle the dispute, which is effectively the effect of the *res judicata* rule in the case where the plaintiff has lost the case. Indeed a hint of this reasoning is found in Lynskey J's explanation in *Kohnke* v *Karger*:[166] "the plaintiff, having elected the tribunal to decide the claim against the defendant and obtained judgment from that tribunal and satisfaction of that judgment, is *bound by his election of the tribunal to decide the issue between the parties*." (Emphasis added). If it is the finality of the plaintiff's election of the *tribunal* to decide his case that is conclusive against the him, then it is arguable that the election can take place *before* the satisfaction of the foreign judgment. For example, an Australian court, principally motivated by the unsatisfactory nature of the non-merger rule, observed that the plaintiff is bound by the foreign judgment even if there was only partial satisfaction of the foreign judgment.[167] The argument can be taken further, that the plaintiff be held to his choice of tribunal once the foreign judgment is entered.[168]

[100] There are few cases in which it would be to the advantage of the plaintiff to commence a fresh action in Singapore.[169] The plaintiff may gain an advantage if he

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[161] *Republic of India v India Steamship Co Ltd* [1993] AC 410, 417-418.

[162] The common law action on the foreign judgment was as a quasi-contractual *debt*.

[163] *Godard v Gray* (1870) LR 6 QB 139.

[164] [1902] 1 KB 676

[165] Same reference, 681, *per* Jelf J.

[166] [1949] 2 KB 670, 676, *per* Lynskey J;

[167] *In the marriage of Miller & Cady* (1985) FLC ¶91-625, at 80,063, Family Court of Australia at Sydney, Nygh J.

[168] If it were strictly a case of election between two rights, then no election can take place at this point, since the obligation to obey the judgment in the forum only arises at the point where the foreign judgment is given. However, the doctrine of election is not so strictly defined.

[169] The argument for its retention in Caffray, *International Jurisdiction and the Recognition and Enforcement of Foreign Judgments in the LAWASIA region : A Comparative Study of the Laws of*

can obtain higher damages by instituting fresh action on the original cause of action, because the plaintiff failed to plead all his loss in the original action, or because the foreign court had applied a rule limiting the plaintiff's recovery. It may be that the original cause of action is a simple contract debt for which the summary judgment procedure may be available, while there may be doubt surrounding the enforceability of the foreign judgment.[170] On the other hand, the plaintiff not only incurs additional costs of renewed litigation, but also takes the extra risk of losing his action. In such a case the local judgment will prevent him from suing on his earlier foreign judgment in the forum,[171] and possibly in a third country too.[172] Thus, one academic had suggested that if the advantages accruing to the plaintiff from the non-merger rule are to be weighed against the considerations of general policy and logical consistency, the rule should be abrogated.[173]

[101] On the other hand, a legitimate consideration from the perspective of international litigation is that the rule of merger is a rule of domestic law after all. The plaintiff may have proceeded with the foreign action on the basis of the law applicable in that court, and that under that law it may be acceptable procedure to sue several times in respect of the same cause of action. The plaintiff may therefore be caught by surprise by such a rule applying in the enforcement jurisdiction.[174] On the other hand, a party who wishes to enforce a foreign judgment in Singapore should have to accept its policy on finality of litigation, so there is nothing inherently unfair in the surprise to the party. Moreover, in such a case, nothing stops the plaintiff from taking further action in the foreign court as permitted under its rules.[175]

Eleven Asian Countries inter-se and with the EEC Countries (1985), at 198, to the effect that otherwise the plaintiff may face a situation where he can neither bring a fresh claim nor enforce his foreign judgment (because it is not recognised in that country) appears misconceived – no question of merger, or indeed estoppel, can arise where the judgment will not be recognised by the courts in the state.

[170] This could be the motivation of the action in *Malaysia Credit Finance Ltd v Chen Huat Lai* [1992] 2 SLR 859. The real problem in *JM Lyon & Co v Meyer* (1893) 1 SSLR 19, however, was not the merger rule but the rule that a judgment against one co-debtor precluded any action against another co-debtor. The plaintiff had obtained a judgment against one co-debtor in Johore and was allowed to sue a second co-debtor in Singapore because the Johore judgment did not preclude the suit against the first co-debtor in Singapore. This preclusion is no longer Singapore law: Civil Law Act (Cap 43, 1999 Rev Ed), s 17. It is not clear whether this is a rule of substance or procedure in the conflict of laws. If procedural, the problem in *JM Lyon* will never arise again. If substantive, then the non-merger rule can improperly circumvent a substantive rule of law applicable by the choice of law rules of the forum.

[171] The argument could be put on estoppel: *Vervaeke v Smith* [1983] 1 AC 145, where the local judgment had been delivered first, but it is arguable that if the local judgment is delivered after the foreign judgment, the latter judgment sets up an estoppel against the recognition of the former, since it is a matter that should have been raised in the latter proceedings: see the *dictum* in *Showlag v Mansour* [1994] 2 WLR 615, 621-622; or on the basis of a cross-estoppel: see *infra*, following note.

[172] In the common law system, the earlier judgment should generally prevail: *Showlag v Mansour* [1994] 2 WLR 615, but this situation arguably fits in the exception of a cross-estoppel - the plaintiff by proceeding on the second action is cross-estopped from estopping the defendant (by virtue of the first judgment) from denying the cause of action. The policy considerations for the general rule in *Showlag v Mansour* are here reversed. In *Showlag v Mansour*, the concern is with a race to judgments, and a fear of an unsuccessful plaintiff trying his luck in other jurisdiction. Here the concern is with a successful plaintiff trying for better luck in other jurisdiction, and allowing the cross-estoppel makes for sounder policy in this context.

[173] Read, *Recognition and Enforcement of Foreign Judgments* (1938), at 120-121.

[174] Briggs (1997) 68 British Yearbook of International Law 357.

[175] No reason of *res judicata* or public policy bars the subsequent judgment from being enforced in the forum, at least in the case where the judgments come from the same court and the first judgment is not regarded as precluding the subsequent one under the rules applicable in that jurisdiction.

[102] In English law, the Civil Jurisdiction and Judgments Act, section 34,[176] now bars the judgment creditor from proceeding on the same cause of action. This does not apply the domestic rule of merger to foreign judgments. Instead, it creates a bar to enforceability of the original cause of action as a result of the prior foreign judgment. An important implication is that if the bar is waived, either expressly or by estoppel, the judgment creditor can sue on the original cause of action.

[103] Abuse of process presents a possible control mechanism for the undesirable effects of non-merger. In the litigation culminating in the case of *Republic of India v India Steamship Co Ltd (No 2),*[177] the plaintiff's cargo was damaged in a fire in the defendants' ship, and as a result there was short-delivery, and damage to the remaining cargo. The plaintiffs sued the defendants *in personam* in India for short delivery and obtained judgment for about £6 million. They then started an action *in rem* in the English court, and asked for about £26 million for the damage to the cargo. The defendants pleaded section 34 of the Civil Jurisdiction and Judgments Act 1982 to strike out the claim. In the House of Lords, the plaintiffs argued that the section was not applicable, *inter alia*, because the defendants had waived reliance on it. The House of Lords held that section 34 was capable of being waived and subject to estoppel, and remitted the case to trial again to be considered on this and other issues. When the case came up for consideration again and reached the Court of Appeal,[178] it was held that all the objections against the application of section 34 were groundless, and that in any event, the plaintiffs were abusing the process of court in advancing the claim in England, which claim they should have advanced in India.

[104] The principle relied on was derived from *Henderson v Henderson*:[179]

> … where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.

[105] Today, *Henderson v Henderson* is understood to have stated a principle of abuse of process, and not an extension of *res judicata* estoppel.[180] In *Henderson v Henderson*, the defendant was precluded from pleading a defence that he should have mounted in the foreign litigation. In the domestic context, similar considerations prevent the plaintiff from claiming the relief which might be or might have been obtained in the first action.[181] The House of Lords[182] affirmed the decision on the section 34 bar, and so expressed no view on the applicability of the *Henderson v Henderson* principle on the facts.

[106] While abuse of process is potentially applicable, its scope remains unclear. In the first place, if it is a substantive rule of law that the judgment creditor is not precluded by

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176 **Annex E**.
177 [1997] 3 SLR 818; affirming [1997] 2 WLR 538. See also [1992] 1 Lloyd's Rep 124; [1993] AC 410; [1994] 2 Lloyd's Rep 331.
178 [1997] 2 WLR 538.
179 (1843) 1 Hare 100, 115.
180 *Johnson v Gore Wood & Co* [2002] 2 AC 1.
181 *Poulet v Hill* [1893] 1 Ch 277; *Williams v Hunt* [1905] 1 KB 512.
182 [1997] 3 SLR 818.

the prior foreign judgment from suing on the original cause of action in the forum, it cannot be an abuse of process merely to seek the application of this rule. The position in England considered in the case discussed by the Court of Appeal in *The Indian Grace (No 2)* is different: in the background was a clear statutory policy against such relitigation.

[107] The question is: whether statutory reform along the lines of the UK Civil Jurisdiction and Judgments Act 1982, section 34, is desirable, or whether the problem should be left to judicial control via abuse of process. In view of the uncertainty surrounding how the abuse of process jurisdiction might work to circumvent the non-merger rule, it is suggested that the better solution is to state clearly in legislation as a general rule that where a plaintiff has won on a foreign judgment, he is precluded from suing on the original cause of action in the forum.

[108] Recommendation: That the law be reformed so that as a general rule, unless there has been a waiver, a party who has won on a cause of action in a foreign judgment that is enforceable in the forum should not be allowed to sue on the same cause of action in the forum.

3. Limitation Periods

3.1. Common Law Approaches

[109] A basic distinction is drawn in the conflict of laws between matters of substance and matters of procedure. Matters of substance are subject to choice of law analysis, while matters of procedure are always regulated by the law of the forum. The traditional common law approach towards the characterisation of limitation periods focuses on the verbal formula used in the limitation statute. One which extinguishes the right is substantive, and which bars the remedy is procedural.[183] Because the language of enforceability is used in most English statutes, the limitation provisions are generally characterised as procedural. The same technique is applied to the characterisation of foreign limitation laws. There are two problems with this traditional approach.

[110] The first problem is that the focus of the method on the characterisation of the potentially applicable *rules of law* is out of step with the modern approach of characterising *the issue*.[184] While the former method tests the applicability of the rule of law by its characterisation, the latter considers the relevant rule of a legal system as relevant only when the issue as characterised has an associated connecting factor pointing towards that legal system. the This is more than just an academic issue. The problems associated with rule characterisation arise starkly in the context of limitation periods. Four possible scenarios may be considered, assuming that the substantive claim is governed by foreign law.

[111] First, both the forum and foreign limitations may be procedural. In this case, the forum limitation is exclusively applicable, so that the plaintiff may succeed in the forum even if the claim would have been time-barred by the substantive law governing the claim. This can lead to problems of forum-shopping, and worse, may prejudice debtors who may have, in reliance on foreign laws, destroyed archived

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[183] *Huber v Steiner* (1835) 2 Bing NC 202, 210, 132 ER 89.

[184] *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387, 391-392, 397-399, 405-407, 417-418; *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC, "The Mount I"* [2001] EWCA CIV 1223, at [26]-[29]; [2001] QB 825, at 840-841.

documentary evidence of payment. Conversely, it may bar a claim that is still alive in the foreign country in which the transaction took place and which law governs the dispute, in circumstances where the forum is the most appropriate forum to hear the case.

[112] Second, both the forum and foreign limitations may be substantive. In this case, the foreign limitation is applicable exclusively.

[113] Third, the forum limitation is substantive while the foreign one is procedural. An odd result follows from the strict logic of the substance-procedure analysis: neither law is applicable.[185] Practically, a common law court is unlikely to reach this impractical conclusion, but it is not clear which of the two laws will be chosen in such a case.

[114] Fourth, the forum limitation is procedural and the foreign one is substantive. In this case, another odd theoretical result follows: both are applicable. In practice, however, it means that the shorter of the two periods will apply. If the forum limitation is shorter, the foreign right is unenforceable. If the foreign limitation is shorter, then there is no right to enforce even if the forum limitation has not expired.

[115] On the other hand, an issue characterisation approach would approach the problem by asking whether the issue of whether the claim could be pursued as a result of a time-limitation is a substantive or procedural one: there are only two possible answers – the application of the law of the forum or the law governing the claim. This leads on to the second problem with the traditional method of characterising limitation periods as procedural: the overemphasis on the language of the potentially applicable law at the expense of the objectives of private international law in the characterisation process.

[116] It is important to note, however, that the line between substance and procedure is drawn in different places for different purposes, and in particular, the line drawn for conflict of laws purposes need not have any bearing on the way the line is drawn for domestic purposes. The internal distinction between right and remedy may serve domestic systems well, but it should not be readily projected into choice of law analysis. In *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*,[186] Goulding J said pointedly:

> Within the municipal confines of a single legal system, right and remedy are indissolubly connected and correlated, each contributing in historical dialogue to the development of the other, and, save in very special circumstances, it is as idle to ask whether the court vindicates the suitor's substantive right or gives the suitor a procedural remedy as to ask whether thought is a mental or a cerebral process. In fact the court does both things by one and the same act.

[117] The modern understanding of the substance-procedure division is a purposive one. *Tolofson v Jensen*, the majority in the Supreme Court of Canada said:[187]

> … [T]he purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties. …

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[185] *Dicey and Morris: The Conflict of Laws* (13th ed, 2000) at [7-042] noted that one German court had indeed reached this conclusion, but that more recent courts had refused to follow it.

[186] [1981] Ch 105, 124.

[187] [1994] 3 SCR 1022 at 1071-1072 ([86] of transcript).

[118] It was held that time-limitations were substantive in character, and a claim that was time-barred by the law governing the tort could not be pursued in the forum even if the time had not expired by the forum limitation statute.

[119] In *John Pfeiffer Pty Ltd v Rogerson*, the majority in the High Court of Australia drew the distinction between substance and procedure thus:[188]

> … First, litigants who resort to a court to obtain relief must take the court as they find it. … [T]he plaintiff cannot ask that the courts of the forum adopt procedures or give remedies of a kind which their constituting statutes do not contemplate …. Secondly, matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure. ...

[120] It is not clear, however, how the Australian courts would approach the characterisation of limitation periods at common law with this new perspective, because traditional approach had been not too long before that been endorsed by the High Court in *McKain v R W Miller & Co (SA) Pty Ltd*:[189]

> It is a well established principle that statutes of limitation, except where title is affected, are rules of procedure only and form part of the *lex fori*. The reason why such statutes are so regarded is that they relate to the remedy and not the right.

[121] However, the problem will not arise in Australia in the interstate context anymore. The Australian Law Reform Commission had reviewed the problem in the context of inter-state conflict of laws and recommended that limitation periods be characterised as substantive for choice of law purposes,[190] and a number of states have followed the recommendations.[191] However, the Australian position for international conflicts remains unclear,[192] and until the High Court pronounces on the matter, the common law position is that such limitation laws are characterised according to the right/remedy distinction, with the result that practically all forum time limitation statutes are procedural.

[122] There is no clear evidence of any judicial attitude towards the classification of limitation periods under Singapore law. Somewhat equivocally, and in a different context, the Singapore Court of Appeal in *Star City Pty Ltd v Tan Hong Woon* stated:[193]

> … in every case, to determine whether a provision is substantive or procedural, one must look at the effect and purpose of that provision. If the provision regulates proceedings rather than affects the existence of a legal right, it is a

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188 [2000] HCA 36; (2001) 172 ALR 625 (HCA) at [99].

189 (1991) 174 CLR 1, 42-44, per Brennan, Dawson, Toohey and McHugh JJ, endorsing Menzies J in *Pederson v Young* (1964) 110 CLR 162, 166.

190 Law Reform Commission Report No 58, *Choice of Law* (1992) at [10.33].

191 Choice of Law (Limitation Periods) Act 1993 (NSW), s 5 (**Annex F**), Limitation Act 1969 (NSW) s 78(2); Choice of Law (Limitation Periods) Act 1993 (Vic), s 5; Limitation Act 1985 (ACT), s 5; Choice of Law (Limitation Periods) Act 1994 (WA), s 5; Limitation f Actions Act 1936 s 38A (SA); Limitation Act 1974 ss 25A-25E, 32C (Tas); Choice of Law (Limitation Periods) Act 1994 (NT) s 5; Choice of Law (Limitation Periods) Act 1996 (Qld) s 5, Limitation of Actions Act 1974 (Qld), s 43A(2).

192 Particularly so as recent statements from the High Court suggest that the same issues may be characterised differently depending on whether the conflicts is an inter-state or international one: *Regie National des Usines Renault SA v Zhang* [2002] HCA 10, 187 ALR 1, at [76].

193 [2002] 2 SLR 22, at [12].

procedural provision. A distinction is drawn between essential validity of a right and its enforceability.

[123] The first two sentences appear to take the modern purposive approach and are consistent with the approaches in the highest courts of Canada and Australia, the third sentence returns to the traditional divide between right and remedy that has been disparaged in the two courts. The case itself dealt with the question whether the Civil Law Act, section 5(2)[194] was substantive or procedural for conflicts purposes, the court held to be procedural because of the "crucial words"[195] of "no action shall be brought" in the statute as well as cases and textbook supporting that interpretation. The supporting cases and textbook passages cited could be criticised for putting too much emphasis on the language of enforceability, but the court's actual decision on the characterisation could be justified on the basis that the provision is in intended to protect the forum's machinery of justice from being congested with frivolous cases, thus wasting judicial resources.[196]

3.2. Arguments for Reform

[124] The common law position was examined by the English Law Commission, which in its report of 1982 recommended the replacement of the common law characterisation rules insofar as they apply to laws relating to limitation periods with a statutory framework under which all limitation laws are applicable as part of the substantive law governing the claim.[197] This is effectively to characterise the *issue* of time limitation as substantive, or alternatively, to characterise the time limitation *rules* of any country as substantive, irrespective of the actual phraseology adopted in the limitation laws. However, the Commission thought that it was more straightforward to direct the application of such laws, rather than to give a statutory direction to characterise them as substantive to be then applied under common law conflict of laws rules. The principal recommendations[198] of the Law Commission were implemented in the Foreign Limitation Periods Act 1984.[199]

[125] The main reasons for the position adopted by the English Law Commission are: the illusory distinction between rights and remedies in domestic law; the encouragement of forum shopping by potential plaintiffs; and the intrusive effect of the forum law's modification of foreign substantive laws, contrary to the avowed objective of private international law to give effect to foreign law.[200] These reasons apply equally in Singapore's context.

[126] In opposition, it might be argued that the traditional approach leading, in most cases, to the application of the law of the forum contain the advantages of simplicity and convenience of application, and also gives effect to the public policy of the forum. The first argument is not convincing, because judges have to apply foreign law

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[194] Cap 43, 1999 Rev Ed: "No action shall be brought or maintained in the court for recovering any sum of money or valuable thing alleged to be won upon any wager or which has been deposited in the hands of any person to abide the event on which any wager has been made."

[195] Note 193 above, at [12].

[196] See especially, same reference, at [31].

[197] Law Commission Report: *Classification of Limitation in Private International Law* (No 114) (1982).

[198] See **Annex F**.

[199] See **Annex F**.

[200] Note 197 above, at [3.2].

anyway if the claim is governed by foreign law. Moreover the argument belies the complexity of the current law.[201] The second argument raises a valid issue, but the current method is too blunt an instrument, and public policy considerations need to be addressed as such. Any reform in this area will not lead to the forum surrendering its fundamental values and public policies to foreign ones. All issues potentially subject to resolution by foreign law are subject to the public policy exception; limitations are no exception.[202]

3.3. Reform Alternatives

[127] Some alternatives for reform may be considered. The Law Reform Commission of New South Wales recommended in 1967[203] that forum limitation statutes be both substantive *and* procedural for choice of law purposes. Thus, if a foreign court were to apply New South Wales law as the law governing the claim, its limitation will be regarded as substantive.[204] But if the court of the New South Wales forum were to hear an action governed by foreign law, the forum's limitation statutes would nevertheless apply as part of the procedure of the forum. It is suggested that there is nothing in this approach to recommend itself. In the first place, it seems futile, and wrong in principle, to try to tell foreign courts how to characterise the forum's laws. Secondly, to have the forum's limitation laws applying as the procedural law of the forum brings with it the kinds of objection that led to reform in England and Canada.

[128] The Ontario Law Reform Commission in 1969[205] proposed legislation to mandate the characterisation of all limitation period provisions as substantive for choice of law purposes. The proposal, similar in effect to the recommendations of the English Law Commission later in 1982, was never implemented, and is now superseded by the developments in the Supreme Court of Canada.[206] The Law Reform Commission of British Columbia, on the other hand, recommended in 1974[207] that its limitation period statute should extinguish the plaintiff's title to sue, thus forcing a substantive characterisation under the traditional common law approach. This was implemented in the Limitation Act,[208] section 9. Section 13 of the Act, implementing another of the Commission's recommendations, provides that if the limitation period provision in the foreign substantive law applicable to the claim is characterised as procedural for choice of law purposes, the "court may apply British Columbia limitation law or may apply the limitation law of the other jurisdiction if a more just result is produced." This pattern of reform lacks the simplicity of the Ontario and English proposals. Moreover, no guidance is provided on how the discretion to decide which limitation law is to be applied under section 13.

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201 See [111]-[114] above.

202 Just as many jurisdictions have come to recognise that the inflexible application of the law of the forum to tort claims is too blunt an instrument to deal with the public policy considerations inherent in the rule: Private International Law (Miscellaneous Provisions) Act 1995, Part III (UK); *Regie National des Usines Renault SA v Zhang* [2002] HCA 10, 187 ALR 1 (Australia); *Tolofson v Jensen* [1994] 3 SCR 1022.

203 *First Report on the Limitation of Actions* (1967), at [321].

204 Limitation Act 1969 (NSW), s 78(2). This assumes, of course, that the foreign court would regard New South Wales' own characterisation of its law as conclusive.

205 *Report on Limitation of Actions* (1969).

206 See [117]-[118] above.

207 *Report on Limitations* (1974).

208 [RSBC 1996] Chapter 266.

3.4. Method of Reform

[129] If reform is desirable, should it be done by legislation (as in the United Kingdom), or should the matter be left to the courts (as in Canada)? On one hand, it is arguable that, as there are no local authoritative pronouncements on the topic, it is open to the courts to follow the lead, for example, in the Canadian court. On the other hand, time limitation is a very important aspect of international commercial litigation, and it is undesirable for the position to be left unclear. Moreover, the common law approach is a very entrenched one, and the courts may be reluctant to depart from long-established authority. The leading common law authority is the 1835 case of *Huber v Steiner*,[209] but antecedents[210] applying the purported analytical distinction between the right and its enforcement date before the Second Charter of Justice (1826), the common law of England at which point at least had formed part of the law of Singapore.[211] It is thus suggested that it should be clarified by legislation that limitation period laws should apply as part of the substantive law governing the claim.

3.5. Some Specific Issues

[130] It remains to examine some specific issues raised by the English model of reform for limitation periods.

3.5.1. Public Policy

[131] The English Law Commission made no specific recommendation as to the application of public policy,[212] preferring to leave the matter to the principles operating in the common law.[213] Public policy as an exception to the application of foreign law is generally invoked only in highly exceptional circumstances in the common law. The majority was concerned that the notion of public policy should not be stretched.

