LAW REFORM SUB-COMMITTEE
SINGAPORE ACADEMY OF LAW

REPORT ON REFORM OF THE LAW CONCERNING CHOICE OF LAW IN CONTRACT

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INTRODUCTION

1. This Sub-Committee was tasked to consider reforms to the law concerning choice of law in contract.

2. The Sub-Committee's task was greatly assisted with the publication of a paper entitled *"Private International Law: Law Reform in Miscellaneous Matters"* by Assoc Prof Yeo Tiong Min on 28 March 2003, a copy of which is annexed at **Appendix 1**. For the purposes of this report, the Sub-Committee has only considered Section 4 of Assoc Prof Yeo's paper which deals specifically with the issues relating to choice of law in contract.

3. Assoc Prof Yeo's paper was principally prepared for the Law Reform and Revision Division of the Attorney-General's Chambers ("LRRD") and the Sub-Committee accordingly records its thanks to LRRD for kindly consenting to the paper being transmitted to the Sub-Committee for its consideration.

4. As Assoc Prof Yeo's paper is a fairly comprehensive work on the issues relating to reform in this area, the Sub-Committee adopts the sub-sections which set out the law as it presently stands and does not seek to repeat them in this report. The Sub-Committee instead follows up on the areas of concern as identified by Assoc Prof Yeo, highlighting at the same time the respective position under the Rome Convention on the Law Applicable to Contractual Obligations ("the Rome Convention")[1] and the views of the Australian Law Reform Commission in their report on reforms in this area[2]. The Sub-Committee then states its own views as to the proposed recommendations outlined by Assoc Prof Yeo. A copy of the Rome

[1] Substantive parts of the Rome Convention have been given effect in the United Kingdom by the enactment of the UK Contracts (Applicable Law) Act 1990

[2] Australian Law Reform Commission ("ALRC") Report No. 58.

Convention is annexed at **Appendix 2** and a copy of the relevant section from the ALRC Report No. 58 is annexed at **Appendix 3**.

5. Whilst there are some shortcomings in the existing law, the Sub-Committee is on the whole not in favour of a substantive overhaul of the law by way of legislative intervention. The Sub-Committee is of the view that the common law has generally worked well. Further, in respect of the UK Contracts (Applicable Law) Act 1990 which gave effect to substantive parts of the Rome Convention., the Sub-Committee agrees with the following observation:

> The Act replaces one of the great achievements of the English judiciary during the last 140 years or so, an achievement which produced an effective private international law of contracts, was recognised and followed in practically the whole world and has not at any time or anywhere led to dissatisfaction or to a demand for reform.[3]

6. This report is divided into the following sections:

(1) Preliminary Observations

(2) Substantive Issues:

(a) Proper Law of the Contract
(b) Capacity to Contract
(c) Formal Validity
(d) Formation of Contract
(e) Change of Proper Law
(f) Law of the Contractual Place of Performance

(3) Possible Reform Options

[3] Mann, (1991) 107 L.Q.R. 353

7. The approach in this paper is as follows. A few preliminary observations of the Sub-Committee are first set out in order to put the entire topic into perspective before turning to the substantive choice of law rules where a case for reform may arguably be made. These choice of law rules constitute the regime of choice of law in contract. After ascertaining these rules, the Sub-Committee then considers how reform implementing such rules may be effected; ie, whether a legislated response is appropriate or whether reform should be left to the incremental development of the common law.

(1) PRELIMINARY OBSERVATIONS

Scope and limits of domestic conflicts law

8. Conflicts law is the branch of law that is concerned with cases with a foreign element, i.e. cases with a connection to some other system of law. For example, a contract may be entered into with a party from another country; or such contract may be performed in another country. Because different countries have different legal systems, adjustments will have to be made when events or transactions are not confined within the borders of a single country. Thus, conflicts law is a necessary part of the domestic law of each country. With globalisation, its importance can only be expected to increase.