[132] The minority view was that this may not be enough to do justice in cases where, for example, where the limitation period of the applicable foreign substantive law is unduly long. The statute in the final form supported the minority view, in not only expressly spelling out the public policy exception,[214] but also *extended* the concept of public policy to cases where "undue hardship" will be caused by the application of the foreign limitation law to parties who are or may be parties to the .proceedings.[215] This provision has been invoked in one case where the court thought it was unfair to apply the limitation law of the proper law of the contract because it would have caught the plaintiff by surprise as it was not evident on the face of the contract what its governing law was.[216]

[133] Hardship is not a defence to the application of foreign law in common law conflicts methodology. This statutory provision is a departure from the general principle that

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209 Note 183 above.

210 See, eg, *Melan v Fitzjames* (1797) 1 Bos & Pul 138; 126 ER 822.

211 Application of English Law Act (Cap 7A, 1994 Rev Ed), s 3(1); Woon, "The Applicability of English Law in Singapore", in Tan , ed, *The Singapore Legal System* (2nd ed, 1999), 237-238.

212 An example of forum public policy preventing the application of a foreign limitation period under the substantive governing law is where the foreign law conflicted with the forum's rule of public policy that time should not run in favour of a thief in an action for conversion: *City of Gotha v Sotheby's* 9 September 1999.

213 At [4.50].

214 s 2(1).

215 S 2(2).

216 *The Komninos S* [1991] 1 Lloyd's Rep 370 (CA).

foreign law applicable through the forum's choice of law rules is denied application only where it would be inconsistent with some fundamental forum interest or public policy of the forum. Of course, it is open to the legislature to so extend the law on policy grounds. There is something to be said in favour of flexibility in choice of alw rules, but where the flexibility is based on hardship caused by the substantive results of applying foreign law, the court has to be careful that it is not passing judgment on the fairness of foreign law. So if the hardship is to provide an exception, it is suggested that the hardship has to arise from the international elements of the case, as in the example in the previous paragraph, and not merely because the court does not agree with the content or the results of the application of foreign law; such issue should properly be the subject of public policy in the narrow sense.

3.5.2. Laches

[134] The English Law Reform Commission considered that the defence of laches in the forum should be unaffected by their recommendations, and this defence was preserved under the Act in section 4(3). The exception appears to cover both laches and the application of limitation statutes by analogy.[217] This 'insular'[218] approach reflects the domestic law, where the equitable discretion is similarly unfettered by statute. There is much to commend the view that limitations in equity should be treated as substantive issues for choice of law,[219] subject to public policy considerations.[220] For example, where the English court had applied laches to a foreign claim, the eighty-one year delay would have been so unconscionably long as to be against public policy anyway.[221] Similarly, where foreign limitation law protects a fraudulent or dishonest party against the true owner of property, it may be disregarded as against public policy.[222]

[135] Strangely, laches in foreign law is applicable as part of the substantive law under the statute.[223] The express reservation for forum laches confirms this, and moreover it is impractical to distinguish laches from other limitation laws in countries that do not have the common law heritage. If the foreign limitation period has expired, the right is lost and there is no further role for the law of the forum.[224] A curious result follows: foreign laches is conclusive if it extinguishes the claim, but only taken into account if it does not.

[136] The modern trend in the thinking on limitation laws has been to minimise the differences between common law and equitable claims.[225] It is to be noted that under

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[217] For an example of the application of statutory limitation by analogy in domestic law, see *Imperio v Heath (REBX) Ltd* [2001] 1 WLR 112 (CA).

[218] PB Carter (1985) 101 LQR 68, 76.

[219] It is to be noted that the French court had no difficulty applying the English doctrine of laches to a claim governed by English law: *Rowe v Walt Disney Productions* [1987] FSR 36 (*Cour D'Appel* Paris).

[220] Foreign Limitation Periods Act 1984, s 2. PA Stone [1985] LMCLQ 497, 511.

[221] *Doss v Secretary of State for India in Council* (1875) LR 19 Eq 509.

[222] *Gotha City v Sotheby's* 9 September 1998.

[223] s 4(2) includes both substantive and procedural law of foreign countries within the meaning of limitation law for the statute.

[224] *Arab Monetary Fund v Hashim* 29 July 1994.

[225] In note 217 above, Sir Christopher Staughton said: "It is not obvious to me why it is still necessary to have special rules for the limitation of claims for specific performance, or an injunction, or other equitable relief. And if it is still necessary to do so, I do not see any merit in continuing to define the circumstances where a particular claim will be time-barred by reference to what happened, or might have happened, more than 60 years ago. If a distinction still has to be drawn between common law and

United Kingdom law, this proviso has been partially superseded by the Rome Convention. Under Art 10(1)(d), the applicable law applies to the 'various ways of extinguishing obligations and prescription and limitation of actions'. Art 1(2)(h), which excludes matters of evidence and procedure from the convention, is subject to Art 14,[226] but not to Art 10. The Convention does not depend on the Foreign Limitation Periods Act for its substantive characterisation of limitation laws. Section 4(3) is thus irrelevant where the Rome Convention applies. The Convention manifests is a strong policy in favour of uniformity of result in contract disputes,[227] thus resulting in a substantive characterisation. It is further noted that the American *Restatement on the Conflict of Laws* had originally applied the law of the forum to the issue of laches, but the *Restatement* was revised in 1988 so that, like limitation laws in general, laches is now an issue subject to the substantive law governing the claim.[228]

[137] The assumption behind the Law Commission's reservation in respect of laches and related defences in equity lies in the assumption that the law of the forum governs all aspects of a claim for equitable relief. That is not necessarily so. It is suggested that no exception needs to be made for equitable defences. The applicability of forum or foreign equitable time bars would then simply follow the judicial characterisation of the claim and the resultant governing law. It is suggested it is a better solution to leave the nascent issue of characterisation of equitable claims to judicial development than to enshrine statutorily that the time-related defences of forum equity should apply irrespective of the international elements in the case.

3.5.3. Other Types of Limitations

[138] So far, the discussion has focussed on time limitations, as the most commonly encountered type of limitation law in international litigation. There may be other types of limitations to liability, eg, limits on recoverable quantum in respect of certain types of causes of actions. The legislative reforms and proposals discussed above have also concentrated on time limitations. It is suggested that any legislative reform be so confined as well. Other types of limitations may raise different considerations of principle and policy, and are better left to judicial development. Any time limitation statute can at best provide some guidance as to the characterisation of other types of limitations for purposes of private international law.

[139] Further, the proposal in this Part does not affect contractually agreed time limitations. As such contractual provisions may take many forms, and are likely under the common law to be characterised as substantive and governed by the proper law of the contract, there is no need to deal with this issue by legislation.

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equitable claims for limitation purposes, I would hope that a revised statute will enact with some precision where that distinction should be drawn, rather than leave it to the product of researches into cases decided long ago." Recently, the English Law Commission, in consideration reform to the domestic law of limitations, recommended that the same limitation laws applied to both common law and equitable claims, subject to the qualification that laches continue to be applied in the court's discretion in determining the appropriateness of equitable remedies: Law Commission Report: *Limitation of Actions* (Law Com No 270) (2001) at [4.268]-[4.278]. In a similar vein, the New Zealand Law Commission Report 61: *Tidying the Limitation Act* (2000) (available at http://www.lawcom.govt.nz/documents/publications/R61lim.PDF, last visited on 26 February 2003), at [23]-[28] recommends putting an end to the division between common law and equitable claims for the purposes of the domestic law of limitations.

[226] Dealing with presumptions, burden and mode of proof in foreign law.

[227] Art 18.

[228] *Restatement (2d) Conflict of Laws*, s 142, comment (d).

3.5.4. Recommendation

[140] Recommendation: There should be legislative clarification that time limitation laws apply as part of the substantive law governing the claim, subject to public policy reservations of the forum, and a statutory exception of hardship due to the international character of the transaction or claim, but there is no need to make any special provision for equitable time limitation defences.

4. Choice of Law in Contract

4.1. General Issues

[141] Contract choice of law is one of the most well-established areas of choice of law in the common law. A preliminary issue is whether the choice of law rules for contract should be codified. While codification brings about the advantage of accessibility to the law and an opportunity to iron out all the (known) uncertainties in the law, the danger of loss of flexibility should not be underestimated.

[142] Generally, the common law choice of law rules have worked well, and no fundamental changes are therefore recommended. The points discussed below are specific issues with the choice of law rules. In many cases it is a matter of debate whether the changes should be done through legislation or the courts.

4.1.1. Choice of Law

[143] In general, the law that governs most contractual issues is the proper law of the contract, and that proper law is determined in three stages.[229] If the parties have made an express choice of law,[230] even if the law chosen has no connection with the contract,[231] that choice will be given effect to unless the choice is not bona fide or legal or is against public policy. If there is no express choice, the courts will try to determine if the parties have made an implied choice of governing law.[232] If there is no express choice, and no choice of law can be inferred by the courts, then the contract is governed by its objective proper law, ie, by the law of the country with which the contract has the closest and most real connection.[233] This common law choice of law methodology raises three issues for consideration.

4.1.1.1. Limitations to Choice

[144] The first issue is whether the limitation to subjective choice of law based on a bona fide choice that is legal and not against public policy creates uncertainty in the law, and whether it should be replaced by a test that is more direct. In the common law world, the limitation is known to have been applied in only one case. In *Golden Acres Ltd v Queensland Estates Pty Ltd*,[234] the Queensland court refused to apply the

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229 *The Komninos S*, note 216 above.

230 *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277; *Peh Teck Quee v Bayerische Landesbank Girozentrale* [2000] 1 SLR 148 (CA); *Pacific Electric Wire & Cable Co Ltd & Anor v Neptune Orient Lines Ltd* [1993] 3 SLR 60.

231 *Vita Food*, same reference, at 290. Observations to the contrary in Boissevain v Weil [1949] 1 KB 482, 491 and *Re Helbert Wagg & Co Ltd 's Claim* [1956] Ch 323, 341 have not gained significant support.

232 *Las Vegas Hilton Corp v Khoo Teng Hock Sunny* [1997] 1 SLR 341.

233 *Sinotani Pacific Pte Ltd v Agricultural Bank of China* [1999] 4 SLR 34 (CA).

234 [1969] Qd R 378.

parties' choice of Hong Kong law to govern a contract relating to commission for the sale of land in Queensland where the arrangement had contravened a Queensland legislation.[235] Hoare J held that the choice of law would not be upheld as it was intended to evade Queensland law and therefore not bona fide. The appeal to the High Court of Australia was dismissed,[236] but on the basis that the relevant Queensland statute was a forum mandatory statute that applied irrespective of any choice of law by the parties.

[145] The issue of limitation to choice was considered by the Singapore Court of Appeal in *Peh Teck Quee v Bayerische Landesbank Girozentrale*.[237] A contract of loan between a branch of a German bank operating in Singapore and its customer, a Malaysian resident, was expressly governed by Singapore law. The loan was disbursed in Malaysian currency and used to purchase Malaysian shares which were held as security for the loan by the bank in a custodian account in a Malaysian bank. In an action by the bank against the customer for repayment, the customer argued that the choice of law should not be given to, and that the contract was illegal and unenforceable under Malaysian law. The High Court allowed the bank's claim, and the appeal was dismissed by the Court of Appeal. Four important points can be noted from the Court of Appeal's decision.

[146] First, the Court of Appeal recast the public policy limitation on the parties' choice of law. Ignoring the formulation in the *Vita Food* case itself that the *choice of law* should not be against public policy, the court took that aspect of the limitation to mean that "the application of foreign law should not be contrary to public policy".[238] As this is a given in choice of law analysis, this aspect of the judgment as effectively excised the public policy limitation to choice of law. But this is not an unwelcome development, since it is very difficult to see how the parties' expression of *choice of law* itself can be against public policy.

[147] Secondly, the Court of Appeal held that the only effective limitation on the choice of the party is that the choice should be made bona fide. After observing that the general principle was to give effect to the parties' autonomy in their choice of governing law, even if the effect was to avoid the application of the laws of another legal system, the Court stated:

> The *only* rider to this is the principle that if the only purpose for choosing Singapore law was to evade the operation of Malaysian law, the court would be likely to hold that the choice of law was not bona fide on the basis of the evidence before it; *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] QD R 378. (Emphasis added).[239]

[148] The limitations on choice of law based on the *legality* of the choice and the choice of law not being against *public policy* thus appear to be marginalised. This is a development in the right direction. Issues of legality and public policy should be considered from the perspective of the law applicable to the contract, not the choice of law itself.

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235 The Real Estate Agents, Debt Collectors and Motor Dealers Acts 1922 to 1961.
236 *Freehold Land Investments Ltd v Queensland Estates Pty Ltd* (1970) 123 CLR 418.
237 [2000] 1 SLR 148.
238 Same reference, at [12].
239 Same reference at [17].

[149] Thirdly, the Court of Appeal made a significant point on the operation of the bona fide limitation. It took a large step forward from the *Golden Acres* case in stating that the evasion of *foreign law* could be grounds for holding the choice to have been not bona fide.

[150] Fourthly, Court of Appeal further observed that a choice would not be bona fide only if the *only* purpose of the choice was the evade the laws of another legal system. This raises four issues.

[151] There are six problems with the current approach to limitation of choice of law as stated by the Court of Appeal.

[152] First, it is not clear whether the evasion of the law is a subjective or objective test. It could be dependent on whether the parties themselves intended[240] to avoid the application of the foreign law in question. Or it could depend on the objective effect of the parties' choice of law.

[153] Second, it is not clear how the "evaded" legal system is to be determined, given that the court has to consider not just the evasion of the forum's laws, but the laws of any potentially applicable foreign legal system? It could be the law of the country with the closest and most real connection with the transaction that would have been the proper law of the contract had there been no subjective choice of law. Or it could be the law of the country with the closest connection with the facts related to the *issue* to which the law would have been applicable.

[154] Third, it is not clear whether the evasion of *any* law of any legal system count as a evasion for the purpose of this limitation, or must it a law reflecting some important socio-economic purpose of that legal system?

[155] Fourth, the limitation is unlikely to have any real impact if it depends on the *sole* purpose of evasion, given that the parties in any case are unlikely not to have some *positive* reason for choosing the law governing the contract. Indeed, even in the *Golden Acres* itself, in spite of finding in the case itself, it is quite incredible that the parties had no reason at all to choose Hong Kong law – the plaintiffs were a Hong Kong company.

[156] Fifth, it is not clear what happens if the choice of not bona fide. Does the law of the forum apply? Or the law with the closest and most real connection to the transaction? The *Golden Acres* case is not helpful in this respect, as the application of Queensland law in the Supreme Court of Brisbane is consistent with either view. A third view is that there is no governing law to be found, and hence no contract to be enforced for choice of law purposes.

[157] Sixth, it is not clear what the rationale of the bona fide limitation is. The common law has no general requirement of good faith in the exercise of rights, nor does it generally question the motives of persons in exercising their rights. What is even harder to understand is that if the law allows the parties to evade the laws of a particular country as part of a bundle of reasons even if it is a predominant reason,[241] there is then an objection if it is the only reason for the choice.

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[240] This *subjective* intention would be ascertained *objectively* by external evidence.

[241] It is hard to escape the inference that the bill of lading in *Vita Food*, note 230 above, was expressed to be governed by English law, though issued in Newfoundland, predominantly to escape the application of Newfoundland's Carriage of Goods by Sea Act 1932.

[158] There are two possible explanations of the limitation to parties' choice of law. The first is that the court should not give effect to the choice when the parties have abused the autonomy given to them in allowing freedom to choose the law to govern their contract. The second is that the court places limits on the choice of the parties not because of any misconduct of the parties, but there are reasons for applying the law of another country which are stronger than the reasons for allowing party autonomy.

[159] The present formulation appears to suggest the former rationale. A similar rationale explains the American Restatement position that the choice of the parties would be ineffective if the parties' choice is *unreasonable*.[242] A different rationale to similar effect is the recommendation of the Australian Law Reform Commission that a choice of law that is *unconscionable* would not be effective.[243] However, a restriction on choice of law based on bona fides, or for that matter, unreasonableness or unconscionability, appears to be too vague to be of any use. The concern about the unfairness of choice of law expressed by the Australian Law Reform Commission can be addressed by traditional notions of public policy.[244] The main concern of the Brisbane Supreme Court in the *Golden Acres* case was that the public policy behind the Queensland statute could not be evaded under the circumstances; and the reasoning of the High Court in terms of mandatory forum rules is more convincing. Thus Fawcett has argued that it is better to develop the concept of mandatory rules focussing on the objective effects of particular laws rather than to examine the motives of the parties to the contract.[245] This is the approach taken in the Rome Convention, and also recommended by the Australian Law Reform Commission.[246]

[160] If this is the right way to go, two questions arise: what mandatory rules are; and whether the Singapore court should be concerned about giving effect to the policies behind foreign mandatory rules.

[161] There are two senses in which rules of law may be mandatory. First, rules may be mandatory in the sense that within domestic law, they cannot be derogated from by the parties themselves. One example is the requirement of consideration for the enforcement of a contract. Secondly, rules may be mandatory in the sense that the court would not allow parties to derogate from them by choosing a different law to govern their relationship. For example, under Singapore law, consideration in contract is mandatory in the domestic sense but not in the international sense, because the parties cannot contract out of the consideration if their contract is governed by Singapore law, but the parties may, by choosing a different law to govern their contract, enter into a contract enforceable without consideration.[247]

[162] The first sense of mandatory rules is only relevant within the domestic law. Its relevance in choice of law analysis lies in the issue whether in a case which in all respects would be regarded as a domestic transaction apart from the parties' choice of a foreign law to govern the contract, such mandatory rules should also apply. This

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242 *Restatement (Second) of Conflict of Laws* (1971), §187(2)(a).

243 ALRC Report No 58, at [8.22].

244 So, eg, that a contract involving duress of an order that is utterly unacceptable to the forum would not be enforced according to the law of the forum even if it is enforceable under its proper law: *Royal Boskalis Westminster NV v Mountain* [1999] QB 674.

245 Fawcett, "Evasion of Law and Mandatory Rules in Private International Law" [1990] CLJ 44. See also Kelly (1970) 19 ICLQ 701.

246 ALRC Report No 58, at [8.13].

247 *Re Bonacina* [1912] 2 Ch 394.

would be an indirect way of domesticating an otherwise international contract in a situation where the international aspect of the contract is one manufactured purely by the parties; it is an attempt at sharpening the line between domestic and international contracts, the latter of which only should be allowed to avoid the policies inherent in domestic rules of law. This would clarify the relationship between domestic rules of contract law and the choice of law rules that allow parties to escape from domestic rules. The Rome Convention takes the argument one step further: such contracts are not allowed to evade the mandatory domestic rules of the country to which it belongs and in which it would have been regarded as a domestic contract, even if the parties choose a different law to govern their relationship.[248] This appears to be a sensible approach, subject to the issue discussed in the following paragraphs relating to the appropriateness of the forum giving force to policies of foreign law that is not the governing law of the contract under the forum's choice of law rules.

[163] Forum mandatory rules in the international sense are important in protecting the fundamental interests of the forum. Evasion of such rules by parties' choice of law is clearly not allowed,[249] and this aspect of the common law choice of law rule does not need reform. The more problematic question is whether foreign mandatory rules of the same international character should be given to. The common law tradition has always regarded the forum's own fundamental interests and public policies as relevant. Foreign mandatory rules and public policy are generally irrelevant in the common law.[250] Indeed, although the Rome Convention provides for the forum to apply the international mandatory rules of a foreign country which has a close connection with the contract,[251] the UK legislature exercised its right not to apply enact that provision into law.[252] In contract, the Australian Law Reform Commission recommended that:

> The limitations on parties [sic] autonomy on the ground of lack of bona fides should be replaced with rules to determine when parties cannot choose to evade the operation of a mandatory law of the place of closest connection.

[164] However, it should be noted that the Commission was primarily concerned with inter-state conflict of laws, and such a provision would not detract in any substantive sense from the traditional common law approach within a federal structure. On the other hand, the Singapore Court of Appeal's approach in *Peh Teck Quee v Bayerische Landesbank Girozentrale*[253] already gives effect to the policies in foreign laws,[254] albeit in the context of the search for an evasive intent. In principle, there is nothing objectionable about having regard to the policies of foreign law, provided such laws are determined by the law of the forum as relevant to the situation. It is an expression of a choice of law rule in itself. It is thus suggested that the uncertain test of bona fide choice of law be replaced with two limitations: first, the objective limitation that

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248 Art 3(3).

249 *Freehold Land Investments Ltd v Queensland Estates Pty Ltd*, note 236 above; *The Hollandia* [1983] 1 AC. 565.

250 See, eg, *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] 1 QB 448, followed in *Shaikh Faisal Bin Sultan Al Qassim T/A Gibca v Swan Hunter Singapore Pte Ltd* [1995] 1 SLR 394, where foreign public policy has to coincide with forum public policy to be taken into consideration to determine if a contract, involving an act done in a foreign country contravening the public policy of that country, could be enforced.

251 Art 7(1).

252 Art 22(1)(a). Contracts (Applicable Law) Act 1990, s 2(2).

253 Note 237 above.

254 Which (and this is not clear) may be wider than the international mandatory rules discussed here.

contracting parties should not be able to escape the domestic mandatory rules of a country where the parties have entered into a domestic contract of that country in all respects except for the subjective choice of law by the parties; and secondly, in the objective limitation that the choice of law by the parties does not affect the application of the international mandatory rules of the forum or the country which legal system would have governed the contract as the law of the country with the closest connection with the contract but for the parties' choice of law.

[165] Recommendation: That the common law limitation that a choice of law that is not bona fide, legal or against public policy be replaced by two objective limitations: first, that where the contract of the parties is in all respect but the parties' choice of law a domestic contract with respect to any country, domestic mandatory rules of the country shall apply to that contract notwithstanding the parties' subjective choice of law; and secondly, that the parties' subjective choice of law does not prevent the court from applying the international mandatory rules of the forum or the country which legal system would have governed the contract as the law of the country with the closest connection with the contract but for the parties' choice of law.

4.1.1.2. Inferred versus Objective Choice of Law

[166] The second issue is whether the transition between the second and third stage causes uncertainty in the law. The test in the second and third stages are similar in that the court has regard to a wide range of circumstances. But the tests are different because while the second stage requires the court to look for indications of the intentions of the parties, the third stage has no reference to such intentions, looking only to pure connections. For the most part, the factors that the courts will consider relevant will be the same in both stages, but some factors, like jurisdiction or arbitration clauses, can carry considerably greater weight in second stage than in the third stage.[255]

[167] Under the common law there is no threshold test to determine when the court should give up looking for an inferred intention, and to move on to ascertain the objective proper law of the contract. In contrast, the Rome Convention provides for the courts to move on to ascertain the objective applicable law if the inferred intention cannot be shown with *reasonable certainty*.[256] However, the Singapore court has taken a pragmatic approach, and has not hesitated to go straight to the third stage of the inquiry to look for the objective proper law where it had considered that a search for an inferred intention would be futile in the circumstances.[257]

[168] It is thus suggested that the common law approach in this respect is satisfactory and no recommendation for reform is made.

4.1.1.3. Objective Proper Law

[169] Where the proper law is not expressed and cannot be inferred from the circumstances, the court has to take all the circumstances surrounding the formation of the contract

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[255] Eg, *The Komninos S*, note 216 above. Another distinction, but this has little practical consequence, is that the inferred intention must be subject to the same limitation to party autonomy as the express choice in the first stage, but the objective proper law would not be.

[256] Art 3(1).

[257] *Las Vegas Hilton Corp v Khoo Teng Hock Sunny*, note 232 above, at [39]-[40]; *Overseas Union Insurance Ltd v Turegum Insurance Co* [2001] 3 SLR 330, at [84].

into consideration to determine the system of law or the country[258] with which the contract has the closest connection. Earlier authorities that have used presumptions (generally focussing on physical acts or connections, eg, law of the flag, law of the place of performance, or law of the place of contracting.) to assist in the location of the proper law of the contract have since been generally frowned upon,[259] as they "may tend to divert attention from the necessity to consider every single pointer."[260]

[170] The objective proper law can be difficult to ascertain, especially where the factors are fairly evenly balanced.[261] In the interest of greater certainty, the concept of characteristic performance has been adopted in the Rome Convention that applies in the European Union (including the United Kingdom) to produce a rebuttable presumption of the applicable law (the law of the place of residence or some concept of seat of management of the characteristic performer) in cases where no subjective choice of law is expressed or can be inferred with reasonable certainty.[262] The same concept is adopted in the Swiss Federal Code on Private International Law,[263] and in the Québec Civil Code.[264] The main advantage of such a presumption is that it brings a greater amount of certainty in the process of determining the objective proper law of the contract. These presumptions are more sophisticated than the presumptions in the common law that have since been discarded. Nevertheless, some flexibility is retained because it remains possible to rebut the presumption if the facts disclose a closer connection with another law. How the balance is achieved depends on what is specified as needed to displace the presumption.

[171] Typical examples of the application of the concept of characteristic performance are:[265]

a. The characteristic performer in a unilateral contract is the person who is bound to perform such a contract;

b. The characteristic performer in a bilateral contract is typically the person who is to deliver the goods, grant a right, provide a service, eg, transport, insurance, banking operations, guarantees, surety, etc;

c. In a banking contract, the characteristic performer is the bank;

d. In a commercial contracts of sale, the characteristic performer is the seller;

e. In a commercial agency contract, the characteristic performer is the agent; and

f. In contracts of storage, the characteristic performer is the bailee.

[172] Under the Rome Convention, the concept does not apply to contracts where the subject matter is right in or a right to use immovable property; here the presumption is

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258 *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, 604.

259 *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34, 44.

260 *Cheshire and North: Private International Law* (11th ed, 1987) at 464. Some of the presumptive indicators that had been used in various contexts were: place of contracting, place of performance, location of immovable property, and nationality of the flag.

261 eg, note 258 above.

262 Rome Convention, Art 4(2).

263 Art 117(2). See **Annex I**. This is said to be the source of inspiration for the concept in the Rome Convention: *Dicey and Morris: The Conflict of Laws* (13th ed, 2000), at [32-112].

264 S 3113. See **Annex J**.

265 These examples are taken from the Guiliano-Lagarde Report and the Swiss Private International Law Act 1987.

the law of the location of the property.[266] Nor does it apply to contracts for the carriage of goods; here the presumption is the law of the country where the carrier has his principal place of business where it is also where the goods are loaded, or where the goods are discharged, or where the consigner has its place of business.[267]

[173] The characteristic performance test is most helpful in cases (eg, sale of goods) where the connections are evenly balanced among many different countries, as a a tie-breaker that can be consistently applied.

[174] However, the concept is not generally helpful in contracts involving complex bilateral obligations. The concept of characteristic performance can be a fragile one. For example, Dicey and Morris gives the example under Swiss law where in a distribution agreement, the vendor is the characteristic performer.[268] However, the editors point out that distribution agreements commonly involve reciprocal obligations other than the payment of money, and there may be significant marketing obligations on the part of the distributor. In other cases, it may not be possible to identify a characteristic performer at all.

[175] Moreover, the concept of characteristic performance is alien to the common law. The connection is with one of the parties, while the common law is more concerned with the connections with the transaction. Judges and lawyers will need time to familiarise themselves with the concept.

[176] On the whole, it is suggested that characteristic performance provides only marginally greater certainty in the law than the common law test of objective connections. The strongest argument in favour of adopting the characteristic performance test is uniformity with other countries, in this case, the European Union and a number of other European countries, and Québec in Canada. It is not clear, however, how important that uniformity is compared to, for example, uniformity of approach with the rest of the Commonwealth world. The Australian Law Reform Commission proposed the adoption of a similar rule,[269] but it has not been implemented.

[177] What may be more useful is a list of presumptions, without necessarily importing the concept of characteristic performance, to deal with specific classes of contracts. Examples are contracts relating to immovable property, and sale of goods contracts. Some classes of contracts which may deserve special protection are specifically dealt with below (See sections 4.2.1 and 4.2.2 below).

[178] Another example may be contracts of reinsurance. As it is one of the Economic Review Committee's recommendations to turn Singapore into a hub for reinsurance business, it may be desirable to inject greater certainty into the determination of the proper law of such contracts in the absence of an express choice. The common law approach based on the general principle of closest connection has to concentrate on the head office of the insurer, giving effect to the interest of the insurer in having all its contracts governed by the same law.[270] It has been observed that practically it is more likely for the insurer than for the policyholder to rely on the law of its place of business and residence respectively.[271] In contrast the American Restatement[272] places

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266 Art 4(3).
267 Art 4(4).
268 *Dicey and Morris: The Conflict of Laws* (13th ed, 2000) at [32-115].
269 ALRC Report No 58, *Choice of Law* (1992) at [8.48].
270 Dicey and Morris: The Conflict of Laws (13th ed, 2000) at [33-122].
271 Dicey and Morris: The Conflict of Laws (11th ed, 1987) at 1292.

more emphasis on the business or residence of the policy-holder, on the basis that the latter requires better protection from the law. A number of Canadian provinces go further to mandate the application of the law of the residence of the policyholder.[273] More recent English cases have looked to the law of the market by reference to which the insurance contract was made.[274]

[179] Where the Rome Convention applies,[275] in the absence of choice, English law would now apply presumptively the law of the residence or place of business of the characteristic performer, in this case, the insurer, similar to the common law conclusion, but if the performance of the contract is to be effected through another place of business, the applicable law is the law of the place where the other place of business is situated.[276] While this level of sophistication seems necessary to deal with cross-border insurance activities, difficulties can arise if the policy is authorised in the head office but issued by the branch office. It would seem that the act of authorisation, where required, is the necessary act of provision of the cover, that is where the relevant performance is taking place.[277] This presumption is displaced if it can be shown that another law is more closely connected.

[180] Where the risk is situated within one of the member states of the European Economic Community and the European Community's Second[278] and Third[279] Directives on Non-Life Insurance, as implemented in the United Kingdom,[280] applies, the law is extremely complex. The basic idea, however, is that in respect of "large risks", that is, relating to the taking up and pursuit of the business of direct insurance other than life insurance,[281] there is considerable freedom of choice of the applicable law, but in the case of "mass risks", that is, relating to all non-life risks other than "large risks", freedom of choice is restricted in favour of protecting the policy holder, restricting the choice of law to the law of the place of the policyholder's habitual residence or the place where the risk is situated. The rationale of this distinction is that the former type of risks tend to occur in cases where parties are of equal bargaining power, and the latter in situations where the policyholder is likely to be in a weaker bargaining position.

[181] Thus in any contract of insurance, there is a tension between protecting the business interests of insurers in having all its contracts governed by a single law and protecting the policy-holder with the comfort of "home" law. Specifically for contracts of reinsurance, the parties are commercial and there is generally no significant difference of bargaining power, and in this case, a presumption in favour of the place of business of the insurer is likely to generate greater certainty without significant prejudice to any interest in the protection of policyholders.

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272 *Restatement of the Conflict of Laws Second* (1971), s 192.

273 See below, at [236].

274 *Cantieri Navali Riuniti SpA v NV Omne Justitia* [1985] 2 Lloyd's Rep 428; *EI du Pont de Nemours v Agnew* [1987] 2 Lloyd's Rep 585.

275 The Rome Convention applies to all contracts of reinsurance (Art 1(4)), but only to contracts of insurance where the risk is not situated within any of the member states of the European Economic Community (Art 1(3)).

276 Art 4(2).

277 Dicey and Morris: The Conflict of Laws (13th ed, 2000), at [33-131].

278 [1988] OJ L172/1, amending [1973] OJ L228/3.

279 [1992] LJ L228/1.

280 Insurance Companies (Amendment) Regulations 1990 (SI 1333/1990, amended by SI 174/1993) and Insurance Companies (Third Insurance Directives) Regulations 1994 (SI 1696/1994).

281 First Council Directive, Art 5(d), [1973] OJ L 228/3.

[182] Recommendation: There should be a list of rebuttable presumptions of the governing law of the contract in respect of specific types of contracts, that would be applicable in the absence of an express or inferred choice of law by the parties to govern the contract.

4.1.2. Capacity

[183] The common law has no clear choice of law rule for capacity of natural persons[282] to enter into commercial contract. Older authorities suggesting either the law of the domicil[283] or the law of the place of contracting[284] or either in the alternative,[285] do not provide sure guidance for the modern law. Neither connecting factor provides neither certainty or relevant connections in modern commercial transactions. Domicil is difficult to ascertain and it is not totally in all cases that the rules of capacity in the domiciliary law are intended to apply to cross-border transactions. The place of contracting can be fortuitous in the modern context. The rule preferred in civil law systems is the personal law of the party whose capacity is challenged, subject to the rider that he cannot rely on his own incapacity by that law if he has capacity according to the law of the place where the contract is made.[286] This rule suffers from the same problems as the connecting factors suggested in the common law.

[184] More modern common law authorities suggest the objective proper law as the connecting factor. In the Canadian case of *Charron v Montreal Trust Co*,[287] it was held that capacity to enter into a separation agreement was governed by the law of the country with which the country has the closest connection, although on the facts it was also the law of the place were the contract was made. The issue of capacity arose oblique in *Bodley Head Ltd v Flegon*.[288] A Russian author granted a power of attorney to a Swiss lawyer to deal with his works outside Russia. This power was expressly governed by Swiss law. The lawyer assigned certain rights to a German publisher who in turned authorised the plaintiffs to publish certain of the author's works in the United Kingdom. The plaintiffs were suing the defendant for breach of copyright and the defence raised was that the assignment of rights was invalid because the original agreement under which the Swiss attorney was appointed was invalid. Brightman J preferred to characterise the issue as one of whether Russian law which purported to invalidate any attempt to confer such powers to act outside Russia had could affect a contract governed by Swiss law to be performed outside Russia (ie, an issue of illegality). However, on the footing that the issue was one of capacity, the judge had no doubt that the question was governed by Swiss law as the proper law of the contract.

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[282] Capacity of corporations to enter into contracts raise different considerations. The common law rule that now requires such capacity to be tested by both the proper law of the contract and the law of the incorporation (*Janred Properties Ltd v Ente Nazionale Italiano per il Turismo* [1989] 2 All ER 444) appears to be satisfactory. The law of the incorporation does not raise the kind of problems of difficulty of ascertainment that personal laws of individuals raise.

[283] *Sottomayer v De Barros* (1877) LR 3 PD 1, 5. This was a case of marriage, but the proposition was stated as a general one. *Male v Roberts* (1790) 3 Esp 163. *Cooper v Cooper* (1888) LR 13 App Cas 88.

[284] *Baindail v Baindail* [1946] 122, 128.

[285] *Republica de Guatemala v Nunez* [1927] 1 KB 669, 689.

[286] Wolff, Private International Law (2nd ed, 1950) at 281-282.

[287] (1958) 15 DLR (2d) 240.

[288] [1972] 1 WLR 680.

[185] In view of the conflicting authorities, Dicey and Morris states tentatively as the common law position that personal capacity to contract is governed by the law of the country with which the contract is most closely connected, or in the alternative by the law of the person's domicil or residence.[289] The reason for the alternative reference is that both the law with the closest connection and the personal law of the party concerned have legitimate interests in having their capacity laws applied to protect parties not regarded to be capable of entering into contracts. However, since capacity laws are protective in nature, there may be situations where neither country is concerned to protect . This would be the case where the person has capacity by his personal law but lacks capacity by the law of the country most closely connected with the contract. On the other hand, if personal law is relevant, it is arguable that the law should simply be concerned with the law of the residence, and not domicil.

[186] It is also not clear whether Brightman J in *Bodley Head Ltd v Flegon*[290] intended to mean the subjective or objective proper law of the contract. Cheshire and North had argued that the courts should not have any regard to intentions in this issue,[291] because a person should not be allowed to confer capacity on himself by the choice of a law which has no connections with the contract. Dicey and Morris takes the same view.[292] On the other hand, the Australian Law Reform Commission, adopting the view in Sykes and Pryles, *Australian Private International Law*[293] that the issue of capacity was no different from other issues of essential validity of a contract, recommended reference to either the proper law of the contract (including the subjective choice of the parties) or the law of the residence[294] of the party whose capacity is impugned.[295] On this view, any evasion of important protective policies of any country relating to capacity of the parties would have to be dealt with under the Commission's other recommendation of applying the international mandatory rules of the country with the closest connection with the contract. It is suggested that it would provide for greater certainty to accept that capacity rules are effectively rules belonging to such a category (at least where capacity is lacking under the relevant personal law), and to state as a choice of law rule that the (alternative) reference to the proper law of the contract is the objective proper law of the contract.

[187] The Rome Convention does not lay down a choice of law rule for the issue of capacity,[296] because the civil law countries generally do not view capacity as an issue of contract but of personal status. However, the Convention qualifies whatever capacity choice of law rule that the forum may apply, by providing that where parties in the same country conclude a contract, a natural person having capacity under the law of that country may invoke any incapacity resulting from another law only if the other party to the contract was or should have been aware of that incapacity at the time of the conclusion of the contract. Guiliano and Lagarde explained in their report, [297] which is an authoritative aid to the interpretation of the Rome

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289 *Dicey and Morris: The Conflict of Laws* (13th ed 2000), Rule 179(1).

290 Note 288 above.

291 *Cheshire and North: Private International Law* (11th ed, 1987) at 482. *Cooper v Cooper*, note 283 above, at 108.

292 Note 289 above, at [32-221].

293 (3rd ed, 1991) at 614.

294 The Commission rejected domicil as inappropriate even for an alternative connecting factor.

295 ALRC Report No 58, at [8.57]-[8.58].

296 Art 1(2)(a).

297 *Report on the Convention on the law applicable to contractual obligations* OJ C282, 31 October 1980.

Convention,[298] that the principal aim of the provision was to cater to those counties which apply only the personal law of the person to the issue of contractual capacity, and it was not necessary for countries which apply the law with the closest connection with the substance of the contract. This rider is thus unnecessary if the rule of capacity is formulated by alternative reference to validation by either the law of the residence of the party whose capacity in question or the objective proper law of the contract.

[188] Recommendation: that there should be legislative clarification that a natural person has the capacity to enter into a contract if he possesses such capacity either by the law of his residence at the time he entered into the contract, or by the objective proper law of the contract.

4.1.3. Formal validity

[189] The common law rules on formal validity are not clearly stated. Leading textbooks[299] have taken the position that, at least where the contract does not relate to title to immovable property, formal validity is to be tested by either the proper law of the contract[300] or the law of the place where the contract is made.[301] Where the contract involves immovable property, a distinction is drawn between the contract and conveyance. The former is subject to contract rules,[302] while the latter is an issue of property subject to the law of the place where the immovable is sited. In Singapore, there is obiter support for the common law rule of alternative reference.[303] This approach appears to be generally satisfactory, as it would meet the reasonable expectations of contracting parties.

[190] However, complications may arise in modern transactions where parties enter into contracts with one another from different countries. In such cases, the place where the contract is made can be difficult to determine, both as a matter of law and fact. This is because the place of making of a contract depends on the municipal rules of contract-making, and the place may differ depending on which countries' contract law is applied to determine the question. The Rome Convention deals with this problem by providing for a special rule in such cases. The formal requirements of a contract are tested by either the applicable law of the contract or the law of the place where the contract was made, if made between parties in the same country. But if the parties are in different countries, then the contract is formally valid if the formal requirements of the law applicable to the contract, or the law of one of those countries. This makes it even easier to comply with formal requirements, and it is suggested, provides a better solution than the common law solution for modern international contracts.

[191] Recommendation: That a contract is formally valid if the contract complies with the formalities of: (a) in the case of contracts concluded between parties in the same country, either the governing law of the contract or the law of the place where the contract is made; and (b) in the case of contracts concluded between parties in different countries, either the governing law of the contract or the law of one of those countries.

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298 Contracts (Applicable Law) Act 1990, s 3(3)(a).
299 Cheshire and North, at 479. Dicey and Morris (11th ed, 1987), Rule 183.
300 *Van Gruten v Digby* (1862) 31 Beav 51.
301 *Guépratte v Young* (1851) 4 De G & Sm 217.
302 *Ward v Coffin* (1972) 27 DLR (3d) 58, 71-72.
303 *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* (7 December 1996) at [39].

4.1.4. Formation

[192] Formation probably presents the most intractable problem in contract choice of law. It has received very little attention from the judiciary with very inconclusive results, and it is has probably generated the most academic controversy in modern legal literature[304] among the all choice of law topics in contract. On one hand, it is difficult to see how the issue of formation is any different from validity, and so both issues should be subject to the same connecting factor. However, as the issue is one prior to the formation of the contract, it is difficult to see how the proper of the contract, which normally governs all issues of validity, can have any role in principle. On the other hand, the law of the forum, which application normally precedes any question of foreign law, is not desirable as it leads to fragmentation of results and therefore encourages forum shopping.

[193] It is not obvious what the correct solution should be. There is judicial support for both the putative proper law[305] and the law of the forum[306] approach, but they are short on reasoning and not conclusive in the results.

[194] There is uncertainty as to a very fundamental issue: the nature of the choice of law clause in the contract. On one view, it is an integral part of the contract, and should be subject to the same choice of law considerations as the rest of the contract. On the this view, the formation of the contract precedes the determination of the proper law of the contract. And if the same connecting factor is to apply to the issue of formation as it does to other issues of validity, then the search is for the *putative proper law of a putative contract*. This is generally what is meant when people talk about the *putative proper law*. The principal objection to such an approach is its circularity: it assumes that a contract has been formed, and then determines the proper law on that basis in order to determine whether the contract has been formed. The most serious practical objection is that it allows one party to impose a system of law on another, by throwing a choice of law clause into the negotiations. Another objection is that when two or more choice of law clauses are thrown into the negotiations, there is no logical basis for preferring one or the other.[307]

[195] The Rome Convention adopts the putative proper law approach.[308] It qualifies it, however, by allowing a party to rely on the law of his habitual residence to establish that he had not consented to the contract where it appears from the circumstances that it would not be reasonable to determine the effect of his conduct by the putative

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[304] Wolff, "The Choice of Law by the Parties in International Contracts" (1937) 49 Jur Rev 110, 128-130; Jaffey, "Essential Validity of Contracts in the English Conflict of Laws" (1974) 23 ICLQ 1; Jaffey, "Offer and Acceptance and Related Questions in the English Conflict of Laws" (1975) 24 ICLQ 603; Libling, "Formation of International Contracts" (1979) 42 MLR 169; Thomson, "A Different Approach to Choice of Law in Contract" (1980) 43 MLR 650; Garner, "Formation of International Contracts - Finding the Right Choice of Law Rule" (1989) 63 ALJ 751; Briggs, "The Formation of International Contracts" [1990] LMCLQ 192; Nygh, *Autonomy in International Contracts* (1999) at 93; Harris, "Contractual Freedom in the Conflict of Laws" (2000) 20 OJLS 247, 254-255.

[305] *The Parouth* [1982] 2 Lloyd's Rep 351; *The TS Havprins* [1983] 2 Lloyd's Rep 356, 359; *The Atlantic Emperor* [1989] 1 Lloyd's Rep 548; *The Heidberg* [1994] 2 Lloyd's Rep 287 (in the alternative).

[306] *Mackender v Feldia AG* [1967] 2 QB 590, 602-603; *Oceanic Sun Line Special Shipping Co Inc v Jay* (1988) CLR 197; *The Heidberg*, note 305 above (though as a result of despair rather than reasoning).

[307] See the analogous case where there were two possible arbitration clauses in *The Heidberg*, note 305 above.

[308] Art 8(1).

proper law.[309] Little guidance can be gleaned, however, on when this exception would be invoked. Its range of application appears to have been narrowly construed. In *Egon Oldendorff v Liberia Corp*,[310] Mance J rejected an argument for the invocation of this exception, on the basis that it would not be consistent with the expectations of the parties engendered by the English arbitration clause (suggesting English law as the proper law) that was in dispute. This does not address the objection raised in the preceding paragraph.

[196] The Australian Law Reform Commission also recommended the putative proper law, on the basis that the issue of formation should be subject to the same connecting factor as issues of essential validity.[311] However, it did not address the difficulties mentioned above.

[197] On another view, the choice of law clause is legally and conceptually independent of the contract; it merely indicates to the court what law to apply to the contractual situation. On this view, the determination of the proper law is a logically anterior exercise to the issue of the formation of the contract. On this view, the search is for the *proper law of the putative contract*. On this view, it is quite clear that the law of the forum has to decide what is the law to govern the question of formation. This is where views diverge significantly. The law of the forum may apply an "international" standard of agreement;[312] or a "factual" test of agreement;[313] or the domestic contract law of the forum;[314] or the forum may choose to apply the law of the country with the closest connection with the putative contract, the objective proper law of the contract, which could mean the law as ascertained on the putative contract as pleaded, or as ascertained from the undisputed aspects of the transaction.[315]

[198] The reference to the law of the forum is either too uncertain (if the reference is to an "international" or "factual" test or too parochial (if the reference is to the domestic contract law of the forum). In both cases, it is likely to work against one of the objectives of private international law to achieve harmony of results whichever forum happens to hear the case, and at worst it would encourage forum shopping. The objective proper law could provide a workable standard, but it suffers from two problems. First, it may be difficult to ascertain. Secondly, it may not be consonant with the expectations of the parties.

[199] On a pragmatic view, the question is what law should apply to the issue of whether a contract has been formed that would be consistent with the reasonable expectations, and would not be unfair to the parties. On this pragmatic view, then if the parties have either agreed that a certain law would apply to the issue, that law should be applied. This is merely an extension of the principle of autonomy recognised in contract choice of law generally. Moreover, if the parties have negotiated with reference to a particular law which they both expect to govern the contract when formed, it is within their reasonable expectations that such law be applied to the issue of formation. Thus, the putative proper law may be justified, not as a matter of principle, but on purely pragmatic grounds. The circularity is not insurmountable. The law of the forum

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309 Art 8(2).
310 [1995] 2 Lloyd's Rep 64.
311 ALRC Report No 58, at [8.57]-[8.58].
312 Wolff, note 304 above.
313 Nygh, note 304 above.
314 Briggs, note 304 above.
315 Garner, note 304 above.

governs the issue of formation, but it selects the putative proper law to govern the issue not because that law would apply if the issue is determined in the affirmative, but because it is it the law that is likely to meet the expectations of the parties.