9. It should be emphasised that conflicts rules are not supra-national laws. Singapore conflicts rules are part of Singapore's domestic law, just as English conflicts rules are part of England's domestic law. Among the Commonwealth countries, there has been substantial uniformity of approach.[4] Inter-reliance on case law is clear[5], although with the implementation in the United Kingdom of the Rome Convention, it appears inevitable that such uniformity of approach may not survive for long.[6]

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[4] This might be attributed to the fact that legislative intervention in the field of conflicts in contract has been slight. However, we might expect increased divergence as Commonwealth jurisdictions begin to introduce reform to their conflicts laws by way of legislative activity rather than through the judicial process.

[5] For example, determination of the rules on freedom to choose the applicable law requires reference to leading authorities from Canada (*Vita Foods Products Inc v Unus Shipping Co.* [1939] A.C.277 - decision of the Privy Council); Australia (*Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] Qd.R.378; and England (eg. *Boissevain v Weil* [1949] K.B.482).

[6] It has however been suggested that the basic approach of the Rome Convention is, in fact, so similar to that of the common law that little uniformity may be lost. See Peter North: *Private International Law Problems in Common Law Jurisdictions* at page 138.

Types of conflicts issues and how they are dealt with

10. Potential conflicts generally involve three types of issues: (1) adjudicative jurisdiction over parties or things in dispute; (2) choice of law; and (3) enforcement of foreign judgments. Ancillary issues include pleading and proof of foreign law and inconvenience of the forum.

11. As with most aspects of civil procedure, statutory law largely prescribes the rules of adjudicative jurisdiction and enforcement of foreign judgments. This is because of the importance attached to ensuring that procedural rules be as stable and clearly expressed as possible. Choice of law is, however, an exception to this body of statutory law. It is largely the product of judicial decisions and legislation is largely limited to address a few particular topics.[7]

The purpose of choice of law rules

12. In examining choice of law rules in contract, it might be helpful to bear in mind that resort to choice of law rules in international contracts arises in two main contexts: (1) resolution of conflicts that have in fact arisen; and (2) conflict avoidance. The interests and purposes of participants are not identical; nonetheless, all demand a stable, concrete set of choice of law rules to guide judicial and other decision-makers.

13. A credible choice of law approach, therefore, is one that would embrace conflict-resolving values, such as simplicity, predictability, and party autonomy, as well as substantive values such as uniformity, fairness and equity, protection of weak

[7] Judging by the rather limited number of shortcomings in the present law that we have managed to gather for this report, the resulting approach does not however appear to be as unruly as one might assume, based on the diversity of connecting factors that transactions or relationships transcending international boundaries may entail.

parties. In the context of contracts, the choice-of-law approach must, in addition, satisfy the criteria of clarity, effectiveness and commercial convenience.

Importance of clear choice of law rules in contracts

14. A survey by the International Chamber of Commerce (ICC) in April 2003 has revealed that many companies are discouraged from entering international contracts if they are not certain of their liability exposure in certain countries.[8] The ICC findings are a clear signal of how important liability issues are for companies doing business in foreign countries, and highlights how this concern affects economic growth in an increasingly globalised marketplace.[9]

15. As businesses continue to expand their relationships and operations across borders[10], one may argue that the call for clear and predictable choice of law rules has never been stronger.

[8] The ICC is the world's largest business organisation with more than 8,000 member companies in more than 140 countries. The ICC survey results are available at www.icwbo.org/law/jurisdiction.

[9] For example, one respondent in that survey explained that if its legal department cannot give a clear statement about a particular foreign law in less than four sentences, management is unwilling to take legal action in that jurisdiction.

[10] Especially with the recent advent of FTAs with our major trade partners

(2) SUBSTANTIVE ISSUES

(1) PROPER LAW OF THE CONTRACT

(A) Summary of the Present Position

16. At common law, the `proper law' of the contract governs most issues relating to a contract. The proper law of a contract is either expressly or impliedly chosen. The court will usually give effect to the law chosen even if it has no connection with the contract, in compliance with the principle of party autonomy; i.e. parties are free to choose the law and terms of their contract.

17. The principle of party autonomy is not absolute. The common law has imposed a limitation that the choice be *"bona fide, legal and not contrary to public policy"*[11]. In certain circumstances, the evasion of foreign law could be grounds for holding that the choice was not bona fide.[12]

18. If the proper law is not expressly or impliedly chosen, the law of the country with the "closest and most real connection" with the contract will be applied (sometimes known as "the objective proper law").