[200] However, the putative proper law is not appropriate in all circumstances. Where it cannot be shown that the parties have selected a law to govern the issue or that they have negotiated with reference to a particular system of law, then the rationale for applying the putative proper law no longer applies. Here the courts could either fall back on the law of the forum, or to objective proper law of the contract. The existence of a purely objective stage in the choice of law process in determining the proper law of a contract indicates that where the parties have not made known what law is to govern their relationship, that law is the default law to govern their relationship. The same argument could apply when the issue is one of formation. Thus, in default of an indication by the parties as to the applicable law relating to the issue, the court should look to the objective connections to determine which law should govern. This serves two functions. First, the application of such a law would not come as a surprise to the parties. Secondly, the country with the closest connection the transaction has a legitimate interest in the outcome of the formation dispute. However, the objective proper law approach may suffer from the same setback as the subjective putative proper law approach if all the objective connections of the putative contract are taken into consideration. Clauses could be thrown into the negotiations to weigh the connections in a particular way. Thus, it is arguable that only connections of undisputed aspects of the transaction should be taken into consideration. This test, however, would not be applicable where the entire contract is disputed. In this case, the court has nothing left but to apply the law of the forum. Given the subsidiary role of the law of the forum, considering that international harmony of decisions cannot realistically be achieved on any meaning of the law of the forum, it is suggested that certainty be promoted by applying the domestic contract law of the forum.

[201] It is suggested that, as a compromise between principles and practical considerations, the following approach be taken towards the issue of formation of contracts: If the parties have negotiated their contract with reference to a particular legal system or have agreed on a law to apply to the issue of formation of their putative contract, that law will govern whether that putative contract has been formed. Otherwise, the issue should be determined by the law of the country with the closest connection with so much of the putative contract that is not disputed between the parties. If the entire contract is disputed, then the issue should be determined by the law of the forum.

[202] In all cases, the contract should be regarded as having been formed even if by the law governing the contract as formed in accordance with one of the sub-rules above the contract has not been formed. But the governing law will apply to all other aspects of validity and interpretation of the contract.

[203] In view of the uncertainty in the common law, there is certainly a case for legislative clarification. However, the recommendation for reform here is made very tentatively here. Formation is an issue that is arguably better left to be sorted out by the courts. There is no obviously correct solution to the problem. In any event, the paucity of authorities on the issue may be evidence that it is not such an important issue in practice. Or it could be that parties do not want to argue the point precisely because it is so uncertain.

[204] Recommendation: the law governing the issue of formation of contract should be clarified. If the parties have chosen a law to govern the specific issue of the

formation of their putative contract, or have negotiated with reference to a particular system of law to govern their putative contract, that law shall apply to the issue whether the contract has been formed. Otherwise, the issue of formation is to be determined by the law of the country with the closest connection with the undisputed aspects of the putative contract, but if the entire contract is disputed, then the issue is determined by the domestic law of the forum.

4.1.5. Change of Proper Law

[205] It is an axiomatic principle of law that a contract cannot exist in a legal vacuum and has meaning only with reference to a system of law, so a contract must have a proper law from its inception.[316] It is also an undoubted principle of law that, in determining the proper law of a contract, the court cannot take into account events subsequent to the contract which were uncertain at the time of the contract.[317] A related but different question arises whether the proper law of a contract can be changed after the contract has been made. The common law authorities are not very clear. What is clear is that the law will not allow the parties to enter into a contract where the proper law can only be determined retrospectively by an event subsequent to the formation of the contract.[318] The parties are probably allowed to enter into a variation agreement subjecting their rights to a different proper law, either through estoppel or a subsequent agreement.[319] They are probably also allowed to stipulate that the contract is governed by one law, but that if certain objective external events occur, the contract would be governed by another law.[320]

[206] A preliminary question of principle arises as to what is the law that governs whether the proper law of a contract should be changed. There are three possible candidates: the law of the forum; the original proper law of the contract; or the new proper law of the contract. In principle, the question relates to a connecting factor over time, and it should be determined by the law of the forum as a choice of law rule.[321] to refer to any other law than the law of the forum to answer a choice of law question is to invoke *renvoi* in contract.[322] However, the original proper law of the contract may be relevant at least insofar as the agreement to change or to allow a change is a term in the contract, but its role should be confined to testing the substantive validity of the clause, not its effect on a choice of law question.[323]

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316 *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50, 65 (Lord Diplock).

317 *Armar Shipping Co Ltd v Caisse Algégrienne d'Assurance* [1981] 1 WLR 207 (CA).

318 *The Iran Vojdan* [1984] 1 Lloyd's Rep 380; *Kredietbank NV v Sinotani Pacific Pte Ltd* [1999] 3 SLR 288 at [116] (affirmed without reference to this point at [1999] 4 SLR 34).

319 *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, 611, 61; *Kredietbank NV v Sinotani Pacific Pte Ltd* [1999] 3 SLR 288 at [113] (affirmed without reference to this point at [1999] 4 SLR 34).

320 *The Mariannina* [1983] 1 Lloyd's Rep 12.

321 North, "Varying the Proper Law" in *Multum non Multa:Festshrift fur Kurt Lipstein* (1980) reprinted in North, *Essays in Private International Law* (1993); Dicey and Morris: The Conflict of Laws (13th ed, 2000) at [32-083].

322 *Amin Rasheed Shipping Corp v Kuwait Insurance Co,* note 316 above, at 61-62 (Lord Diplock).

323 See *The Iran Vojdan*, note 318 above, where the court struck down the relevant clause on the basis that German law governed the contract before the exercise of the power in the clause, and under German law the clause had not been incorporated into the contract because it was in fine print. However, the alternative reference to Iranian law as the objective proper law of the contract to

[207] In principle, it is merely an extension of party autonomy to allow contracting parties to change the proper law. There may be good commercial reasons for doing so.[324] In fact, it may be a useful tool if there is some doubt as to what the objective proper law of the contract is. A further practical consideration is that many countries allow for parties to change the proper law,[325] and if Singapore law does not, the parties will simply try to take their case to another forum.

[208] Four points remain unclear. First, it is unclear whether the parties may agree that one of the parties can exercise the power to change the proper law of the contract. Secondly, it is not clear whether there are any limitations to the power of the parties to change the proper law of the contract where third party rights may be affected. Thirdly, it is not clear whether a change of proper law can validate an otherwise invalid contract or invalidate an otherwise valid contract. Fourthly, it is not clear what is the effect of the change of proper law on the issue of formal validity of the contract.

[209] Unilateral Change. The English case of *The Iran Vojdan*[326]prohibits the parties from agreeing to allow one party to nominate a governing law to apply to the contract retrospectively. What is less clear is whether this prohibition extends to a change of proper law. On one hand, the reasoning of the case proceeded on the basis that the contract could not exist without a proper law, and therefore the court appeared to treating the case as one of retrospective application of a proper law to a contract which did not have a proper law to begin with. On the other hand, in striking out the clause, the result was not that there was no contract, but the contract did not contain that clause empowering one party to nominate a law to govern the contract, so the underlying assumption was that there was an objective proper law that governed the contract from its inception.[327] On the latter view, the case was really about a *change* of proper law. As a matter of principle, it is impossible to distinguish between cases of unilateral changes and changes dependent on an objective external event; both are the subject of agreement between the parties. There may be concerns about inequality of bargaining power, but that is not unique to this issue. A more practical concern is that unilateral changes may cause uncertainty. On the other hand, but such uncertainty is normally the result of bad drafting, and not the result of a unilateral power to change the proper law. In any event, whether there is sufficient certainty in a contract term for it to be enforceable is an issue normally left to the proper law of the contract.

[210] Third Party Rights. It is important to note that contracts do confer third party rights under domestic laws.[328] Allowing parties to change the proper law of the contract may adversely affect vested third party rights. Specific provisions within domestic law that prevent the contracting parties from taking away the rights of third parties will not necessarily be effective in a choice of law context; such provisions are not applicable unless they are part of the governing law or part of international mandatory rules that the forum would apply. At the same time, the forum should not impose its own

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determine whether the proper law can be determined or changed retrospectively appears to be a erroneous step.

[324] See, eg, *The Mariannina*, note 320 above, where the parties were providing for possible contingencies in their commercial relationship.

[325] Rome Convention, Art 3(2). Swiss Federal Code on Private International Law, Art 116(3);

[326] Note 318 above.

[327] This is consistent with the court's references to the objective proper law of the contract in an attempt to resolve the issue of the validity of the choice/change of law clause.

[328] This is so under in many civil law countries. Common law countries are judicially or legislatively coming round to this view. See, eg, Contracts (Rights of Third Parties) Act 2001 in Singapore.

domestic law on the protection of contractual third party rights on contracts governed by foreign law. The better solution is to leave any rights acquired and protected under the original proper law to the continuing protection of such law, and the forum law should simply provide that the variation of the proper law should not prejudice the rights of the third parties.

[211] Essential Validity. Kahn-Freund had argued against the idea of change of proper law on the basis that the essential validity of the parties' acts cannot be changed restrospectively.[329] It is suggested, however, that the issue of essential validity turns out to be a red herring in this context. The issue whether prior invalid acts can be retrospectively validated,[330] and whether prior valid acts are invalidated, are matters of essential validity for the substantive law chosen as the new proper law to determine.

[212] Formal Validity. Parties attempt to comply with the formal requirements at the time of the conclusion of the contract. It has been argued above that choice of law rules should facilitate compliance with formal requirements for contracts. It would be harsh on the parties to require the issue of formal validity to be retested upon the selection of a different governing law, and possibly to subject the parties' prior acts to the potential retrospective operation or otherwise of such laws. Moreover, the function of formal requirements are normally discharged at the time of the conclusion of the contract. It is thus unnecessary and undesirable for the issue to be reopened when the proper law is changed.

[213] It is to be noted that the Rome Convention provides that the parties may at any time agree to change the applicable law of the contract, but that any such variation shall not prejudice the rights of third parties or affect its formal validity.[331] No distinction is made between changes made by one party, bilaterally, or made with reference to the happening of external events. This provides a possible model for us to follow.

[214] Recommendation: The law should be clarified to allow the proper law of a contract to be changed by the agreement of the parties. However, such change should not affect the formal validity of the contract, nor should it adversely affect the rights of third parties.

4.1.6. The Law of the Contractual Place of Performance

[215] As a general rule, whether a contract is enforceable or not is governed by the proper law of the contract. Exceptionally, a contract, whatever its governing law, will not be enforceable if to do contravenes a fundamental public policy of the forum. An example is a contract which the parties entered into with the intention of committing an act in a friendly foreign country that is illegal in that country.[332]

[216] One rule that has caused much controversy in the common law is the purported rule that a contract is unenforceable if it is illegal by the law of the place of contractual

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[329] Kahn-Freund, *General Problems in Private International Law* (1976) at 257. See also Beck, "Floating Choice of Law Clauses" [1987] LMCLQ 523; Briggs, "The validity of "floating" choice of law and jurisdiction clauses" [1986] LMCLQ 508.

[330] Where the term in the contract providing for the change of proper law is itself invalid under its original proper law (see, eg, note 323 above), then there is no legal basis for the change of proper law. However, such situations may alternatively be analysed as the creation of a fresh contract.

[331] Art 3(2).

[332] *Foster v Driscoll* [1929] 1 KB 470; *Regazzoni v KC Sethia* [1958] AC 301; *Royal Boskalis Westminster NV v Mountain* [1999] QB 674.

performance. The source of this rule is *Ralli Brothers* v *Compania Naveria Sota y Aznar*.[333] In this case, there was an agreement governed by English law to pay freight at a particular rate in Spain. After the conclusion of the contract, but before the obligation to pay arose, the government of Spain passed a law that made it illegal to pay freight beyond a certain amount, which the contractual rate exceeded. This was a case of supervening illegality at the place of contractual performance. The English Court of Appeal amount of the rate in excess of the Spanish statutory limitation could not be recovered. The reasoning, however, is obscure. Scrutton LJ said, in a passage that also reflected the view of the other members of the court:

> [w]here a contract requires an act to be done in a foreign country, it is in the absence of very special circumstances, an implied term of the continuing validity of such provision that the act to be done in the foreign country shall not be illegal by the law of that State.[334]

[217] There are four possible views of this case in the modern law. First, it may be simply a statement of domestic English law applicable as the governing law of the contract. Secondly, it may be stating a specific choice of law rule applying the law of the place of contractual performance to the issue of legality of the contract. Thirdly, it may be sn instance of an application of a fundamental forum public policy that the forum "should not … assist or sanction the breach of the laws of other independent States."[335] Fourthly, it could be seen as an international mandatory rule of the forum that would apply regardless of the law governing the contract. Subsequent authorities have not thrown further light on this decision. The issue was considered briefly by the Singapore Court of Appeal in *Peh Teck Quee v Bayerische Landesbank Girozentrale*.[336] The court rejected the view that it could be an application of forum public policy,[337] because there was no initial illegality.[338] Indeed it is difficult to see why forum public policy is engaged, except where the forum is itself the place of performance, but this latter point could be dealt with as an issue of public policy without any such rule. The Court of Appeal also left open the question whether it was a rule of domestic law or an independent choice of law rule.

[218] The curious history of the purported rule in English law is succinctly summarised by Reynolds, who laments that the *Ralli Brothers* case has been the subject of more casual citations than reasoned consideration:[339] although it has appeared as an independent rule in Dicey and Morris since 1896, the extended commentary had always cast doubt on its correctness, but the purported rule is cited so frequently in cases without reference to the doubts in the commentary that the expanded footnotes then lend even greater support to the rule. Indeed it is difficult to see why such a rule should exist as in independent choice of law rule. First, its usefulness is limited to a situation where the place of performance is in one foreign country, the law is governed by the law of another foreign country, and the domestic law of the latter is

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333 [1920] 2 KB 287.
334 Same reference, at 304.
335 Same reference, at 304.
336 [2000] 1 SLR 148.
337 Same reference, at [54]. The court also rejected the public policy argument on the basis that there was no issue of evasion of Spanish law. This curious, since evasion of foreign law is not against forum public policy under the current common law position.
338 Compare *Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financiere SA* [1979] 2 Lloyd's Rep 98, 107.
339 (1992) 109 LQR 553.

different from the law of the forum on this issue. Secondly, it is more consistent with international comity to allow the proper law of the contract to deal with issues relating to illegality by the place of contractual performance. Indeed, the proper law of the contract may, as in the case of the common law, take into consideration the law of the contractual place of performance. Public policy can play, if at all, its usual secondary role in choice of law analysis. In English law, although the rule has sometimes been argued to be a fundamental rule of public policy or an international mandatory rule that would apply notwithstanding that the Rome Convention has no such choice of law rule,[340] the better view is that it is unlikely that such an interpretation will be taken of the Rome Convention.[341]

[219] In view of the confusion engendered by the *Ralli Brothers* case in the common law, it would be desirable that the uncertainty in the common law be resolved in favour of the interpretation of the rule in the case as a rule of domestic law.[342] On the other hand, it should also be noted that its correct interpretation would be decisive only in the rare situation where the place of performance is in one foreign country, the law is governed by the law of another foreign country, and the domestic law of the latter is different from the law of the forum on the issue.

[220] Recommendation: that the law be clarified that, for the avoidance of doubt, there is no choice of law rule that requires the application of the law of the contractual place of performance to determine the legality of a contract or its obligations.

4.2. Specific Contracts

[221] In the common law, there are no special choice of law rules that apply to employment or consumer contracts. Any protection provided is through the application of international mandatory rules of the forum.[343] Choice of law for contracts to which one part is an employee or a consumer, because of the general imbalance of bargaining power against their favour, require special consideration.

4.2.1. Employment Contracts

[222] Compared to the position in the civil law, conflict of laws issues in relation to employment contracts have generally escaped the attention of common law judges and academics principally for four reasons. First, the general common law rules of choice of law for contracts are seen to be flexible enough to be applied to all types of contracts, so there was no need to single out any particular type of contract for special treatment. Secondly, many employment issues have tended to arise in the context of workmen injury, and such claims are normally pleaded as tort claims in common law systems. Thirdly, statutes relating to employment have not been the subject of searching analysis for their conflictual scope of application. Finally, labour law was

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340 Art 7(2), 16.

341 *Dicey and Morris: The Conflict of Laws* (13th ed, 2000) at [32-148]. See also note 339 above.

342 The Australian Law Reform Commission (ALRC Report No 58, at [8.17]) recommended that the position be resolved *in favour* of stating the rule as an independent choice of law rule because the rule is a "useful and necessary one". However, no reasons were given why it was either useful or necessary.

343 Eg, Unfair Contract Terms Act, Cap 396 (1994 Rev Ed), s 27(2)(b).

recognised as a distinct discipline much later in English and Commonwealth law than in civil law countries.[344]

[223] The need to give special consideration to employment contracts at the choice of law level can be justified from a number of perspectives. First, it is a question of fairness itself, as a result of the recognition of the general need to protect workers. Secondly, the provision for greater certainty in employment contracts with international elements will encourage global mobility in the international labour market, which will be beneficial to workers. Thirdly, that same certainty will also benefit employers in cross-border businesses. Fourthly, it can display to her trading partners Singapore's commitment to labour protection issues.

[224] The need to provide protection to employees as a class of persons who are generally of weaker bargaining power in a contractual relationship is recognised in the Rome Convention, and by the Australian Law Reform Commission.[345] The recognition of this need calls for consideration of special treatment of individual employment contracts in two respects: first, the need for greater certainty in the determination of the proper law of the contract in the absence of choice; and secondly, whatever law governs the contract, protective mandatory rules of the law of country with which the employee is most closely connected ought to be applied if it is to the greater benefit of the employee.

[225] The arguments for the first proposition are: there ought to be certainty about the law governing an employment contract; and where the parties have not chosen a law to govern their contract, an employment contract ought to be governed by the law with the closest connection with the work of the employee; that law ought to define and regulate the employer-employee relationship. For example, the Rome Convention provides that in the absence of choice, the applicable law of an individual[346] employment contract is the law of the place where the employee habitually carries out his work in performance of his employment contract, even if he is temporarily employed in another country or, if there is no single place of habitual employment, the law of the country where the place of business through which the employee was engaged is situated, unless the contract is most closely connected with the law of another country.[347]

[226] The argument for the second proposition is that given the desirability of applying the law most closely connected with the employee's work articulated in the previous paragraph, there should be some limitation on the exercise of the freedom of choice of the parties to take away that protection. Thus, the Rome Convention provides that the choice of law of the parties does not deprive the employee from the protection of the mandatory rules of the law objectively applicable to the employment contract. Here mandatory rules is used in the broader sense of rules of law that cannot be derogated from by contract, and these include rules of law governing industrial safety and hygiene.[348]

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[344] CGJ Morse, "Contracts of Employment and the E.E.C. Contractual Obligations Convention", in PM North, *Contract Conflicts: The EEC Convention on the Law Applicable to Contractual Obligations: A Comparative Study* (1982) 143.

[345] Report No 58, *Choice of Law* (1992), at [8.52]-8.55].

[346] The article does not apply to collective agreements between trade unions and employers.

[347] Art 6(2).

[348] Guliano and Lagarde.

[227] A threshold difficulty will be to define an employment contract for the purpose of a choice of law rule designed for employment contracts. Under the Rome Convention, the issue is to be resolved by reference to autonomous interpretation of the Convention articles, ie, a supra-European law. In a common law system, the answer, in the absence of a statutory definition, would have to be found in the characterisation principles of the forum. It is suggested that the meaning and scope of employment contracts be left to the characterisation technique of the common law as it is unlikely that any satisfactory statutory formula can be devised.

[228] In the context of Singapore, there are significant scope for conflict of laws issues to arise in respect of employment contracts as increasing numbers of Singapore residents are sent to work overseas, and foreigners come to work in Singapore. One relevant consideration is whether the introduction of a special choice of law rule, which include possible references to the protective laws of the objective proper law of the contract which is defined in a way to favour the employee, will increase the cost of doing business. However, most contracts involving foreigners working in Singapore and involving Singaporeans working abroad are not going to raise any practical difficulties about the application of mandatory rules of the objective proper law of the employment contract, as in most of these contracts there will be a clear place of habitual employment under the contract, and it is anticipated that in many of these cases, that is likely to coincide with the country of the chosen law.

[229] Recommendation: That contracts of employment be subject to the a special set of choice of law rules: the parties may choose the governing law, but in the absence of choice, the objective proper law of the contract shall be the law of the country in which the employee habitually carries out the employment under the contract, even is the employee is temporarily employed elsewhere, or where there is no place of habitual employment, by the law of the country where the employer has its place of business. But any choice of the parties shall not prevent the application of the mandatory rules of the objective proper law where they provide better protection for the employee.

4.2.2. Consumer Contracts

[230] Consumers as a class deserves some protection from the imposition of laws foreign to the consumer by businesses. Any attempt by a domestic legal system to protect consumers is liable to be subverted by a choice of a different law to govern the transaction. At the same time, businesses must be given sufficient flexibility to choose the laws to govern their transactions in the interest of commercial certainty. The common law deals with problems of consumer protection with two techniques. First, the choice of law by the parties may be attacked as not bona fide or legal or against public policy. It is, however, difficult to see why this qualification to a choice of law should be invoked merely because the parties are of unequal bargaining power.[349] Secondly, the court may apply its own consumer protection legislation as an international mandatory rule requires to be applied irrespective of the foreign elements in the case.[350] This technique is limited in two ways. First the law to be applied has to be characterised as an international mandatory law, and courts may be

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[349] There is a distinct argument that the choice of law by the parties should not be conclusive in a contract of adhesion (*Siegelman v Cunard* 221 F 2d 189 (1955) (Frank J, dissenting). But this is not the view of English or Singapore common law.

[350] *English v Donnelly* 1959 SLT 2. See also Unfair Contract Terms Act, s 27(2)(b).

slow to reach that conclusion. Secondly, there is no necessary connection between the mandatory law sought to be applied and the law that is most closely connected to the consumer to which the consumer should rightly appeal to for protection.

[231] The balance of protection achieved in the Rome Convention[351] is to allow the parties to choose the governing law, but to apply as the applicable law in the absence of choice, the law of the consumer's habitual residence in certain situations: where the consumer was invited to enter in the contract in that country and took steps necessary to conclude the contract there; where the business or its agent received the consumer's order there; or where business had arranged for the consumer to travel to another country to induce the consumer to make an order for goods. In any event, whether there is a choice or not, the protective rules of the consumer's habitual residence will apply in the circumstances specified in the previous sentence. The 1980 Hague Convention on the Law Applicable to Certain Consumer Sales also apply the law of the consumer's habitual residence to consumer contracts.[352]

[232] As in the case of employment contracts, an initial difficulty in any reform lies in the difficulty of the definition of a consumer contract. Here a number of international instruments have tried to define the concept,[353] so they may provide models for a statutory definition, which may provide greater certainty than common law characterisation. There is greater international consensus on what is a consumer contract than what is an employment contract.

[233] Two countervailing considerations in this context are: firstly, whether the introduction of choice of law rules to protect consumers will significantly increase the cost of doing business in Singapore; and secondly, whether it is realistic to expect that consumers will actually resort to litigation invoking such provisions. The first is not thought to be a problem. The rules here are designed to determine the governing law of the contract only. Indeed, the certainty provided as to the governing law may reduce business costs. The second is not a real issue. It is true that in many cases, consumer disputes are not worth invoking rules of international jurisdiction and choice of law, but in the odd case that arises which does raise these issues, the need for protection is not thereby diminished.

[234] Recommendation: That there should be special choice of law rules to govern consumer contracts. The objective proper law in the absence of choice should be the law of the habitual residence of the consumer provided there are sufficient connections between the contract and that residence. Where these connections

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[351] Art 5.

[352] Art 5 provides: The Convention shall apply only in the following cases:

1. the negotiations for the sale were conducted mainly in the country in which the consumer then had his habitual residence and the consumer there took the steps necessary on his part for the conclusion of the contract;
2. the seller or his representative, agent or commercial traveller received the order in the country in which the consumer then had his habitual residence;
3. the order was preceded by a specific invitation addressed to the consumer in the country of his habitual residence, or by advertising or other marketing activities undertaken in, or direct to, that country, and the consumer there took the steps necessary on his part for the conclusion of the contract;
4. the consumer travelled from the country of his habitual residence to another country and there gave his order, provided that the consumer's journey was directly or indirectly arranged by the seller for the purposes of inducing the consumer to buy.

[353] Apart from the Rome Convention, Art 5(1), at **Annex G**, see also **Annex K**. On balance, the widest definition is that found in the Rome Convention.

are present, the express choice of law should not preclude the application of the law of his habitual residence where it provides better protection for the consumer.

4.2.3. Insurance Contracts

[235] Insurance contracts represent another class of contracts which potentially calls for consideration because of the need to provide a counterpoint to an imbalance of bargaining power. Generally, the insurance market in Singapore is domestic and tightly regulated. However, foreign insurers may now be allowed into the market under Foreign Insurer Schemes.[354] It is not clear, however, to what extent foreign insurers will be allowed into the general insurance business, so there is no clear case for reform in this respect at the moment.

[236] Canadian law provides a number of models where the forum protects the interests of insured resident in the forum, generally favouring the law of the residence of the insured, if this step is thought necessary. A number of provinces[355] have passed legislation in the following form:

> Where the subject matter of a contract of insurance is property in [the province] or an insurable interest of a person resident in [the province], the contract of insurance, if signed, countersigned, issued or delivered in [the province] or committed to the post office or to any carrier, messenger or agent to be delivered or handed over to the insured, his assign or agent in [the province] shall be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all money payable under the contract shall be paid at the office of the chief officer or agent in [the province] of the insurer in lawful money of Canada.

[237] This provision mandates the application of the law of the forum as the applicable law of the relationship between the insurer and the insured for insurance contracts with the requisite connections with the forum.

[238] It should also be noted that this overlaps to a large extent with consumer contracts. The Canadian jurisdictions have no special choice of law rules for consumers.

4.2.4. Jurisdictional considerations

[239] Any protection accorded to special classes of contract will not be very useful if they are going to be circumvented by exclusive jurisdiction clauses in the contracts designed to bring the case to a jurisdiction favourable to the party with the stronger bargaining power. The common law requires the party who wants to sue in Singapore to show strong cause or exceptional circumstances to justify to the court why that party should be allowed to proceed with the action in Singapore in breach of

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[354] Insurance Act (Cap 142, 2000 Rev Ed), Part IIA.

[355] Insurance Act, RSM 1987, c I40, ss 115-116; Insurance Act, RSNB 1973, c I12, ss 96-97; Insurance Contracts Act RSN 1990, c I-12, ss 3-4, Insurance Act, RSO 1990, c I8, ss 122-123, Insurance Act, RSPEI 1988, CI-4, ss 85-86, Insurance Act RSNWT 1988 c I-4, S40; Insurance Act RSS 1978 C S-26, ss 101-102; Insurance Act, RSY 1986, c 91, ss 45-46; Insurance Companies Act, SC 1991, c 47, s 2(1). See Castel, Canadian Conflict of Laws (3rd ed, 1994) at [462].

contract.[356] The problem is ameliorated to the extent that the courts may impose a less stringent test of strong cause where the parties are not of equal bargaining power,[357] but it is uncertain how the fact that one party is a consumer or employee will affect the standard of the strong cause, and indeed, whether that fact itself counts towards the strong cause. In contrast, one American case had articulated an explicit public policy in favour of protecting consumers in order not to give effect to a jurisdiction clause.[358] For the same reason, special rules of jurisdiction are also implemented in the Brussels Regulations for consumer, employment and insurance contracts.

[240] The common law rule does not provide adequate protection for the protected classes of contracts against the use of jurisdiction clauses without the taking the American route of invoking public policy, and in this respect, it is suggested that there is no clear common law public policy in Singapore to justify this path of analysis.

[241] Recommendation: To the extent that there should be any special choice of law rules for protected classes of contracts, provision should also be made that such rules are not subverted by the use of jurisdiction clauses.

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[356] See eg, a class action by a group of consumers resident in Ontario started in the Ontario court against a US corporation was stayed because of an exclusive jurisdiction clause in *Rudder v Microsoft Corp* (1999) 2 CPR (4th) 474.

[357] *The Eastern Trust* [1994] 2 SLR 526, 534.

[358] *Williams v America Online Inc* (2001) Mass Super Ct No 00-0962.

Annex A (Jurisdiction over Companies)

Companies Act 1985 (UK)

Service of documents on oversea company

695 (1) Any process or notice required to be served on an oversea company [to which section 691 applies] is sufficiently served if addressed to any person whose name has been delivered to the registrar under preceding sections in this Part and left at or sent by post to the address which has been so delivered.

(2) However –

(a) where such a company makes default in delivering to the registrar the name and address of a person resident in Great Britain who is authorised to accept on behalf of the company service of process or notices, or

(b) if at any time all the persons whose names and addresses have been so delivered are dead or have ceased so to reside, or refuse to accept service on the company's behalf, or for any reason cannot be served,

a document may be served on the company by leaving it at, or sending it by post to, any place of business established by the company in Great Britain.

Annex B (Protective Measures)

Brussels Regulation (Council Regulation (EC) No 44/2001, 22 December 2000, OJ 16.1.2001 L12/1)

Provisional, including protective, measures

Article 31

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

Civil Jurisdiction and Judgments Act 1982 (UK)

Interim relief in England and Wales and Northern Ireland in the absence of substantive proceedings

25 (1) The High Court in England and Wales or Northern Ireland shall have power to grant interim relief where –

(a) proceedings have been or are to be commended in a Brussels or Lugano Contracting State or a Regulation State other than the United Kingdom or in a part of the United Kingdom other than that in which the High Court in question exercises jurisdiction; and

(b) they are or will be proceedings whose subject-matter is within the scope of the Regulation as determined by Article 1 of the Regulation (whether or not the Regulation has effect in relation to the proceedings).

(2) On an application for any interim relief under subsection (1) the court may refuse to grant that relief it, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it.

(3) Her Majesty may by Order in Council extend the power to grant interim relief conferred by subsection (1) so as to make it exercisable in relation to proceedings of any of the following descriptions, namely--

(a) proceedings commenced or to be commenced otherwise than in a Brussels or Lugano Contracting State or Regulation State;

(b) proceedings whose subject-matter is not within the scope of the 1998 Convention as determined by Article 1;

(4) An Order in Council under subsection (3)--

(a) may confer power to grant only specified descriptions of interim relief;

(b) may make different provision for different classes of proceedings, for proceedings pending in different countries or

courts outside the United Kingdom or in different parts of the United Kingdom, and for other different circumstances; and

(c) may impose conditions or restrictions on the exercise of any power conferred by the Order.

(6) Any Order in Council under subsection (3) shall be subject to annulment in pursuance of a resolution of either House or Parliament.

(7) In this section "interim relief", in relation to the High Court in England and Wales or Northern Ireland, means interim relief of any kind which that court has power to grant in proceedings relating to matters within its jurisdiction, other than--

(a) a warrant for the arrest of property; or

(b) provision for obtaining evidence.

Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 302/1997) (made under Civil Jurisdiction and Judgments Act 1982, s 25(3))

2. The High Court in England and Wales or Northern Ireland shall have power to grant interim relief under section 25(1) of the Civil Jurisdiction and Judgments Act 1982 in relation to proceedings of the following descriptions, namely—

(a) proceedings commenced or to be commenced otherwise than in a Brussels or Lugano Contracting State;

(b) proceedings whose subject-matter is not within the scope of the 1968 Convention as determined by Article 1 thereof.

UK Civil Procedure Rules (CPR)

6.20 In any proceedings to which rule 6.19 does not apply, a claim form may be served out of the jurisdiction with the permission of the court if -

…

Claims for interim remedies

(4) a claim is made for an interim remedy under section 25(1) of the 1982 Act

Annex C (Submission)

Civil Jurisdiction and Judgments Act 1982 (UK)

Certain steps not to amount to submission to jurisdiction of overseas court

33 (1) For the purposes of determining whether a judgment given by a court of an overseas country should be recognised or enforced in England and Wales or Northern Ireland, the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely--

(a) to contest the jurisdiction of the court;

(b) to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country;

(c) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings.

Annex D (Breach of Jurisdiction Clauses)

Civil Jurisdiction and Judgments Act 1982 (UK)

Overseas judgments given in proceedings brought in breach of agreement for settlement of disputes

32 (1) Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if--

(a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and

(b) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given; and

(c) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court.

(2) Subsection (1) does not apply where the agreement referred to in paragraph (a) of that subsection was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given.

(3) In determining whether a judgment given by a court of an overseas country should be recognised or enforced in the United Kingdom, a court in the United Kingdom shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsection (1) or (2).

Annex E (Non Merger)

Civil Jurisdiction and Judgments Act 1982 (UK)

Certain judgments a bar to further proceedings on the same cause of action

34 No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales or, as the case may be, in Northern Ireland.

Annex F (Limitations)

Summary of Recommendations in the Report of the Law Commission, Classification of Limitations in Private International Law (No 114) 1982:

5.2 Our recommendations are as follows:

(1) Our principal recommendation. The English rule whereby statutes of limitation, as opposed to rules of prescription, are classed as procedural should be abandoned, and where under our rules of private international law a foreign law falls to be applied in proceedings in this country, the rule of that foreign law relating to limitation should also be applied, to the exclusion of the law of limitation in force in England and Wales.

(paragraph 4.13 and clause 1(1))

(2) By way of qualification to our principal recommendation, the rules of limitation in force in England and Wales should not be excluded in cases where both a foreign law and the law of England and Wales fall to be taken into account under the rules of private international law in the determination of any issue by the court.

(paragraph 4.15 and clause 1(2))

(3) The domestic law of England and Wales should be applied for the purpose of determining the *terminus ad quem* of a limitation period prescribed by a foreign *lex causae*.

(paragraph 4.20 and clause 1(3))

(4) Section 34 of the Limitation Act 1980 should extend to arbitrations whose subject-matter involves the application of a period of limitation prescribed by a foreign *lex causae*, in accordance with our principal recommendation.

(paragraph 4.23 and clause 5)

(5) In its application of a foreign rule as to limitation the court or, as the case may be, an arbitrator should have regard to the whole body of the law of limitation of the *lex causae*, including (i) any provisions (other than those mentioned in subparagraph (6) below) which might operate to suspend the running of the appropriate period and (ii) any discretion conferred by that law, which shall so far as is practicable be exercised in the manner in which it is exercised in comparable cases by the courts of the relevant foreign country.

(paragraph 4.25 and clause 4(1)

(as to (i))

and clause 1(4)

(as to (ii))

(6) Where the period of limitation prescribed by a foreign *lex causae* may be extended or interrupted by reason of the absence of a party to the proceedings from any specified jurisdiction or country, such part of the *lex causae* as relates to such extension or interruption should be disregarded.

(paragraph 4.32 and clause 2(2))

(7) Where, in a particular case, the court or, as the case may be, an arbitrator determines that the application of the period of limitation prescribed under a foreign law would be contrary to public policy, the court (or an arbitrator) may refrain from applying it.

(paragraph 4.49 and clause 2(1))

(8) Our principal recommendation does not apply to a claim for equitable relief; but if a period of limitation prescribed under a foreign law would otherwise be applicable in accordance with that recommendation, and such period has not expired, the court shall take that fact into account in determining whether or not to grant the relief sought.

(paragraph 4.54 and clause 4(3))

(9) The Limitation (Enemies and War Prisoners) Act 1945 should extend to cases where the period of limitation prescribed by a foreign *lex causae* is applied in accordance with our principal recommendation.

(paragraph 4.57 and clause 2(3))

(10) Where a foreign court has given a judgment in any matter by reference to the law of limitation of its own or of any other country (including that of England and Wales) that judgment should be regarded as conclusive "on the merits" for the purposes of its recognition or enforcement in England and Wales.

(paragraph 4.71 and clause 3)

[Note: The references to paragraph numbers and clauses are to main text in the Law Commission Report and the Bill attached thereto, respectively. These are not reproduced in this Annex.]

Foreign Limitation Periods Act 1984 (UK)

An Act to provide for any law relating to the limitation of actions to be treated, for the purposes of cases in which effect is given to foreign law or to determinations by foreign courts, as a matter of substance rather than as a matter of procedure.

[May 24, 1984]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

Application of foreign limitation law

1 (1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter –

(a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and

(b) except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply.

(2) A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account.

(3) The law of England and Wales shall determine for the purposes of any law applicable by virtue of subsection (1)(a) above whether, and the time at which, proceedings have been commenced in respect of any matter; and, accordingly, section 35 of the Limitation Act 1980 (new claims in pending proceedings) shall apply in relation to time limits applicable by virtue of subsection (1)(a) above as it applies in relation to time limits under that Act.

(4) A court in England and Wales, in exercising in pursuance of subsection (1)(a) above any discretion conferred by the law of any other country, shall so far as practicable exercise that discretion in the manner in which it is exercised in comparable cases by the courts of that other country.

(5) In this section "law", in relation to any country, shall not include rules of private international law applicable by the courts of that country or, in the case of England and Wales, this Act.

Exceptions to s. 1

2 (1) In any case in which the application of section 1 above would to any extent conflict (whether under subsection (2) below or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.

(2) The application of section 1 above in relation to any action or proceedings shall conflict with public policy to the extent that its

application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings.

(3) Where, under a law applicable by virtue of section 1(1)(a) above for the purposes of any action or proceedings, a limitation period is or may be extended or interrupted in respect of the absence of a party to the action or proceedings from any specified jurisdiction or country, so much of that law as provides for the extension or interruption shall be disregarded for those purposes.

[(4) omitted.]

Foreign judgments on limitation points

3 Where a court in any country outside England and Wales has determined any matter wholly or partly by reference to the law of that or any other country (including England and Wales) relating to limitation, then, for the purposes of the law relating to the effect to be given in England and Wales to that determination, that court shall, to the extent that it has so determined the matter, be deemed to have determined it on its merits.

Meaning of law relating to limitation

4 (1) Subject to subsection (3) below, references in this Act to the law of any country (including England and Wales) relating to limitation shall, in relation to any matter, be construed as references to so much of the relevant law of that country as (in any manner) makes provision with respect to a limitation period applicable to the bringing of proceedings in respect of that matter in the courts of that country and shall include—

(a) references to so much of that law as relates to, and to the effect of, the application, extension, reduction or interruption of that period; and

(b) a reference, where under that law there is no limitation period which is so applicable, to the rule that such proceedings may be brought within an indefinite period.

(2) In subsection (1) above "relevant law", in relation to any country, means the procedural and substantive law applicable, apart from any rules of private international law, by the courts of that country.

(3) References in this Act to the law of England and Wales relating to limitation shall not include the rules by virtue of which a court may, in the exercise of any discretion, refuse equitable relief on the grounds of acquiescence or otherwise; but, in applying those rules to a case in relation to which the law of any country outside England and Wales is applicable by virtue of section 1(1)(a) above (not being a law that provides for a limitation period that has expired), a court in England and Wales shall have regard, in particular, to the provisions of the law that is so applicable.

[rest omitted.]

Choice of Law (Limitation Periods) Act (New South Wales) 1993

Definitions

3. In this Act:

court includes arbitrator.

limitation law means a law that provides for the limitation or exclusion of any liability or the barring of a right of action in respect of a claim by reference to the time when a proceeding on, or the arbitration of, the claim is commenced.

Application

4. This Act extends to a cause of action that arose before the commencement of this Act, but does not apply to proceedings instituted before the commencement of this Act.

Characterisation of limitation laws

5. If the substantive law of a place, being another State, a Territory or New Zealand, is to govern a claim before a court of the State, a limitation law of that place is to be regarded as part of that substantive law and applied accordingly by the court.

Exercise of discretion under limitation law

6. If a court of the State exercises a discretion conferred under a limitation law of a place, being another State, a Territory or New Zealand, that discretion, as far as practicable, is to be exercised in the manner in which it is exercised in comparable cases by the courts of that place.

Application to New Zealand

7. (1) This Act does not apply in relation to New Zealand until it is declared by proclamation that it does so apply. The proclamation may be the proclamation commencing this Act or another proclamation.

(2) If the substantive law of New Zealand is to govern a claim before a court of the State and proceedings have been instituted on the claim before that declaration takes effect, this Act does not apply to those proceedings. This subsection has effect despite section 4.

Review of Act

8. (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

(3) A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

Limitation Act 1950 (New Zealand)

PART 2A - APPLICATION OF LIMITATION LAW OF OVERSEAS COUNTRIES

Interpretation

28A. In this Part of this Act,—

"Country'" includes a State, territory, province, or other part of a country:

"Limitation law" in relation to any matter, means a law that limits or excludes liability or bars a right to bring proceedings or to have the matter determined by arbitration by reference to the time when proceedings or an arbitration in respect of the matter are commenced; and includes a law that provides that proceedings in respect of the matter may be commenced within an indefinite period.

[Cf Foreign Limitation Periods Act 1984 (UK), s 4; Choice of Law (Limitation Periods) Act 1993 (NSW), s 3]

Application of this Part of the Act

28B. (1) This Part of this Act applies to the Commonwealth of Australia or any State or Territory of Australia, the United Kingdom, and to any country to which this Part of this Act is declared to apply by an Order in Council made under subsection (2) of this section.

(2) The Governor-General may from time to time, by Order in Council, declare that this Part of this Act applies to a country specified in the order.

(3) In the case of a country that is responsible for the international relations of a territory, an Order in Council under subsection (2) of this section may apply to the country and all or some of those territories.

Charaterisation of limitation law

28C. (1) Where the substantive law of a country to which this Part of this Act applies is to be applied in proceedings before a New Zealand Court or in an arbitration, the limitation law of that country is part of the substantive law of that country and must be applied accordingly.

(2) If, in any case to which subsection (1) of this section applies, a New Zealand Court or an arbitrator exercises a discretion under the limitation law of another country, that discretion, so far as practicable, must be exercised in the manner in which it is exercised in that other country.

[Cf Foreign Limitation Periods Act 1984 (UK), s 1; Choice of Law (Limitation Periods) Act 1993 (NSW), ss 5 and 6.]

Annex G (Rome Convention)

Rome Convention 1980

CONVENTION on the law applicable to contractual obligations (1) opened for signature in Rome on 19 June 1980

PREAMBLE

THE HIGH CONTRACTING PARTIES to the Treaty establishing the European Economic Community,

ANXIOUS to continue in the field of private international law the work of unification of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments,

WISHING to establish uniform rules concerning the law applicable to contractual obligations,

HAVE AGREED AS FOLLOWS:

TITLE I

SCOPE OF THE CONVENTION

Article 1 Scope of the Convention

1. The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.

2. They shall not apply to:

(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 11;

(b) contractual obligations relating to:

- wills and succession,

- rights in property arising out of a matrimonial relationship,

- rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate;

(c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(d) arbitration agreements and agreements on the choice of court;

(c) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organization or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;

(f) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party;

(g) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;

(h) evidence and procedure, without prejudice to Article 14.

3. The rules of this Convention do not apply to contracts of insurance which cover risks situated in the territories of the Member States of the European Economic Community. In order to determine whether a risk is situated in those territories the court shall apply its internal law.

4. The proceeding paragraph does not apply to contracts of re-insurance.

Article 2 Application of law of non-contracting States

Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State.

TITLE II

UNIFORM RULES

Article 3 Freedom of choice

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.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called 'mandatory rules`.

4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

Article 4 Applicable law in the absence of choice

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. evertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected 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 unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.

4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Article 5 Certain consumer contracts

1. This Article applies to a contract the object of which is the supply of goods or services to a person ('the consumer`) for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.

2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or

- if the other party or his agent received the consumer's order in that country, or

- if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.

4. This Article shall not apply to:

(a) a contract of carriage;

(b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

5. Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 6 Individual employment contracts

1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.

2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or

(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;

unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

Article 7 Mandatory rules

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Article 8 Material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.

2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

Article 9 Formal validity

1. A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.

2. A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.

3. Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2.

4. An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under this Convention governs or would govern the contract or of the law of the country where the act was done.

5. The provisions of the preceding paragraphs shall not apply to a contract to which Article 5 applies, concluded in the circumstances described in paragraph 2 of Article 5. The formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence.

6. Notwithstanding paragraphs 1 to 4 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.

Article 10 Scope of applicable law

1. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular:

(a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law;

(d) the various ways of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.

Article 11 Incapacity

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Article 12 Voluntary assignment

1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ('the debter`) shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.

2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

Article 13 Subrogation

1. Where a person ('the creditor`) has a contractual claim upon another ('the debtor`), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent.

2. The same rule applies where several persons are subject to the same contractual claim and one of them has satisfied the creditor.

Article 14 Burden of proof, etc.

1. The law governing the contract under this Convention applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognized by the law of the forum or by any of the laws referred to in Article 9 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

Article 15 Exclusion of convoi

The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law.

Article 16 'Ordre public`

The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ('ordre public`) of the forum.

Article 17 No retrospective effect

This Convention shall apply in a Contracting State to contracts made after the date on which this Convention has entered into force with respect to that State.

Article 18 Uniform interpretation

In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.

…

Annex H (ALRC Report No 58 Extract)

The Law Reform Commission (Report No 58), *Choice of Law* (1992) [Australia]
Appendix B: Draft Uniform State and Territory Choice of Law Bill 1992

Contract

9. (1) A person is to be taken to have capacity to enter into a contract if the person has that capacity according to either:

(a) the law that would, if there were a contract, be the proper law of the contract; or

(b) the law in force in the place where the person usually resides.

(2) A question whether a contract has come into existence is to be determined in accordance with the law that is, or that would, if there were a contract, be, the proper law of the contract.

(3) A claim arising under a contract that was made in Australia and is for the supply in Australia to a consumer of goods or services is to be determined in accordance with the law in force in the State or Territory where the consumer was when he or she completed what he or she had to do for the contract to come into existence. However:

(a) if, under the contract:

(i) the goods are to be delivered or the services rendered; or

(ii) if the contract is a contract for the provision of credit to the consumer - the consumer is to receive the credit or the use or benefit of the credit;

in a State or Territory other than the State or Territory where the consumer was when he or she completed what he or she had to do for the contract to come into existence - the claim is to be determined in accordance with the law in force in the other State or Territory; or

(b) if the contract provides for a mortgage or other security to be given over property of the consumer, whether or not it also provides as mentioned in paragraph (a) – the claim is to be determined in accordance with the law in force in the State or Territory where the property is when the contract was made.

(4) A contract is to be taken to be a contract for the supply to a consumer of goods or services if the person would be taken to have acquired the goods or the services as a consumer under the Trade Practices Act 2974 of the Commonwealth section 48. For the purposes of this subsection, it is to be presumed that that Act applies in relation to the contract.