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[11] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277. Note however the decision of the Singapore Court of Appeal in *Peh Teck Quee v Bayerische Landesbank Girozentrale* [2000] 1 SLR 148, where the exception was considered slightly differently in the sense that instead of the choice of law not being against public policy, the application of foreign law was not to be contrary to public policy. See further paras [145]-[157] of Assoc Prof Yeo's Paper for a substantive discussion of this decision.

[12] Para [149], Assoc Prof Yeo's Paper

Specific issues for consideration:

(I) Common law limitation on choice

(A) The Issues

19. Several issues arise in respect of the application of the common law limitation on choice:

    (1) whether evasion of the law is to be assessed subjectively or objectively[13];
    (2) it is not clear by reference to which law a court will have to consider is being "evaded" or by which its legality is to be tested or whose public policy is to be respected[14]
    (3) the rationale of bona fides as a test[15].

(B) The Rome Convention

20. Under Article 3.3 of the Rome Convention, the fact that the parties have chosen a foreign law shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country alone, prejudice the application of the mandatory rules of the law of that country (which cannot be derogated from by contract). In other words, notwithstanding the parties' choice of law, the mandatory rules of such country would apply.

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[13] Para [152], Assoc Prof Yeo's Paper

[14] Para [153], Assoc Prof Yeo's Paper. The Australian Law Reform Commission ("ALRC") had also identified this as an issue – see para 8.11, ALRC Report No. 58.

[15] Para [157], Assoc Prof Yeo's Paper

(C) ALRC Report

21. The Australian Law Reform Commission has recommended that the limitations on the ground of lack of bona fides be replaced with rules to determine when parties cannot choose to evade the operation of a mandatory law of the place of closest connection[16]. They further recommended that 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 and the objective proper law would then be the governing law of the contract[17].

(D) Assoc Prof Yeo's Recommendations

22. Assoc Prof Yeo is of the view that a restriction on choice of law based on a bona fides test is too vague to be of any use, and recommends the approach taken in the Rome Convention that the concept of mandatory rules focussing on the objective effects of particular laws be adopted rather than to examine the motives of the parties to the contract[18].

23. Assoc Prof Yeo recommends that the uncertain test of bona fide choice of law be replaced with two objective limitations:

(1) where the contract of the parties is in all respect a domestic contract (with respect to any country) but for the parties' express choice of law, the mandatory rules of the domestic law shall apply to that contract notwithstanding the parties' subjective choice of law; and

[16] Para 8.13, ALRC Report No. 58

[17] Para 8.25, ALRC Report No. 58.

[18] Para [159], Assoc Prof Yeo's Paper; see also Para 8.13, ALRC Report No 58

(2) the parties' express choice of law does not prevent the court from applying the international mandatory rules of the forum or of 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[19].

(E) The Sub-Committee's Views

24. The Sub-Committee is of the view that the concept of mandatory rules presents its own problems. Primarily, there is already ambiguity as to what rules are mandatory. It appears that mandatory rules are those that cannot be derogated from by the parties themselves[20] or that the forum will consider as rules that are capable of overriding the chosen governing law[21].

25. The problem is less marked if the mandatory rules to be applied are that of Singapore law. The Singapore court will only need to consider if any particular Singapore law is of mandatory application. However, complications arise if a Singapore court has to consider the mandatory rules of the objective proper law (which is not Singapore law) and the parties have chosen the law of another country (not being the objective proper law nor Singapore law) to apply. For example, where a contract is expressly stated to be governed by Malaysian law but the objective proper law is Indonesian law.

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[19] Para [165], Assoc Prof Yeo's Paper

[20] Assoc Prof Yeo cites as an example the requirement of consideration for the enforcement of a contract. Para [161], Assoc Prof Yeo's Paper.

[21] For example, the Unfair Contract Terms Act 1977. Article 3(3) of the Rome Convention defines "mandatory rules" as the rules of law of a country which application cannot be derogated from, if all the elements of the contract is connected to that one country alone, notwithstanding that the parties chose a different law to govern the contract.

26. The Sub-Committee takes the view that notwithstanding the recommendations for a more objective limitation test (through the application of mandatory rules), it appears extremely difficult to recommend any definitive rules which would form an authoritative guide for a Singapore court to follow in implementing the limitations arising from foreign mandatory rules.