(5) A question that is to be determined according to the proper law of a contract is to be determined in accordance with:

(a) the law chosen expressly or by clear inference by the parties to the contract as the proper law of the contract; or

(b) if:

(i) the parties have not chosen such a law; or

(ii) having regard to the circumstances in which the choice was made, it would be unjust or unconscionable to determine the question in accordance with the law so chosen;

the law in force in the place that has the most real and substantial connection with the contract.

(6) The place with which a contract has the most real and substantial connection is:

(a) the place where the party to the contract that is to effect the performance that is characteristic of the contract has at the time when the contract is made:

(i) his or her habitual residence; or

(ii) if that party is a body corporate or unincorporate - its principal place of business; or

(b) if the contract was entered into in the course of the trade or profession of the party to the contract that is to effect the performance that is characteristic of the contract:

(i) the place where that party's principal place of business is; or

(ii) if, under the contract, that performance is to be effected through a place of the party's business other than its principal place of business - that place; or

(c) if the contract is a contract of employment - the law in force in:

(i) the place where the person usually carries out his or her work in the course of the employment (even if the person was, at the relevant time, temporarily employed in another place); or

(ii) if the person usually carries out his or her work in the course of the employment in more than 1 place - the place where the person was when he or she was last hired or otherwise taken into employment by the employer; or

(d) so far a s th e subject matter of the contract is a right in immovable property or a right to use immovable property- the place where the property is;

unless it appears from the circumstances as a whole that the place with which the contract has the most real and substantial connection is some other place.

(7) Paragraphs (6)(a) and fb) do not apply if the performance that is characteristic of the contract cannot be established.

(8) If, because of a written law in force in the State or Territory that has the most real and substantial connection with a contract, the application of a provision of a law in force in that State or Territory in relation to the contract cannot be excluded or modified, a claim or a question arising under that provision is to be determined in accordance with that provision.

(9) If, because of a written law in force in a place other than a State or Territory, being a place that has the most real and substantial connection with a contract, the application of a provision of a law in force in the place in relation to the contract cannot be excluded or modified despite the operation of a law that relates to choice of law, a claim or a question arising under that provision is to be determined in accordance with that provision.

(10) If:

(a) performance of an obligation under a contract in the place where, under the contract, it is to be performed would be contrary to the law in force in that place; and

(b) relief in respect of the non-performance of the obligation, including relief by way or in the nature of an order for specific performance of the obligation, would not be granted by a court of that place;

then, despite the other provisions of this section, a court is not to enforce performance of the obligation or to give relief in respect of the non-performance of the obligation.

Note: This section does not provide an exhaustive statement of choice of law rules in relation to contracts.

Annex I (Swiss Private International Law Extract)

Swiss Federal Code on Private International Law (1987, including amendments up to 1 January 2002). (Authoritative private translation of the official text by Umbricht Attorneys, Switzerland.)

Art. 116

II. Applicable law

1. In general

a. Choice of law by the parties

1. The contract shall be governed by the law chosen by the parties.

2. The choice of law must be expressly or clearly evident from the terms of the contract or the circumstances. In all other respects it shall be governed by the law chosen.

3. The choice of law may be made or modified at any time. If made or modified following the conclusion of the contract, it shall be retroactive to the time the contract was concluded. The rights of third parties shall take precedence.

Art. 117

b. Absence of a choice of law

1. In the absence of a choice of law, the contract shall be governed by the law of the State with which it is most closely connected.

2. It is presumed that closest connection exists with the State in which the party who must perform the characteristic obligation is habitually resident or, if the contract was concluded in the exercise of a profession or commercial activity, where such party has his place of business.

3. In particular, the following shall be considered the characteristic obligation:

a. The obligation of the alienator, in contracts of alienation.

b. The obligation of the party transferring the use of a thing or a right, in the case of contracts concerning the use of a thing or a right;

c. The service provided, in the case of mandates, word and labor contracts, and similar service contracts;

d. The obligation of the custodian, in custodial contracts;

e. The obligation of the guarantor or the surety, in guaranty or surety contracts.

Art. 118

2. In particular

a. Sale of movable property

1. The sale of movable property shall be governed by The Hague Convention of June 15 1955 on the Law Applicable to the International Sale of Goods.

2. Article 120 takes precedence.

Art. 119

b. Real property

1. Contracts concerning real property or its use shall be governed by the law of the State in which it is located.

2. A choice of law by the parties is permitted.

3. The form of the contract shall be governed by the law of the State in which the real property is located unless that law permits the application of another law. In the case of real property located in Switzerland, the form shall be governed by Swiss law.

Art. 120

c. Consumer contracts

1. Contracts relating to the provision of ordinary goods and services intended for the personal or family use of the consumer and which are not associated with the professional or commercial activities of the consumer shall be governed by the law of the State in which the consumer is habitually resident:

a. If the supplier received the order in that State;

b. If the conclusion of the contract was preceded in that State by an offer or advertisement and the consumer performed there the necessary acts to conclude the contract; or

c. If the consumer was induced by the supplier to go abroad to place his order there.

2. A choice of law by the parties is precluded.

Art. 121

d. Employment contracts

1. An employment contract shall be governed by the law of the State in which the employee habitually carries out his work.

2. If the employee habitually carries out his work in several States, the employment contract shall be governed by the law of the State of the place of business or, in the absence of a place of business, at the domicile or place of habitual residence of the employer.

3. The parties may subject the employment contract to the law of the State in which the employee is habitually resident or in which the employer has his place of business, his domicile, or his place of habitual residence.

Art. 122

e. Contracts concerning intellectual property

1. Contracts concerning intellectual property rights shall be governed by the law of the State in which the party transferring the intellectual property right or granting the use thereof has his place of habitual residence.

2. A choice of law by the parties is permitted.

3. Contracts between an employer and an employee regarding rights to intellectual property which the employee has created in the course of his employment shall be governed by the law applicable to the employment contract.

Art. 123

3. Provisions in common

a. Failure to respond to an offer

The party who fails to respond to an offer to conclude a contract may request that the effects of his silence be governed by the law of the State in which he has place of habitual residence.

Art. 124

b. Form

1. A contract is valid as to form if it conforms with the law applicable to the contract or to the law of the place where it is concluded.

2. The form of a contract concluded between persons in different States is valid if it conforms with the law of one of those States.

3. The form of the contract shall be governed exclusively by the law applicable to the contract if, to protect a party, that law prescribes compliance with a specific form unless that law permits the application of another law.

Annex J (Québec Civil Code Extract)

Civil Code of Québec, SQ 1991, c 64

BOOK TEN

PRIVATE INTERNATIONAL LAW

TITLE TWO

CONFLICT OF LAWS

Chapter III

STATUS OF OBLIGATIONS

Section I

GENERAL PROVISIONS

§1. — Form of juridical acts

3109. The form of a juridical act is governed by the law of the place where it is made.

A juridical act is nevertheless valid if it is made in the form prescribed by the law applicable to the content of the act, by the law of the place where the property which is the object of the act is situated when it is made or by the law of the domicile of one of the parties when the act is made.

A testamentary disposition may be made in the form prescribed by the law of the domicile or nationality of the testator either at the time of the disposition or at the time of his death.

1991, c. 64, s. 3109.

3110. An act may be made outside Québec before a Québec notary if it pertains to a real right the object of which is situated in Québec or if one of the parties is domiciled in Québec.

1991, c. 64, s. 3110.

§2. — Content of juridical acts

3111. A juridical act, whether or not it contains any foreign element, is governed by the law expressly designated in the act or the designation of which may be inferred with certainty from the terms of the act.

A juridical act containing no foreign element remains, nevertheless, subject to the mandatory provisions of the law of the country which would apply if none were designated.

The law of a country may be expressly designated as applicable to the whole or a part only of a juridical act.

1991, c. 64, s. 3111.

3112. If no law is designated in the act or if the law designated invalidates the juridical act, the courts apply the law of the country with which the act is most closely connected, in view of its nature and the attendant circumstances.

1991, c. 64, s. 3112.

3113. A juridical act is presumed to be most closely connected with the law of the country where the party who is to perform the prestation which is characteristic of the act has his residence or, if the act is made in the ordinary course of business of an enterprise, his establishment.

1991, c. 64, s. 3113.

SECTION II

SPECIAL PROVISIONS

§1. — Sale

3114. If no law is designated by the parties, the sale of a corporeal movable is governed by the law of the country where the seller had his residence or, if the sale is made in the ordinary course of business of an enterprise, his establishment, at the time of formation of the contract. However, the sale is governed by the law of the country in which the buyer had his residence or his establishment at the time of formation of the contract in any of the following cases:

(1) negotiations have taken place and the contract has been formed in that country;

(2) the contract provides expressly that delivery shall be made in that country;

(3) the contract is formed on terms determined mainly by the buyer, in response to a call for tenders.

If no law is designated by the parties, the sale of immovable property is governed by the law of the country where it is situated.

1991, c. 64, s. 3114.

3115. Failing any designation by the parties, a sale by auction or on a stock exchange is governed by the law of the country where the auction takes place or the exchange is situated.

1991, c. 64, s. 3115.

§2. — Conventional representation

3116. The existence and scope of the powers of a representative in his relations with a third person and the conditions under which his personal liability or that of the person he represents may be incurred are governed by the law expressly designated by the person represented and the third person or, where none is designated, by the law of the country in which the

representative acted if the person he represents or the third person has his domicile or residence in that country.

1991, c. 64, s. 3116.

§3. — Consumer contract

3117. The choice by the parties of the law applicable to a consumer contract does not result in depriving the consumer of the protection to which he is entitled under the mandatory provisions of the law of the country where he has his residence if the formation of the contract was preceded by a special offer or an advertisement in that country and the consumer took all the necessary steps for the formation of the contract in that country or if the order was received from the consumer in that country.

The same rule also applies where the consumer was induced by the other contracting party to travel to a foreign country for the purpose of forming the contract.

If no law is designated by the parties, the law of the place where the consumer has his residence is, in the same circumstances, applicable to the consumer contract.

1991, c. 64, s. 3117.

§4. — Contract of employment

3118. The designation by the parties of the law applicable to a contract of employment does not result in depriving the worker of the protection to which he is entitled under the mandatory provisions of the law of the country where the worker habitually carries on his work, even if he is on temporary assignment in another country or, if the worker does not habitually carry on his work in any one country, the mandatory provisions of the law of the country where his employer has his domicile or establishment.

If no law is designated by the parties, the law of the country where the worker habitually carries on his work or the law of the country where his employer has his domicile or establishment is, in the same circumstances, applicable to the contract of employment.

1991, c. 64, s. 3118.

§5. — Contract of non-marine insurance

3119. Notwithstanding any agreement to the contrary, a contract of insurance respecting property or an interest situated in Québec or subscribed in Québec by a person resident in Québec is governed by the law of Québec if the policyholder applies therefor in Québec or the insurer signs or delivers the policy in Québec.

Similarly, a contract of group insurance of persons is governed by the law of Québec where the participant has his residence in Québec at the time he becomes a participant.

Any sum due under a contract of insurance governed by the law of Québec is payable in Québec.

1991, c. 64, s. 3119; 1992, c. 57, s. 716.

Annex K (Consumer Contract)

Convention on Contracts for the International Sale of Goods

Article 2(1): … sales of goods bought for personal, family or household use, unless the seller, at anytime before or at the conclusion of the contract, neither knew or ought to have known that the goods were bought for any such use …

Brussels Regulations

Article 15 Jurisdiction over consumer contracts

1. … a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession …

(a) it is a contract for the sale of good son instalment credit terms; or

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods …

Hague Convention on the Law Applicable to Certain Consumer Sales

Article 1: … contracts for the international sale of goods bought primarily for personal, family or household use, where the seller acts in the course of his business or profession and where at any time before the contract was entered into, he knew or ought to have known that the goods were being bought primarily for any such use.

Appendix 2

CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS
opened for signature in Rome on 19 June 1980 (80/934/EEC)

Official Journal L 266 , 09/10/1980 p. 0001 - 0019

Spanish special edition...: Chapter 1 Volume 3 p. 36

Portuguese special edition Chapter 1 Volume 3 p. 36

PREAMBLE

THE HIGH CONTRACTING PARTIES to the Treaty establishing the European Economic Community, ANXIOUS to continue in the field of private international law the work of unification of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments, WISHING to establish uniform rules concerning the law applicable to contractual obligations, HAVE AGREED AS FOLLOWS:

TITLE I SCOPE OF THE CONVENTION

Article 1

Scope of the Convention

1. The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.

2. They shall not apply to: (a) questions involving the status or legal capacity of natural persons, without prejudice to Article 11;
(b) contractual obligations relating to: - wills and succession,
- rights in property arising out of a matrimonial relationship,
- rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate;

(c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
(d) arbitration agreements and agreements on the choice of court;
(e) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organization or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;
(f) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party;
(g) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;
(h) evidence and procedure, without prejudice to Article 14.

3. The rules of this Convention do not apply to contracts of insurance which cover risks situated in the territories of the Member States of the European Economic

Community. In order to determine whether a risk is situated in these territories the court shall apply its internal law.

4. The preceding paragraph does not apply to contracts of re-insurance.

Article 2

Application of law of non-contracting States

Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State.

TITLE II UNIFORM RULES

Article 3

Freedom of choice

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.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".

4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

Article 4

Applicable law in the absence of choice

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. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected 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 unincorporate, its central administration. However, if the contract is entered into in

the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.

4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Article 5

Certain consumer contracts

1. This Article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.

2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:
- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
- if the other party or his agent received the consumer's order in that country, or
- if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.

4. This Article shall not apply to: (a) a contract of carriage;

(b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

5. Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 6

Individual employment contracts

1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.

2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:
(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country ; or
(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated; unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

Article 7

Mandatory rules

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Article 8

Material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.

2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the

circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

Article 9

Formal validity

1. A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.

2. A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.

3. Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2.

4. An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under this Convention governs or would govern the contract or of the law of the country where the act was done.

5. The provisions of the preceding paragraphs shall not apply to a contract to which Article 5 applies, concluded in the circumstances described in paragraph 2 of Article 5. The formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence.

6. Notwithstanding paragraphs 1 to 4 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.

Article 10

Scope of the applicable law

1. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular:
(a) interpretation;
(b) performance;
(c) within the limits of the powers conferred on the court by its procedural law, the consquences of breach, including the assessment of damages in so far as it is governed by rules of law;
(d) the various ways of extinguishing obligations, and prescription and limitation of actions;
(e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.

Article 11

Incapacity

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Article 12

Voluntary assignment

1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.

2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

Article 13

Subrogation

1. Where a person ("the creditor") has a contractual claim upon another ("the debtor"), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent.

2. The same rule applies where several persons are subject to the same contractual claim and one of them has satisfied the creditor.

Article 14

Burden of proof, etc.

1. The law governing the contract under this Convention applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognized by the law of the forum or by any of the laws referred to in Article 9 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

Article 15

Exclusion of renvoi

The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law.

Article 16

"Ordre public"

The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the forum.

Article 17

No retrospective effect

This Convention shall apply in a Contracting State to contracts made after the date on which this Convention has entered into force with respect to that State.

Article 18

Uniform interpretation

In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.

Article 19

States with more than one legal system

1. Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Convention.

2. A State within which different territorial units have their own rules of law in respect of contractual obligations shall not be bound to apply this Convention to conflicts solely between the laws of such units.

Article 20

Precedence of Community law

This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts.

Article 21

Relationship with other conventions

This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party.

Article 22

Reservations

1. Any Contracting State may, at the time of signature, ratification, acceptance or approval, reserve the right not to apply:
(a) the provisions of Article 7 (1);
(b) the provisions of Article 10 (1) (e).

2. Any Contracting State may also, when notifying an extension of the Convention in accordance with Article 27 (2), make one or more of these reservations, with its effect limited to all or some of the territories mentioned in the extension.

3. Any Contracting State may at any time withdraw a reservation which it has made ; the reservation shall cease to have effect on the first day of the third calendar month after notification of the withdrawal.

TITLE III FINAL PROVISIONS

Article 23

1. If, after the date on which this Convention has entered into force for a Contracting State, that State wishes to adopt any new choice of law rule in regard to any particular category of contract within the scope of this Convention, it shall communicate its intention to the other signatory States through the Secretary-Geneal of the Council of the European Communities.

2. Any signatory State may, within six months from the date of the communication made to the Secretary-General, request him to arrange consultations between signatory States in order to reach agreement.

3. If no signatory State has requested consultations within this period or if within two years following the communication made to the Secretary-General no agreement is reached in the course of consultations, the Contracting State concerned may amend its law in the manner indicated. The measures taken by that State shall be brought to the knowledge of the other signatory States through the Secretary-General of the Council of the European Communities.

Article 24

1. If, after the date on which this Convention has entered into force with respect to a Contracting State, that State wishes to become a party to a multilateral convention whose principal aim or one of whose principal aims is to lay down rules of private international law concerning any of the matters governed by this Convention, the procedure set out in Article 23 shall apply. However, the period of two years, referred to in paragraph 3 of that Article, shall be reduced to one year.

2. The procedure referred to in the preceding paragraph need not be followed if a Contracting State or one of the European Communities is already a party to the multilateral convention, or if its object is to revise a convention to which the State concerned is already a party, or if it is a convention concluded within the framework of the Treaties establishing the European Communities.

Article 25

If a Contracting State considers that the unification achieved by this Convention is prejudiced by the conclusion of agreements not covered by Article 24 (1), that State may request the Secretary-General of the Council of the European Communities to arrange consultations between the signatory States of this Convention.

Article 26

Any Contracting State may request the revision of this Convention. In this event a revision conference shall be convened by the President of the Council of the European Communities.

Article 27

1. This Convention shall apply to the European territories of the Contracting States, including Greenland, and to the entire territory of the French Republic.

2. Nothwithstanding paragraph 1:
(a) this Convention shall not apply to the Faroe Islands, unless the Kingdom of Denmark makes a declaration to the contrary;
(b) this Convention shall not apply to any European territory situated outside the United Kingdom for the international relations of which the United Kingdom is responsible, unless the United Kingdom makes a declaration to the contrary in respect of any such territory;
(c) this Convention shall apply to the Netherlands Antilles, if the Kingdom of the Netherlands makes a declaration to that effect.

3. Such declarations may be made at any time by notifying the Secretary-General of the Council of the European Communities.

4. Proceedings brought in the United Kingdom on appeal from courts in one of the territories referred to in paragraph 2 (b) shall be deemed to be proceedings taking place in those courts.

Article 28

1. This Convention shall be open from 19 June 1980 for signature by the States party to the Treaty establishing the European Economic Community.

2. This Convention shall be subject to ratification, acceptance or approval by the signatory States. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the Council of the European Communities.

Article 29

1. This Convention shall enter into force on the first day of the third month following the deposit of the seventh instrument of ratification, acceptance or approval.

2. This Convention shall enter into force for each signatory State ratifying, accepting or approving at a later date on the first day of the third month following the deposit of its instrument of ratification, acceptance or approval.

Article 30

1. This Convention shall remain in force for 10 years from the date of its entry into force in accordance with Article 29 (1), even for States for which it enters into force at a later date.

2. If there has been no denunciation it shall be renewed tacitly every five years.

3. A Contracting State which wishes to denounce shall, not less than six months before the expiration of the period of 10 or five years, as the case may be, give notice to the Secretary-General of the Council of the European Communities. Denunciation may be limited to any territory to which the Convention has been extended by a declaration under Article 27 (2).

4. The denunciation shall have effect only in relation to the State which has notified it. The Convention will remain in force as between all other Contracting States.

Article 31

The Secretary-General of the Council of the European Communities shall notify the States party to the Treaty establishing the European Economic Community of:
(a) the signatures;
(b) the deposit of each instrument of ratification, acceptance or approval;
(c) the date of entry into force of this Convention;
(d) communications made in pursuance of Articles 23, 24, 25, 26, 27 and 30;
(e) the reservations and withdrawals of reservations referred to in Article 22.

Article 32

The Protocol annexed to this Convention shall form an integral part thereof.

Article 33

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Irish and Italian languages, these texts being equally authentic, shall be deposited in the archives of the Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy thereof to the Government of each signatory State.

Appendix 3

8. Contracts

Introduction

This chapter

8.1. This chapter deals with choice of law issues relating to contract. It explains why the choice of law rules should be reformed and analyses problems concerning the proper law of the contract, the limits to party autonomy and the effect of mandatory laws. It deals with certain issues relating to capacity and the formation of contracts. Recommendations are made for the reform of choice of law rules for contracts generally; specific proposals are made in respect of statutory claims which arise in respect of consumer contracts and under fair trading laws.

Reform is needed

8.2. The choice of law rules relating to contract should be reformed because the proper law of the contract as developed by the common law is ill-defined and uncertain in scope and inadequate to deal with modern developments in international contracts:

- there is uncertainty about the extent of implied choice
- the limits to party autonomy are unclear
- the concept of the objective proper law is too vague for modern commercial use
- the common law rules as to capacity to contract and formation of contract need to be clarified.

In addition, the multiplicity of legislation in Australia covering consumer contracts gives rise to a range of potential conflicts.

The proper law of the contract

Current law

8.3. *General principles.* At common law the 'proper law' of the contract governs almost all issues pertaining to a contract. If the parties expressly or impliedly choose the law of a specific place to govern the contract, the courts will, in general, give effect to that choice. In the absence of such a choice the court will find the place with the 'closest and most real connection' with the contract and apply the law of that place. This is sometimes called 'the objective

proper law'. Parties can also incorporate certain parts of another country's law as terms of that contract. Although the general principles of choice of law are well entrenched there is considerable uncertainty about particular issues:

- the extent of party autonomy, that is, the extent to which parties may choose the law and the terms of their contract
- the extent to which the law will infer a choice.

The main issue in contract however is whether the existing rules are appropriate to modern conditions particularly in the light of recent international conventions.

8.4. ***Freedom of contract.*** The fundamental reason for allowing parties to choose the law to govern their contract is that it accords with the principle of freedom of contract. English courts have used this principle to justify the application of English law even if the contract has no other English connections.[1] An Australian court has applied the same principle in order to uphold a choice of New York law.[2] Reasons which courts have given for allowing parties to choose the law applicable to their contact include familiarity with the chosen law[3] and the perceived neutrality of that law.[4] Another justification was that certain types of standard commercial contracts especially maritime contracts, have been developed in English legal and commercial practice.[5] This has been considered a rationale for allowing parties to choose English law.

8.5. ***Certainty and fulfilment of expectations.*** Apart from freedom of contract, other justifications for allowing parties to choose their own law are that it promotes certainty and economic efficiency and fulfils their expectations.

Other legal systems

8.6. The principle of party autonomy is widely accepted in other legal systems[6] and in international conventions. Australia is a party to the UN Convention on Contracts for the International Sales of Goods 1980 (Vienna Convention) which recognises that parties may choose the proper law. The Hague Convention on the Law Applicable to Contracts for the International Sales of Goods 1985 ('Hague Convention 1985'), which Australia may ratify, and the Rome Contracts Convention provide for parties' choice.

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1. *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572, 609.
2. *BHP Petroleum Pty Ltd v Oil Basin Ltd* [1985] VR 725.
3. *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277.
4. *British Controlled Oil Fields v Staff* [1921] WN 319.
5. Dicey & Morris 1987, 1176.
6. Comprehensive survey in Blom 1978, 1979, 1980.

Can a choice be inferred?

8.7. The issue for the Commission is not whether to permit the parties to choose the law to govern their contracts but how to determine whether they have done so and the restrictions to be placed on their right of choice. The Hague Convention 1985 provides

> A contract of sale is governed by the law chosen by the parties. The parties' agreement on this choice must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety. Such a choice may be limited to a part of the contract.[7]

At common law there is considerable uncertainty over the extent to which a court may infer a choice of law by the parties or indeed whether the notion of inferred choice has been overtaken by the objective proper law. This has received some attention in the Australian cases.[8] Implied choice serves a useful purpose in certain circumstances. For instance the presence of a jurisdiction clause or an arbitration clause[9] or the use of legal terms that point particularly to one legal system[10] taken with other evidence pointing to the same legal system, would all indicate an implied choice. Alternatively the contract may be in a standard form which is known to be governed by a particular system of law despite the fact there is no express statement to their effect, for example, Lloyds policy of marine insurance. The previous conduct of the parties under similar contracts may also be used to shown an implied choice.[11] So for instance if previous contracts contained an express choice of law clause but this one did not, it might be inferred that the parties nonetheless intended the same system of law to govern.

When should a choice be inferred?

8.8. Where courts are tempted to approach the question by trying to spell out from the circumstances an inference as to what the parties intended, they may be led to deciding on a proper law different from that which would arise from the closest connection test. In fact, there would be no point in pursuing intention unless the answer might be different. But the result could be artificial. It seems desirable to limit the inquiry into intent to cases where it is reasonably clear that there was an original intention.

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7. Article 7(1). Article 7(2) provides that a different choice may be made after the conclusion of the contract.
8. eg *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts* (1989) 90 ALR 244.
9. *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572.
10. *Amin Rasheed Corp v Kuwait Insurance Co* [1948] AC 50.
11. Blom 1978, 263–4, Giuliano-Lagarde Report, 371.

Recommendation

8.9. The Commission recommends that the parties' right to choose the law to govern their contract should be upheld provided that the choice is express or can be clearly inferred from the circumstances. If the indications are not clear, the court should not be free to infer the choice but should apply an objective test of the proper law.

Limits to party autonomy

Party autonomy is not absolute

8.10. Party autonomy is restricted within Australia

- at common law by the principle that the choice be 'bona fide', legal and not contrary to public policy
- by statutes
- by the operation of public policy and the principle of illegality

Each of these principles operates differently and will be discussed in turn.

Common law

8.11. ***Bona fides.*** The rule in the Vita Food Case[12] that a choice of law clause should be given effect to provided it was 'bona fide, legal and not contrary to public policy' is not clear.[13] It is not specified by reference to which law its legality is to be tested, or whose public policy must be respected. Cheshire & North presume that bona fides means 'the parties cannot pretend to contract under one rule in order to validate an agreement that clearly has its closest connection with another law'.[14] *In Golden Acres v Queensland* Justice Hoare refused to give effect to the parties' selection of Hong Kong law because 'the selection of a law other than that of Queensland was made for the specific purpose of avoiding the consequences ... which would or might have followed if the Queensland law applied'.[15]

12. *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC277.
13. Mostly because there has been almost no case law on it.
14. Cheshire and North 1987, 454.
15. [1969] Qd R 378, 384. The contract in that case contained a clause stating that it should be deemed to have been entered into in Hong Kong. This was clearly designed to evade the operation of a law which applied on its terms to all contracts made in Queensland, where in fact this contract was made. The judge however made clear that the reason for applying Queensland law was not just because it was the law of the forum but because it was the place with which the contract was most closely connected.

8.12. ***Problems applying bona fides.*** Rejecting the parties chosen law on the grounds of lack of *bona fides* only makes sense when there are good reasons to prefer the law which would apply in the absence of choice, namely the law with which the contract has its most real and substantial connection. Even then, it is fraught with evidentiary problems and conceptual difficulties. For example, if the law with which the parties' contract was most closely connected included unfavourable rules, it would make good commercial and legal sense to choose another governing law. For this reason, Fawcett argues[16] that it is better to develop a concept of 'mandatory rules' which focuses on the objective effect of particular laws, rather than to seek an evasive motive in the parties to the contract.[17] The question of what is bona fide appears to be too vague to be useful for either international or interstate contracts.

8.13. ***Recommendation.*** The limitations on parties autonomy on the ground of lack of bona fides should be replaced with rules to determine when parties cannot choose to evade the operation of a mandatory law of the place of closest connection.

Statute law

8.14. The consumer protection provisions of the *Contracts Review Act 1980* (NSW) and the *Trade Practices Act 1974* (Cth) apply to all contracts of which the proper law is that legal system[18] or where 'it would have been the proper law but for a term that the proper law should be the law of some other state'.[19] This means that the parties cannot escape the application of those provisions by choosing a different law to govern the contract. The proper law of the contract thus includes 'mandatory provisions' which cannot be evaded by choosing another law.

Public Policy

8.15. The English courts have on occasions refused to enforce contracts the object of which is to break the laws of a friendly foreign country. So for instance in *Regazzoni v Sethia*[20] the Courts refused to enforce a contract which flouted the laws of India against trade with South Africa. It did not matter that the foreign law was undoubtedly a penal law nor that the contract could on its terms be implemented without breach of the particular Indian Order in Council. Similarly the Courts have refused to enforce contracts made in breach of

16. Fawcett 1990, 58.
17. This issue is discussed in detail at para 8.26.
18. NSW or Australia.
19. *Contracts Review Act 1980* (NSW) s 7; *Trade Practices Act 1974* (Cth) s 67.
20. [1958] AC 301, cf Kelly 1977.

American prohibition laws.[21] However, since the proper law of the contracts in these two cases was arguably English they do not represent a clear authority in favour of a principle of upholding certain types of laws of foreign countries. The function of public policy is useful but limited. The court gives indirect effect to the law in question by refusing to enforce the contract. It does not itself indicate another legal system that should apply.[22]

Illegality

8.16. Whether or not a term of a contract or performance of a contractual obligation is 'illegal' is generally speaking governed by the proper law. This also determines whether or not a contract is unenforceable. However, there is an exception to this.

> An English court will not enforce a contract where performance of the contract is forbidden by the law of the place where it must be performed.[23]

If an Australian court applied this rule, it would excuse performance of the obligation if such performance was illegal as from the beginning or had become illegal by subsequent change of the law under the law of the place of performance, regardless of the proper law of the contract and the effect which such illegality would have under the proper law. In *Ralli Bros v Cia Naviera Sota y Aznar* it was said that

> where a contract requires an act to be done in a foreign country, it is in the absence of very special circumstances, an implied term of the continuing validity of such provision that the act to be done in the foreign country shall not be illegal by the law of that State.[24]

It is unclear whether this principle was applied on the basis that English law was the proper law of the contract, or whether it was itself a choice of law rule. The Commission considered whether the principle of illegality should be extended by a rule that party autonomy should be overridden if the contract was illegal by the place of most real and substantial connection. This option was not pursued.[25]

21. *Foster v Driscoll* [1929] 1KB 470 (CA). See also statements about a breach of exchange control laws *Rossano v Manufacturers' Life Ins. Co.* [1963] 2 QB 352.
22. But see Kelly 1977 258–9.
23. *R v International Trustee for the Bondholders AG* [1937] AC 500, 519 (Wright L J).
24. [1920] 2 KB 287, 304 (Scrutton LJ).
25. This is reminiscent of the Vita Food principle by which a choice of law is upheld if 'it is legal'. The problem here was to define 'legality' or rather 'illegality' for the purpose of such a rule.

Recommendation

8.17. In the Commission's view the requirement that a contract be legal by its place of performance is a useful and necessary rule. It is recommended that uncertainty at common law as to whether it is a rule of the proper law, or itself a choice of law rule, be overcome by making express legislative provision providing that the place of performance can be pleaded as a defence in so far as it prohibits performance of part or whole of the obligations of that place.

Options for reform of party autonomy: unjust or unconscionable contracts

Current law

8.18. ***Common law principles of contract law.*** Common law doctrines of duress and undue influence are bases on which a contract can be vitiated. It may be contrary to public policy, as that concept is applied in the conflict of laws, to enforce a contract entered into under duress.[26] The concept of unconscionability, however, is broader than mere lack of consent and includes inequality of bargaining power. Developments in domestic and overseas law increasingly protect the weaker party to a contract against the consequences of unfair contracts.[27]

8.19. ***What is unconscionable conduct?*** Unconscionable conduct was explained in the High Court in *Blomley v Ryan*.[28]

> This is a well known head of equity. It applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired facilities, financial need or other circumstances affect his ability to conserve his own interests and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.[29]

8.20. ***Statute law.*** The *Contracts Review Act 1980* (NSW) and the *Trade Practices Act 1974* (Cth) list factors to take into account in determining whether conduct is 'unjust' or 'unconscionable'. Where conduct falls within these categories, the courts may grant relief which includes discussion or variation of the contract. In

26. The English courts have refused to recognise a foreign divorce entered into under duress: *Re Meyer* [1971] P 68.
27. Peden 1982 ch 2.
28. (1956) 99 CLR 362, 415 (Kitto J).
29. This doctrine has been recently further clarified in the High Court: *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

the context of choice of law the focus of the enquiry is much narrower, being limited to the choice clause. Nevertheless some of the factors listed in these Acts could be relevant. For instance, the relative strength of the bargaining position of the parties, the inability by one party to understand the documents involved, undue influence or unfair tactics, could be part of the circumstances which lead to the conclusion that what appears, on the face of the document to be a choice of a legal system to govern the contract will not be given effect.

American law

8.21. The American courts have enunciated a distinction between procedural and substantive unconscionability. The former includes factors like 'absence of meaningful choice, superiority of bargaining power, or the contract being an adhesion contract ... Substantive unconscionability refers to unfair substantive terms of the contracts and overall unjust results of the transaction'.[30] So for instance, a contract of adhesion might contain a choice of law clause unfavourable to one party or the transaction could lead to unjust results if the law chosen was not objectively the law of the closest connection and contained provisions unduly disadvantageous to the weaker party.

Should the court have express power to strike down a choice of law clause that is unconscionable?

8.22. ***Unconscionable conduct as a criterion for choice of law.*** Unconscionable conduct occurs when the stronger party unconscientiously take advantage of the weaker. Applied to a contractual choice of law, this could be established by demonstrating that another system of law, closely connected to the contract, was more favourable to the weaker party or contained consumer protection provisions that the stronger party wished to avoid. However, to look to the end result of the dispute would be to involve the court in an expensive and time consuming mini-trial. It would be preferable to limit the inquiry solely to the circumstances under which the choice of law was made.

8.23. ***What conduct is relevant?*** As has been pointed out, the *Contracts Review Act 1980* (NSW) and the *Trade Practices Act 1974* (Cth) contain a list of conduct which should be viewed as unconscionable. Professor Peden suggests that courts are more apt to apply legislation if the factors are spelt out.[31] But the Commission views the concept as sufficiently well established for the courts to

30. Peden 1982, 25.
31. ibid, 95.

be able to apply it to an unconscionable choice of law clause without spelling out the details. It would anyway be open to the courts to refer to the definitions in other legislation.

8.24. ***Should protection be limited to consumers?*** The unconscionable conduct provisions of the *Contracts Review Act 1980* (NSW) and the *Trade Practices Act 1974* (Cth) protect consumers only. The Trade Practices Commission has recently recommended that commercial contracts should be covered by the Trade Practices Act because of the relative inequality of bargaining power between large and small commercial entities.[32] In the context of choice of law there is no need to limit the rule to consumers since it is only the choice of law clause which is affected. In principle the weaker party in all contracts should receive the protection provided for by the rule.

Recommendation

8.25. The Commission recommends that, irrespective of any special rules for consumer contracts, the autonomy of parties to choose be limited so that the court can reject a choice of law clause when the circumstances in which the contract was made lead to the view that its enforcement would be unconscionable. The courts should have the power to strike down a choice of law clause found to be unjust or unconscionable. The objective proper law would provide the governing law of the contract.

Options for reform: mandatory laws[33]

EEC Convention

8.26. In the Rome Contracts Convention there are two distinct concepts of mandatory rules.[34] Broadly speaking, the first kind of mandatory law specifically intends to override choice of law.[35] Mandatory laws of the second kind are domestic laws of such socio-economic or political importance that courts will not allow parties to circumvent them.[36] An example of the first kind is of the *Sea-Carriage of Goods Act 1924* (Cth) s 9 whereas an example of the second is exchange control regulations.[37]

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32. Separate provisions for small businesses are proposed, Report of Trade Practices Commission 1991, 35, 36.
33. See generally Diamond 1979; Plender 1992, ch 7. Hartley 1990.
34. French and German law draw a linguistic distinction as well.
35. Rome Contracts Convention art 7, 'lois de police'.
36. Rome Contracts Convention art 3(3), 'dispositions imperatives'.
37. *Boissevain v Weil* (1950) AC 327.

Two categories of mandatory laws

8.27. Mandatory laws have been described as falling mostly into two categories

- those laws which protect parties to a contract — being particularly consumers, workers, or insured persons
- those laws which reflect the national interest and often an international policy; for instance: international transport laws;[38] exchange control legislation; price control legislation; anti-trust legislation; legislation requiring permission to export certain goods (such as works of art or armaments); legislation prohibiting trade with certain countries; legislation designed to prevent tax evasion; and legislation giving certain bodies a monopoly in the buying and selling of certain products.[39]

European law

8.28. The concept of mandatory laws is recognised by most member states of the EEC.[40] French law uses the mechanism 'lois de police' to apply both French law and foreign law despite choice of law principles. For instance, the Cour d'Appel of Paris has held that a Vietnamese law making void any sale of land that had not been approved by the relevant government officials was a 'law partaking of *ordre public* binding on contracting parties as a 'lois de police', whose effects could not be avoided by invoking the law selected by the parties'. Even if the sale in the case before them had been governed by French law, it would have been void by the application of the lex situs.[41]

American law

8.29. ***Second Restatement.*** The Second American Restatement provides for restrictions on freedom of choice of proper law which require an assessment of the legislative policies of relevant states.[42] Broadly speaking the law chosen will apply unless either

- the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice or

38. eg *Sea-Carriage of Goods Act 1924* (Cth).
39. Hartley, 1979.
40. Giuliano Lagarde Report.
41. *Roux v Agent Judiciaire de Tresor*, Cour d'Appel de Paris, May 15, 1975, 1976 [Rev Crit 690, note Batiffol], as cited in Blom 1979, 226.
42. Second Restatement, s 187.

- application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of s 188[43] would be the state of the applicable law in the absence of an effective choice of law by the parties.[44]

8.30. ***American case law.*** Many American cases have applied the law of the forum, on the basis that it was the home state of the weaker party at the time of the contract and that the laws of that state with regard to consumer protection, protection of employees, protection of insured parties under insurance contracts, should take precedence over a choice of law clause directing the law of another state to apply to the contract. In *Lilienthal v Kaufman* the Court considered a restrictive covenant in a contract between a Tennessee corporation, recently licensed to do business in Georgia, and a Georgia resident who was to represent them in Georgia. The contract was expressly said to be governed by Tennessee laws, but the Court held that this choice of law was outweighed by the interests of Georgia in the 'flow of information needed for competition among businesses'. A choice of law would not be followed if 'application of the chosen law would contravene the policy of, or would be prejudicial to the interest of, this state'.[45] This 'governmental interest' argument has been used to apply foreign laws despite a choice of law clause in favour of the forum.[46] It would appear that in the United States of America the application of a statute over a choice of law by the parties does not depend on the court finding that the legislation in question has the 'internationally mandatory character' explained above. This is of interest when seeking a rule for a federal system.

International Conventions

8.31. ***Rules about the effect of mandatory laws.*** The Hague Convention on Agency of 1978 and the Hague Convention on Trusts, 1984 (the latter adopted into Australian law by the Trusts (Hague Convention) Act 1991 both contain rules about the effect of mandatory laws. The Trusts Convention art 16 refers to international mandatory rules. The Rome Contracts Convention art 7 permits a court to apply mandatory rules not forming part of the proper law if either they are part of forum law or they are part of a law of a country having a 'significant connection with the situation at issue' and they are applicable to the contract under the law of that country irrespective of the law chosen by the parties. That is they are 'internationally mandatory' rules. Significant connection was ex-

43. s 188 defines the proper law of a contract.
44. The application of these provisions is complex. Blom 1979 226-234.
45. 395 P 2d 543 (1946).
46. eg *Fricke v Isbrandtsen* 151 F Sup 465 (DD NY 1957).

plained in the commentary as requiring a 'genuine', not a 'vague' connection. Examples were given of the place of performance or the place where one of the parties was resident or had his or her business. In deciding whether to apply a foreign mandatory the court is to consider the nature and purpose of the rule and the consequences of its non-application.

8.32. ***Need for international standards.*** The conflict of laws exists in a rapidly changing economic environment.

> The conflict of laws cannot afford to continue to fudge the issue as to the international ramifications of the 'growth in the mandatory control of contracting'. This is an issue which arbitrators and courts are increasingly faced with and which standard proper law techniques do not resolve. The Rome Contracts Convention art 7(1) is only a beginning. What is urgently needed is some more specific formulation as to what types of mandatory rule are to be recognised, or rather, how mandatory rule problems are to be resolved. A way forward here may be found in a preference for international standards. Examples of the use of such standards may be seen in the carriage of goods context, in the use of international human rights standards to define 'public policy', in the cultural property context in discussions of legislative jurisdiction in economic law and in exchange control under the Bretton Woods Agreement. If it is sought to free the conflict of laws from 'the little vanities and susceptibilities of states, this may be an appropriate response'.[47]

Different consequences of restrictions on party autonomy

8.33. The current situation is that quite different consequences flow from of the different types of restriction on party autonomy which have been described. The consequence of a Vita Food Case restriction on party autonomy is that the choice of law clause is struck down and replaced with the laws of the place of closest connection.[48] The consequence of the application of mandatory rules is that the law chosen by the parties continues to apply to the contract to the extent that it can consistently with those laws. The consequence of the application of the public policy exception is that the contract is not enforced at all. The Commission considers that it is desirable to clarify this situation both for interstate issues and international issues.

Interstate contract law

8.34. Within Australia it may not be possible to prevent a court applying the mandatory law of the forum on the ground of local public policy, but a rule

47. McLachlan 1986, 626-7.
48. Authority on this point is meagre but see *Golden Acres Ltd v Queensland Pty Ltd* [1969] Qd R 378.

expressly permitting it is not appropriate because of the artificial nature of the concept of the forum. A rule however, in favour of the mandatory laws of the place which is the objective proper law of the contract would protect the mandatory laws of the forum wherever that was appropriate and would conform with s 118 in requiring recognition of the written laws of other States even when they were not the law chosen to govern the contract. As in the USA, it does not appear appropriate to restrict the definition of mandatory law to those which expressly override choice of law rules.

International contracts

8.35. In principle it would be appropriate for a rule requiring recognition of internationally mandatory rules to apply to international contracts. It would be for the law of the country whose rule falls to be characterised to decide whether the law rule has a mandatory character in the international sense. Such a rule would also provide the checks on choice of law clauses to be adverted to in the discussion of capacity and formation of contract. However, while the distinction between 'internationally mandatory' rules and domestically mandatory rules is clear in Continental law[49] it is quite novel in the common law. Therefore the rule needs to be specific that it refers only to laws that purport expressly or by necessary inference to apply, irrespective of a choice of law. The concept of public policy will be relevant to exclude this rule if the mandatory law in question contravenes fundamental policies of the forum.[50]

Recommendation

8.36.The Commission recommends that where the objective proper law of the contract is a law of a State or Territory which has mandatory legislation which applies to a question arising under the contract that question should be decided in accordance with the legislative provision.[51] Where the objective law of the contract is the law of an overseas place which has mandatory legislation which applies to a question arising under a contract and which cannot be excluded by the operation of choice of law rules a majority of the Commission[52] recommends that that question may be decided in accordance with the legislation of that place.[53]

49. Plender 1990 154.
50. paras 4.6-4.7.
51. Draft Bill cl 81G(9).
52. Justice Nygh, dissents from this recommendation. In his view the only way Australian courts should protect the mandatory laws of a foreign country should be by treaty. Dr Richardson also opposes this *Submission* September 1990.
53. Draft Bill cl 81G(10).

Options for reform: the objective proper law

Current law

8.37. ***Closest connection test.*** In the absence of a choice by the parties, the proper law of a contract is the law of the country with the 'closest and most real connection' with the transaction. All the connections must be taken into account, including the place of residence or business of the parties, the place where the relationship between the parties is centred, the place where the contract is made and the place where it is to be performed. In many cases the place of performance is the crucial factor. The court must then determine the system of law or the country[54] with which the contract is most closely connected. There are a number of Australian cases applying this test. This test has taken over from the earlier approach in which presumptions were used to help indicate the proper law.

8.38. ***Criticism of test.*** Most criticisms of the 'closest and most real' connection test focus on the fact that it is uncertain, vague and unpredictable especially when the connections are evenly balanced.[55] As far as the Commission is aware, the problem of evenly balanced factors has not created any significant problems within Australia. Nevertheless the potential for factors to be evenly balanced does exist. Certainly it is unsatisfactory for parties to a contract to need a legal decision in order to know what law governs their contract.

Rome Contracts Convention — characteristic performance

8.39. ***Characteristic performance test.*** The Rome Contracts Convention art 4(1) provides that, in the absence of choice, the governing law is 'the law of the country with which the contract is most closely connected' (Article 4 (1)). Article 4 (2) refines this notion by introducing a rebuttable presumption that

> the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has . . . his habitual residence . . . or central administration.

The concept of characteristic obligation has gained widespread acceptance in Europe by virtue of its inclusion in the Rome Convention. It has been taken up by English law[56] and in several Continental Codes.[57]

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54. *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners* (1970) AC 583, 604.
55. See eg *Miller v Whitworth St Estates (Manchester) Ltd* [1969] 1 WLR 377 reversed [1970] 2 WLR 728.
56. *Contracts (Applicable Law) Act 1990* (UK).
57. Swiss Federal Statute, Article 120, E German Code para 12(2) Hungarian Code para 29. German Private Int Law Code Art 28.

8.40. *Scope of application.* This presumption does not apply to immovables[58] or to the carriage of goods[59] and may be rebutted if the characteristic performance cannot be found or if the circumstances indicate that the contract is more closely connected with another country.[60] The Convention is limited in its application. It does not apply to a number of other specified areas, including arbitration and choice of court agreements, and insurance contacts where the insurable risk lies within the territory of EEC members. It does not apply to consumer contracts or employment contracts for which there are separate Articles in the Convention.

8.41. *Place of residence or central administration.* For common-law lawyers, this presumption represents a novel departure. This is because the governing law is the law of the place of the habitual residence or central administration of the party performing the characteristic obligation. It is not the law of the place of characteristic performance or the system of law closest to the contracts.

8.42. *Place of performance.* The governing law is the law of the place of performance of contracts involving an agent or contracts

> entered into in the course of a party's trade or profession or where, under the terms of the contract, the performance is to be effected through a place of business other than the principal place of business.[61]

Since most commercial contracts would fall into this latter category there will often be a connection with the place of performance. Nonetheless, this represents a radical change in the common law, which has used place of performance as a crucial factor in choice of law.