(F) The Sub-Committee's recommendation

27. Notwithstanding the apparent deficits of the common law limitation, the Sub-Committee does not recommend any legislative changes. The Sub-Committee takes the view that these apparent defects do not urgently require reform. The Sub-Committee in fact believes that the common law limitation has so far been effectively applied by the courts, as apparent from the decision of the Singapore Court of Appeal in *Peh Teck Quee v Bayerische Landesbank Girozentrale*[22].

(II) Implying the Choice of Law

(A) The Issues

28. There is some uncertainty as to the extent to which a court can imply a choice of law and when the court should move on to consider what is the law that has the "closest and most real connection".

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[22] See footnote 11 above.

(B) The Rome Convention

29. Under the Rome Convention, the courts are to move on to ascertain the "objective applicable law" if the inferred intention cannot be demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case[23].

(C) ALRC Report

30. The Australian Law Commission has recommended that the parties' right to choose the governing law of their contract be upheld provided that the choice is express or can be clearly inferred, and that if the indications are not clear, the court should not be free to infer the choice but to seek to apply the objective proper law[24].

(D) Assoc Prof Yeo's Recommendations

31. Assoc Prof Yeo does not recommend any changes as he feels that the common law approach is satisfactory.

(E) The Sub-Committee's Views

32. The Sub-Committee agrees that no changes are necessary. The Sub-Committee agrees with Assoc Prof Yeo that the Singapore court has taken a pragmatic approach by proceeding to ascertain the objective proper law where it had considered that a search for an inferred intention would be futile in the

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[23] Article 3.1, Rome Convention.

[24] Para 8.9, ALRC Report No. 58.

circumstances, and the concerns of the Australian Law Reform Commission are therefore already addressed.[25]

(F) The Sub-Committee's recommendation

33. The Sub-Committee is of the view that no legislative clarification is necessary for this issue.

(III) The Objective Proper Law

(A) The Issues

34. Where there is no expressly chosen governing law and this cannot be inferred from the circumstances, the court has to consider all the circumstances surrounding the formation of the contract to determine the law with which the contract has the closest connection. The connections which will be considered include the place of residence or business of the parties, the place where the contract was made and the place where it is to be performed.

35. The main criticism of the *"closest connection test"* is that it is uncertain, vague and unpredictable when the connections are evenly balanced.[26]

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[25] See *Las Vegas Hilton Corp v Khoo Teng Hock Sunny*, [1997] 1 SLR 341 & *Overseas Union Insurance Ltd v Turegum Insurance Co* [2001] 3 SLR 330.

[26] Para 8.38, ALRC Report No 58; Para [170], Assoc Prof Yeo's Paper.

(B) The Rome Convention

36. Article 4(1) of the Rome Convention 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(2) goes on to provide 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 place of residence or seat of management.[27]

(C) ALRC Report

37. The Australian Law Reform Commission favours the Rome Convention approach. It has therefore recommended that the proper law of the contract where the parties have not chosen the 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, unless the contract has its most real and substantial connection with another place[28].

(D) Assoc Prof Yeo's Recommendations

38. Assoc Prof Yeo considered whether the concept of characteristic performance found under the Rome Convention should be adopted. Assoc Prof Yeo noted that

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[27] The Guiliano-Lagarde Report (which is a commentary on the Rome Convention by the members of the Working Group responsible for drafting the Convention and used as an aid to interpretation of the Rome Convention) identifies various examples of the application of the concept of characteristic performance, as discussed in para [171] of Assoc Prof Yeo's Paper.

[28] Para 8.48, ALRC Report No. 58

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.

39. However, Assoc Prof Yeo noted that besides being alien to the common law (which is usually more concerned with the connections to the place of the contractual transaction rather than the place of the party performing the contract)[29], this concept is to a certain extent limited in its application and the presumption would be easily rebuttable where the characteristic performer cannot be easily ascertained. Assoc Prof Yeo therefore concludes that the concept of characteristic performance only provides marginally greater certainty in the law than the common law test of objective connections.

40. Assoc Prof Yeo instead recommends that there be a list of presumptions instead of the governing law of the contract in respect of specific types of contract that would be applicable in the absence of an express or inferred choice of law by the parties.

41. Assoc Prof Yeo proposes the following presumptions for two types of specific contracts:

(a) <u>Employment Contracts:</u>

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 if 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.

[29] Para [175], Assoc Prof Yeo's Paper

However, 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.

(b) 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 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.

42. Assoc Prof Yeo further recommends that 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.

(E) The Sub-Committee's Views

43. The Sub-Committee agrees that the doctrine of characteristic performance would not necessarily contribute to greater clarity in the law. The Sub-Committee does not feel that situations where there are evenly balanced connecting factors are prevalent.

44. Whilst the Sub-Committee agrees that this area can be clarified with Assoc Prof Yeo's approach of drawing up presumptions for various specific types of contract, the Sub-Committee is of the view that the common law has worked reasonably well, even in such specific contracts. The Sub-Committee believes that it would be impossible to fully justify the logic and rationale of any set of presumptions.

(F) The Sub-Committee's recommendation

45. It is therefore the view of the Sub-Committee that no legislative clarification is presently required on this area.

(B) CAPACITY TO CONTRACT

(A) Summary of the Present Position

46. The common law has no clear choice of law rule for determining the capacity of natural persons to enter into contracts. The authorities suggest a number of possible systems of law.

- Law of the domicile or residence[30]
- Law of the place of contracting[31]
- Proper Law of the Contract.[32]

47. Dicey & Morris suggest capacity to be tested 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 domicile or residence.[33]

48. In relation to the proper law of the contract, one query is whether this refers to the objective proper law of the contract or can include the proper law chosen by the parties. Both Dicey & Morris and Cheshire & North argue against this. The rationale is that a person should not be allowed to confer capacity on himself by the choice of a law which has no connection with the contract[34].

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[30] Para [183], Assoc Prof Yeo's Paper

[31] Para [183], Assoc Prof Yeo's Paper

[32] Para [184], Assoc Prof Yeo's Paper

[33] Para [185], Assoc Prof Yeo's Paper

[34] Para [186], Assoc Prof Yeo's Paper

(B) The Rome Convention

49. The Rome Convention does not provide a choice of law rule for testing capacity[35] except in so far as allowing a party to a contract to invoke an incapacity resulting from another law, provided the other party was aware of that incapacity[36].

(C) ALRC Report

50. The Australian Law Reform Commission takes the opposite view that subjective proper law can be used to test capacity, in the alternative, the law of the residence of the party whose capacity is being impugned[37].

(D) Assoc Prof Yeo's Recommendations

51. Assoc Prof Yeo recommends 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[38].

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[35] Art 1(2)(a) of the Rome Convention

[36] Art 11 of the Rome Convention

[37] Para 8.57-8.58, ALRC Report No 58. See also Para [186], Assoc Prof Yeo's Paper

[38] Para [188], Assoc Prof Yeo's Paper

(E) The Sub-Committee's Views

52. It is true that the common law has no clear choice of law rule for determining the capacity of natural persons to enter into contracts. However, it is the view of the Sub-Committee that no legislative clarification is needed at this point.

53. The position relating to natural persons, whilst an interesting academic issue, is not an issue that commonly presents a problem for the courts. It is more likely to occur in the context of commercial transactions where the parties involved are generally corporate entities and the position relating to corporate entities has been clarified by *Janred Properties Ltd v Ente Nazionale Italiano per il Turismo* [1989] 2 All ER 444[39].

54. If a case does arise in relation to the capacity of natural persons, the Sub-Committee is of the view that the court should have the flexibility to select the best approach available to achieve the ends of justice.

(F) The Sub-Committee's recommendation

55. The Sub-Committee is of the view that no legislative clarification is necessary at present on this issue.

[39] The common law now provides for the capacity of an incorporation to be tested by both the proper law and the law of the incorporation.

(3) FORMAL VALIDITY

(A) Summary of the Present Position

56. As Assoc Prof Yeo has mentioned, the common law position for determining the formal validity of a contract is not clearly stated.[40] Where the contract does not relate to title to immovable property, the authorities appear to suggest that the contract is formally valid under either:

- The proper law of the contract; or
- The law of the place the contract was made

57. This seems to have been viewed as an "alternative choice" approach and appears to have been accepted in Singapore[41]. There is some concern that in modern international transactions, determining the place of contracting may not always be an easy task.