8.43. *Rome Contracts Convention report.* The explanatory report of Professors Giuliano and Lagarde has been given great weight in interpreting the Convention.[62] The report stresses that characteristic performance is to be understood in the sense that it sets the legal obligation in its appropriate social and economic context.[63] As formulated it was intended to focus on the essence of the transaction. The question was 'with which legal order does the contract functionally speaking have the narrowest ties?' In this regard the payment of

58. art 4(3).
59. art 4(4).
60. art 4(5).
61. art 4(2).
62. The UK Parliament specifically mentions the report as an interpretive tool: *Contracts (Applicable Law) Act 1990* (UK) s 3 (3)(a).
63. Ghuliano-Lagarde Report in North 1980.

money is seen not as performance but as counter performance and since it is an obligation in almost all contracts, it is therefore not an obligation characteristic of that particular contract.

8.44. ***Application to different kinds of contracts.*** In contracts for the supply of goods or services the characteristic performance is the supply of those goods or services. This preference for the law of the supplier's home state or business establishment has been criticised and the rule has been called arbitrary.[64] In the Swiss statute characteristic performance is amplified and contracts are classified according to their characteristic social function, for example, contracts of alienation (sale, barter, gift), contracts providing a right of use (hire, lease, loans), contracts accepting risk (for instance, insurance contracts) or responsibility (for instance, guarantee contracts). In all cases the party providing the function provides the characteristic performance.[65]

8.45. *Case law.* Examples of the application of characteristic performance can be found in European case law. In *Compagnie Europeenne des Petroles SA v Sensor Nederland,*[66] a Dutch company contracted to sell equipment to a French company for use on the Trans-Siberian oil pipeline. When it failed to deliver, the Dutch company claimed that, as a subsidiary of a US company, it was prohibited by US regulations from supplying equipment for a Soviet project. The parties had not stipulated a choice of law and the Dutch court used the principle of characteristic obligation to apply Dutch law to the contract and refused to allow the vendor to rely on the US embargo.

8.46. ***Evaluation of the concept.*** A presumption reached in accordance with the Rome Contracts Convention is likely to serve a useful purpose where the mutual obligations created by a contract are to be performed in different jurisdictions; for in such an event there are two *leges solutionis*, each of which might be taken as a pointer to the applicable law. In a simple synallagmatic contract, where a vendor habitually resident in one country agrees to sell property to a buyer habitually resident in another, both parties may undertake to perform their obligations in the country of their own habitual residence or in that of the other. Where the parties have not demonstrated their intention with reasonable certainty from the circumstances of the case, it appears reasonable to presume that the contract is more closely connected with the law of the vendor's habitual residence than with that of the purchaser, if only because the pecuniary obligations of the purchaser are less likely to require supplementation by law than the specific obligations of the vendor; and the parties must be taken to be

64. Jelliger in North 1980, 301. Diamond 1979, 155; d'Oliviera 1977, 309–13.
65. Swiss Federal Statute Article 117.
66. cited in Plender 1991, 111.

aware of this fact.[67] Even where one of the parties undertakes to perform his obligations in a country other than that of his habitual residence, the presumption created by art 4(2) of the Convention may be apt. Thus, where corporeal property forming the subject of a sale is situated in a country other than that of the vendor's habitual residence at the time when title passes to the purchaser, its location at that moment may well be less reliable as a guide to the country with which the contract is most closely connected than the habitual residence of the vendor.

8.47. ***Limitations of the concept.*** However, it would appear that for more complex contracts involving reciprocal obligations the test will not work because it will not be possible to find a characteristic performance. For instance, a German manufacturer of steel wool and a Dutch manufacturer of scouring sponges entered into a contract whereby the former would buy sponges for sale in Germany and the latter would enjoy exclusive rights to distribute the former's steel wool in Holland and Belgium. A German court tried unsuccessfully to find a characteristic obligation. The court eventually used other, more traditional, methods to ascertain the proper law of the contract.[68] The test also does not work well for distribution contracts where it is hard to choose between the obligation of the producer to supply the goods and the obligation of the distributor to distribute them as the essential characteristic of the contract. This is not a sufficient ground to reject the presumption, since it is quite appropriate in cases where it is not applicable to revert to the main test of real and substantial connection and apply that test to the circumstances without the presumption.[69] The Rome Contracts Convention provides expressly for cases in which the presumption is inapplicable.

Recommendation

8.48. The rule of characteristic performance has been adopted in two international Conventions, and into the domestic law of numbers of states.[70] It is seen as providing a degree of certainty and predicability in a range of contracts which would be otherwise subject to the main, real and substantial connection test. A variation of the test is adopted in the Hague Convention 1985. It was emphasised in submissions to the Commission that rules for international commercial contracts must be practical and in harmony as far as possible with international trends. The Commission recommends that in regard to interstate and international contracts, the proper law of the contract where the parties

67. Lipstein 1983, 404.
68. Plender 1991, 112.
69. See Richardson 1989, 284.
70. Austria, Denmark, Switzerland etc.

have not chosen a law, should be the law of the place that has the most real and substantial connection with the contract. The place with which a contract has the most real and substantial connection should be presumed to be the place where the party to the contract that is to effect the performance that is characteristic of the contract habitually resides[71] unless the contract has its most real and substantial connection with another place.[72]

Contracts for the sale of land

8.49. The presumption of characteristic performance does not apply to contracts for the sale of land. The presumption is in favour of the situs of the land. This is also the position at common law and, in the Commission's view, should be retained. Therefore the Commission recommends that in contracts concerning immovable property, the place of closest connection should be presumed to be the place where the property is.

Contracts for the sale of goods

8.50. ***Hague Convention on the Law Applicable to Contracts for the International Sale of Goods 1985 ('Hague Convention 1985').*** In the absence of an agreement between the parties the law of the place where the seller has his place or business governs the contract. Article 8(2) qualifies this principle by providing a number of circumstances where the law of the buyer will displace that of the seller —

- where negotiations were conducted and the contract concluded by and in the presence of the parties in the buyer's State
- where the contract expressly provides that the seller must deliver the goods in the buyer's state
- where the contract was concluded on terms determined mainly by the buyer and in response to an invitation directed by the buyer to persons invited to bid, that is where there was a call for tenders.

These concessions to the buyer's law arose from proposals put by third world countries who saw themselves as buyers rather than sellers and challenged the main rule.[73] Article 8(3) provides that where the contract is manifestly more closely connected with another law the contract is governed by that other law. There are situations which can be envisaged where neither the buyer's nor the

71. Draft Bill cl 819(6).
72. Presumptions were used as a way to find the proper law in early cases but fell into disfavour. eg *Jacobs v Credit Lyonnais* (1884) 12 QBD 589; *Re Missouri Steamship Co* (1889) 42 Ch D 32. cf *Coastlines Ltd v Hudig and Vender Chatering NV* [1972] 2QB 34 at 46–48.
73. Pryles points out that these exceptions can be manipulated by the vendor: Pryles 1988, 340.

seller's law should apply. Pryles cites as an example, the sale of a ship between an Australian seller and a Swiss buyer where the vessel is situated in Italy and both parties travel to Italy to make their contract which is in Italian, both parties performing their obligations in that state.[74] The Hague Convention 1985 has thus taken up the characteristic performance test in its simplest manifestation.

8.51. ***Implications for Australia.*** It appears to the Commission that the rules in the Sale of Goods Convention are compatible with the more general rule in the Hague Convention. The circumstances outlined in the latter, in which the seller's law must give way to the buyer's law, are also situations in which it would be appropriate for the presumption of characteristic performance to be give way to the place of most real and substantial connection. If Australia were to ratify the Convention on the International Sales of Goods Convention its rules could largely coexist with the general rules provided. The Commission makes no recommendation on this point.

Individual employment contracts

8.52. ***Place of employment.*** It is apparent that the characteristic performance in a contract of employment is the work to be performed. Nonetheless, the Rome Contracts Convention art 6(2) provides a specific rule for employment contracts. If the parties do not choose the governing law, it is the law of the place of the habitual employment or, if the person does not have a place of habitual employment, the law of the country where the place of business through which he or she was engaged is situated. Only if it appears from the circumstances as a whole that the contracts has its closest connection with another country is the contract to be governed by the law of that country. The policy behind characteristic performance is that the laws relating to the party whose acts make the substantial performance of the contract must govern because it is those acts (rather than the payment of money) which the law needs to regulate is particularly true of employment contracts because of the extent to which statutes regulate terms and conditions of employment.

8.53. ***Parties' choice.*** The Convention permits parties to choose the law to govern the contract but stipulates that in that event the mandatory laws of the law stipulated under paragraph 2 shall also apply. As explained in the Giuliano Lagarde Report[75] in so far as the mandatory rules give better protection to employees, or better safety and hygiene provisions than are available under the law chosen by the parties these shall prevail and the provision of the chosen law shall be set aside. The article applies to individual employment contracts, not to

74. Id 350.
75. in North 1980, 397.

collective agreements. In the case of work, for instance, on an oil rig platform on the high seas, the law of the country of the undertaking which engaged the employee should be applied.

8.54. ***Implications for Australia.*** The Commission considers that it is essential to include this provision to ensure that the 'worker's' law apply as the presumption for employment contracts. They agree with the arguments presented in the Giuilano-Lagarde Report that it is apparent that the term 'mandatory' in this provision is the broader concept of those rules that cannot be derogated from by contract. Much of the compulsory legislation referred to in the Report should be of this character rather than rules expressly overriding choice of law clauses.

8.55. ***Recommendation.*** The Commission recommends the adoption of the law of the place of habitual employment as the principal means of establishing the proper law of an employment contract in the absence of choice.[76]

Other common law rules

The capacity to contract

8.56. ***Domicile or residence.*** At common law the question whether a party has capacity to contract is unsettled, older authorities favouring the law of the domicile of the party[77] or the law of the place where the contract was made,[78] more recent authority favouring the proper law of the contract.[79] Dicey and Morris favour a rule by which capacity under the law of the domicile or the proper law or the law of residence would be sufficient to validate the contract.[80] The Commission does not consider that domicile is an appropriate connecting factor in a largely commercial area and that the place of residence of the party concerned is a preferable test. On the basis that rules should render contracts valid rather than invalid a rule similar to the common law rule for formalities which refers a contract to either of two legal systems for its validity, is to be preferred.[81] The capacity of a corporation to contract is not dealt with in this rule.

76. Draft Bill cl 81G(6)(c).
77. *Cooper v Cooper* (1888) 13 App Cas 88.
78. *Male v Roberts* (1800) 3 Esp 163).
79. *Bodley Head v Flegon* [1972] 1 WLR 680; *Charron v Montreal Trust* (1958) 15 DLR (2d) 420.
80. Dicey & Morris 1987, 1202.
81. Dr Richardson stressed the importance of the principle of holding parties to their bargain *Submission* September 1990.

8.57. *Proper law.* It is sometimes said that parties should not be permitted to confer capacity upon themselves and that therefore capacity must be referred to the objective proper law.[82] However, the Commission agrees with a contrary view

> It is difficult to see why capacity should be difficult from say essential validity where the parties may deliberately choose the laws of a state which upholds the validity of the transaction as opposed to the law of a state which does not. Of course if it is not a true private international law case the choice may not be effective in either instance but in a multistate situation where a law of one of the 'connected' states is chosen it is hard to see why the stipulation should be effective as far as essential validity is concerned but denied effect in regard to capacity.The problems of scope of party autonomy in cases of essential validity and capacity are analogous and it is not immediately apparent why a different rule should be employed for each issue.[83]

8.58. *Recommendation.* The Commission recommends that capacity according to either the law of the relevant party's residence or the proper law of the contract should suffice to make a valid contract.[84]

Formation of contract

8.59. At common law the question of which law should govern the issues of whether a contract has come into existence is unsettled. There are dicta in the High Court to the effect that the law of the forum governs this question.[85] Despite this the weight of opinion favours the proper law.[86] The formation of contract — offer and acceptance, consideration, the reality of consent are as much part of the substance of the law of contract as are questions of material validity and it is illogical to submit them to a different law, especially the law of forum, merely because they are dealt with before issues of material validity arise. The Commission recommends that they be governed by the proper law of the contract.[87]

Consumer contracts and fair trading

8.60. *Consumer protection law.* There is a wealth of legislation in every State and Territory designed to regulate consumer transactions. Consumer protection legislation imposes specific formal requirements on the supplier of goods or

82. Cheshire & North 1987, 480, Castel 1986, 549.
83. Sykes & Pryles, 1991, 614.
84. Draft Bill cl 81F(1).
85. *Oceanic Sunline Special Shipping Co v Fay (1988)* 165 CLR 197 410 (Brennan J).
86. See Pryles 1988, 788–90, Dicey & Morris 1987; 1200; Garner 1989, 75.
87. Draft Bill cl 81G (2).

services and the providers of credit and provides remedies for non-compliance. Some legislation had its origin in the UK Sales of Goods Act and is fairly uniform throughout Australia although recent amendments have tended to diverge. In recent years there has been a move towards uniform consumer credit legislation throughout Australia but there are still significant differences between the laws of different jurisdictions. The *Trade Practices Act 1974* (Cth) is the most important Commonwealth Act in this area but its constitutional limitations have led to the introduction in most States of complementary uniform fair trading legislation. Some of the Fair Trading Acts cover contractual issues, and they all provide provisions which mirror the *Trade Practices Act 1974* (Cth) Part V. It is proposed to treat the contractual aspects of fair trading legislation separately from the non-contractual aspects.

8.61. ***Consumer contracts.*** There are differences in the States' laws of contract which have an impact on consumer transactions and give rise to difficult choice of law issues. For instance, the Statute of Frauds which is still in force in all States and Territories (except Queensland, South Australia and the Australian Capital Territory) provides that a contract for the sale of any goods of the value of $20 or upwards is not enforceable by action unless the buyer accepts part of the goods, gives something in earnest to bind the contract, or some note or memorandum in writing of the contract is made. The *Frustrated Contracts Act 1974* (NSW), the *Contracts Review Act 1980* (NSW) and the *Misrepresentation Act 1972* (SA) are examples of statutes which have no exact counterparts in the law of other States and impinge on consumer contracts.

8.62. ***Consumer credit.*** Consumer credit transactions are often tripartite rather than bipartite and therefore the possibilities of conflicts arising are multiplied. There may be, for instance both a contract of sale and a contract for the provision of credit as well as a contract for the provision of security. As Begg points out.[88]

> The security need not necessarily be situated in or be governed by the law of the same jurisdiction as would apparently govern the transaction of sale or of credit. In consumer credit transactions where there is security, the security is frequently movable and in that case a second or subsequent jurisdiction may be involved at later stages.

8.63. ***Problems illustrated.*** If a buyer were to sign a hire purchase contract in Victoria for the provision of a motor car to be delivered in South Australia where the seller or credit provider has its place of business under the current law, both the *Credit Act 1984* (Vic) and the *Consumer Transactions Act 1972–83*

88. Begg 1985, 138.

(SA) expressly purport to apply to the transaction. The former applies because the offer to enter into the contract was signed in Victoria; the latter because the goods are to be delivered there. The *Credit Act 1984* (Vic) s 13(1) deems the agreement to be a credit sale contract and property passes on the making of the contract which under that Act follows delivery; whereas the South Australian Act s 24 provides that property passes on delivery. Furthermore, the mortgages prescribed by the two statutes are similar but not identical. Each in different ways would justify repossession where the other would not.[89]

8.64. ***No territorial application provisions.*** Further problems are caused by the lack of territorial application clauses in some of the older legislation.[90] The High Court addressed this problem in *Kay's Leasing Corp v Fletcher*.[91] In interpreting the *Hire Purchase Act 1941* (NSW) their Honours restricted to application of the Act to contracts made in New South Wales despite the fact that the Act was silent on its territorial application. More modern acts however do specify their territorial application.

8.65. ***Molomby Report 1972.*** The Molomby Report on Fair Consumer Credit laws[92] noted that most Australian legislation at that time was silent on problems of conflict of laws and territorial application. It recommended that legislation should make specific provision for its territorial application. In the view of the Committee the same rules should apply in all states to the credit contract, the sales contract and the contractual aspects of any security contract. The law to be applied should be the law of the State which the consumer would ordinarily expect to apply. The law of one State should govern the transaction as regards formation, disclosure of information, content (including implied and prohibited terms), operation, assignment and discharge of contracts. The recommendation of the Committee was that the law to govern should be chosen by reference to the place where an important element of the transaction is located. The options it considered were the law of the State in which

- the consumer resides
- the goods or services are to be provided
- the credit contract is signed by the consumer and
- the credit contract or offer is received by the credit provider.

The Committee considered that the laws of the state in which the credit contract or offer is signed by the consumer should be the law to govern the whole consumer credit transaction because this would be the law which the consumer

89. We are indebted to the article by Begg for this example id 141.
90. Most of the States' Sale of Goods Acts and the Consumer Credit Act 1972-83 (SA) fall into this category.
91. (1964) 116 CLR 124.
92. Molomby Report para 9.1.1.

would ordinarily expect to apply. In their view credit providers operating in border towns who in the ordinary course of business receive applications for credit from both sides of the border needed special consideration. If the laws of the bordering states differed they would need to hold and process two different types of forms.

8.66. ***Credit laws have application clauses.*** Most States have now enacted Credit Acts which apply to suppliers of credit in respect of consumer goods. The legislation reflects the basic recommendations of the Molomby Committee in that it adopts a territorial application clause. In most States the Act applies to transactions which are signed in that State or, if the contract is not in writing, to goods and services which are to be delivered in that State.[93] The South Australian Consumer Transactions Act however provides differently.

> This Act shall apply to every consumer contract, consumer credit contract and consumer mortgage
> (a) of which the law of this State is the proper law; or
> (b) where —
> (i) in the case of a consumer contract, the goods or services are, or are to be, delivered or rendered in this State;
> (ii) in the case of a consumer credit contract, the consumer receives the credit, or the use or benefit of the credit, in this State; or
> (iii) in the case of a consumer mortgage, the goods subject to the mortgage are situated in this State.

The attractive feature of this legislation is that it has more than one ground of application. While this means that potentially the laws of two States could apply to a transaction, this is unlikely to be a problem since the party bound by the legislation will usually be able to comply with both laws.

8.67. ***Overseas developments.*** The fact that consumer contracts warranted special rules was taken up in Europe as early as 1964 but most recently has led to the Hague Convention of 1980 on the Law Applicable to Certain Consumer Sales. The Rome Contracts Convention of 1980 provides that the mandatory laws of the country in which the consumer has his habitual residence shall, unless the parties have chosen their law, apply in the following circumstances:

- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract

93. *Credit Act 1984* (NSW) s 3(1), *Credit Act* (ACT) s 3(1), *Credit Act* (Vic) s 3, *Credit Act* (WA) s 3, *Credit Act* (Qld) s 3.

- if the other party or his agent received the consumer's order in that country or
- if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

8.68. ***The place where the contract was signed.*** It would be possible for an adroit vendor to manipulate the legal system to govern the contract by choosing as a place where the contract should be signed a State in which the law was more favourable to him or her. This would be particularly the case in border situations where an office might be maintained on both sides of the border. To avoid this possibility it would be preferable that the connecting factor be not the place of the signing of the contract but the place where the consumer was when he or she entered the contract. This would also comply with the likely expectations of the consumer.

8.69. ***The place of supply of goods.*** Contrary to the general rule for contract which tends to favour the vendor's place of business the South Australian Consumer Transactions Act applies to protect a consumer where the vendor or supplier provides the goods and services in that State — as the place of performance. In circumstances in which this differs from the place where the consumer was when he or she entered the contract it is likely that it will also be the place where the consumer resides.[94] Applying the law of the place of supply of the goods and services would meet the expectations of the consumer. In its submission to the Commission the Federal Bureau of Consumer Affairs supported a rule that relates to the place where goods and services were supplied. Such a rule would be well designed to control the operations of mail order sales.

8.70. ***Reasonable expectations of a vendor.*** If a person entered a shop in Victoria and bought a selection of books and then asked, having paid for the goods, that they be packaged up and delivered to him in his residence in New South Wales because he was a visitor in Victoria, it would seem unreasonable to subject the vendor to the law of New South Wales to govern the contract of sale. In a more complicated situation it might mean that the forms used to effect the contract would be invalid. The application of the law of the place of performance should therefore be restricted to circumstances in which the vendor knew, or should have known, at the time at which the contract was made that the consumer resided in a different State to which the goods must be delivered.

94. The Rome Contracts Convention opts for use the place of habitual residence of the consumer as the connecting factor in consumer contracts but this is not a feature of Australian statutes.

Recommendation

8.71. The Commission recommends that the law should provide that consumer contracts are to be governed by the law of the place where the consumer was when he or she entered the contract provided that, if it were a term of the contract that supply or delivery were to be in another State, that other State's law should apply. Given the specific features in common in Australian consumer laws this rule should be confined to the States and Territories of Australia.[95] To avoid an overlap of provisions the rule would need to apply only when the contract was entered and the goods were to be supplied within Australia. If, for instance, the consumer entered a shop in Sydney and bought goods to be delivered in New Zealand this rule would not apply.

What is a consumer?

8.72. The term consumer is defined differently in different State laws. The Commission is adopting the *Trade Practices Act 1974* (Cth) definition. Whilst the definition has its shortcomings, it is less unsatisfactory than any alternative of which the Commission was aware. It also has the virtue of being familiar.

Supply of goods and services

8.73. ***The meaning of 'supply'.*** Any definition of consumer transactions should include the concept that the goods or services were 'supplied' to a consumer. In the case of goods, 'supply' refers to the physical delivery of the goods. The place where 'services' are supplied may be more problematic. Some services are physically performed in an identifiable place. In that situation it would accord with the expectations of the consumer if the law of that place was applicable. However, some services, such as professional advice, are intangible. They may be supplied electronically, for example by telephone or facsimile transmission. The rules governing the determination of the place where contracts are made electronically is still not clear.

8.74. ***Place where goods are supplied.*** To remove any uncertainty in such situations, the Commission suggests that where the services provided consist of the giving of advice or information, they should be presumed to have been provided in the place where the recipient of the services was when the services were provided. For instance the *Chattel Securities Act 1987* (WA) provides[96] that certain provisions apply to a security interest if the goods are in Western

95. Draft Bill cl 81G(3).
96. s 4(1).

Australia — at the date of attachment of the interest or for the time being[97] The Victorian Fair Trading Act applies in respect of the acquisition or supply of goods and services if the person who it is proposed will acquire them signs in Victoria a document relating to their acquisition or supply or if not, if the goods or services are to be delivered or supplied in Victoria.

Breach of fair trading laws

8.75. ***Uncertainty as to where breach occurs.*** The fair trading provisions of the *Trade Practices Act 1974* (Cth) deal with misleading or deceptive conduct, unconscionable conduct, false or misleading representations, certain advertising and selling practices. Liability is independent of contract. The various State and Territory Acts mirror the Trade Practices Act. Although similar, they are not identical and could give rise to choice of law problems.

8.76. ***Recommendation.*** Under the various State and Territory Acts the law governing the rights and obligations under the fair trading provisions is that of the place of the act or omission that constitutes the breach. This is the place where the breach occurs. The Commission recommends the adoption of the place of the breach as the rule.[98]

97. cf Chattel Securities Act 1981 (Vic) s 3.
98. Draft Bill cl 81H.