(B) The Rome Convention

58. The Rome Convention provides for the testing of formal validity through the "alternative choice" approach where parties are in the same country. In a situation where parties are in different countries, the Rome Convention provides that it is sufficient if the contract is formally valid if it complies with the requirements of

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[40] Para [189], Assoc Prof Yeo's Paper. The formal validity of a conveyance of immovable property is subject to the law of the place where the property is situated.

[41] See para 39 of the judgment of Lai Siu Chiu J in *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* (Suit 395/1996, unreported).

the law of one of those countries[42]. This makes the requirement of formal validity even easier to satisfy.

(C) ALRC Report

59. This issue does not seem to have been addressed by the Australian Law Reform Commission.

(D) Assoc Prof Yeo's Recommendations

60. Assoc Prof Yeo has recommended 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[43].

(E) The Sub-Committee's Views

61. Assoc Prof Yeo's paper essentially recommends the approach in the Rome Convention.

[42] Art 9 of the Rome Convention. For contracts involving rights in immovable property, Article 9(6) of the Rome Convention provides that the mandatory requirements of form of the law of the country where the property is situated shall apply if by that law, those requirements are imposed irrespective of the country where the contract was concluded and irrespective of the law governing the contract.

[43] Para [191], Assoc Prof Yeo's Paper

62. The Sub-Committee is of the view that as the "alternative choice" approach under the common law does not seem to have posed any serious problem, there is no strong reason to adopt the approach in the Rome Convention.

(F) The Sub-Committee's recommendation

63. The Sub-Committee does not recommend any legislative changes.

(4) FORMATION OF CONTRACT

(A) Summary of the Present Position

64. Formation is an area that has generated much academic controversy with no clear judicial approach. There appear to be two primary approaches for which there is judicial support.

- Putative Proper Law[44]
- Law of the Forum[45]

65. Each of these approaches has problems. The putative proper law approach presents a problem of circularity because it assumes that a contract has been formed to determine the applicable proper law and then uses that to determine whether the contract has been formed.[46]

66. The law of the forum approach is also problematic in that it can be both uncertain and parochial. This approach will certainly not further the objectives of private international law. There will not be harmonization of results as the outcome will depend on whatever forum eventually hears the case. This will almost certainly lead to forum shopping.[47]

67. Apart from considerations of the objectives of private international law, expectations of commercial parties would be that their choice of law should apply. It is also possible to argue that the law of the forum approach refers to the choice of law rules of the forum (as opposed to the domestic contract law) which can

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[44] Para [193], Assoc Prof Yeo's Paper

[45] Para [193], Assoc Prof Yeo's Paper

[46] Para [194], Assoc Prof Yeo's Paper

[47] Para [198], Assoc Prof Yeo's Paper

then in turn point to the putative proper law. Coupled with the expectations of the parties, a strong case can be made for applying the putative proper law. On this pragmatic basis, the putative proper law approach can be justified where there is an expressed choice.[48]

68. Where an expressed choice does not exist, these considerations no longer apply and the courts can go back to using the domestic law of the forum or objective proper law of the contract.[49]

69. As a balance between principle and pragmatism, Assoc Prof Yeo suggests a three-step approach as set out in his recommendations below.

(B) The Rome Convention

70. The Rome Convention adopts the putative proper law approach.[50] In addition, this approach is qualified 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 proper law.

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[48] Para [199], Assoc Prof Yeo's Paper

[49] Para [200], Assoc Prof Yeo's Paper

[50] Art 8 of the Rome Convention. See also Para [195], Assoc Prof Yeo's Paper

(C) ALRC Report

71. The Australian Law Reform Commission also recommends this approach on the basis that issues of formation of contract should be treated the same way as issues of material validity.[51]

(D) Assoc Prof Yeo's Recommendations [52]

72. Assoc Prof Yeo has recommended that 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.

(E) The Sub-Committee’s Views

73. This issue appears to be one of the stronger cases for legislative intervention. The problem is a real one in that at times parties in commercial transactions do claim that a contract has not been formed. Further, the different approaches adopted in the cases add to the confusion.

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[51] Para 8.59, ALRC Report No 58. See also Para [196], Assoc Prof Yeo's Paper

[52] Para [204], Assoc Prof Yeo's Paper

74. However, this must be weighed against the utility of legislative clarification. As Assoc Prof Yeo also indicates, his recommendations are tentative and it is perhaps better left to the Courts to resolve any issue arising.[53]

75. The Sub-Committee agrees with this view. Again, there is no clear advantage to having this issue clarified by legislation as opposed to the courts. Considering that Singapore is not part of a larger legal entity (a la the European Union), the courts should have the flexibility to select the best solution when the appropriate case presents itself.

(F) The Sub-Committee's recommendation

76. The Sub-Committee is therefore of the view that no legislative reform is necessary for this issue.

[53] Para [203], Assoc Prof Yeo's Paper

(5) CHANGE OF PROPER LAW

(A) Summary of the Present Position

77. The common law authorities are not very clear on the issue of whether the proper law of a contract can be changed after the contract has been made.[54] The parties are *probably* allowed to enter into a variation agreement subjecting their rights to a different proper law, either through estoppel or subsequent agreement.[55] 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.[56]

78. Common law authorities are also unclear on 4 other issues:

- whether parties may agree that one of the parties can exercise the power to change the proper law of the contract ("unilateral change");
- 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 ("third party rights");
- whether a change of proper law can validate an otherwise invalid contract or invalidate an otherwise valid contract ("essential validity"); and
- what is the effect of the change of proper law on the issue of formal validity of the contract ("formal validity").

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[54] See the *Giuliano Lagarde Report* which states that "In the laws of England and Wales, Scotland, Northern Ireland and Ireland, there is no clear authority as to the law which governs the possibility of a change in the proper law."

[55] *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 [117] (affirmed without reference to this point at [1999] 4 SLR 34).

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

(B) Rome Convention

79. Article 3(2) gives the parties the power, at any time, to agree to a change in the proper law governing the contract. Parties may therefore alter the previously chosen law, or choose one where they had failed to do so at the time of contracting. This right is subject to the limitations that the subsequent choice must not adversely affect the rights of third parties, and that any variation shall not prejudice the formal validity of the contract.

80. However, it is not clear under the Rome Convention which law determines whether a purported variation is effective, or conformed to any conditions which the parties may have imposed on the exercise of this choice.[57]

(C) ALRC Report

81. This issue does not seem to have been addressed by the Australian Law Reform Commission.

(D) Assoc Prof Yeo's Recommendations

82. Assoc Prof Yeo recommends that 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.

83. Concerning formal validity, Assoc Prof Yeo argues that it would be harsh on parties to require the issue of formal validity to be retested upon the subsequent

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[57] Briggs, The Conflict of Laws, Clarendon Law Series, OUP 2002 at p.161

selection of a different governing law, or to subject parties' prior acts to the potential retrospective operation or otherwise of such laws. Moreover, the function of formal requirements is normally discharged at the time of the conclusion of the contract. It is unnecessary and undesirable for the issue to be reopened when the proper law is changed.

84. Allowing parties to change the proper law of the contract may adversely affect vested third party rights. For example, parties may seek to change the proper law from that of a jurisdiction which confers third party rights under contract[58]. Even if domestic laws contain specific provisions preventing contracting parties from taking away the rights of third parties, this may not necessarily be effective in a choice of law context[59]. On the other hand, it may not be justifiable for a forum to impose its own 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. The position should be that while parties should be allowed to vary the proper law, this should not be to the prejudice of third parties' rights already vested under the original proper law.

(E) The Sub-Committee's Views

85. Insofar as parties are free to enter into whatever contractual bargains they think fit, that freedom is not complete unless they can choose the law by reference to which their agreement will be construed. By the same principle of party autonomy, parties should be entitled to change the proper law. There may be good

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[58] As in many civil law countries, and also more recently, Singapore (under the Contracts (Rights of Third Parties) Act 2001).

[59] Such provisions are not applicable unless they are part of the governing law or part if international mandatory rules that the forum would apply.

commercial reasons for doing so.[60] Where parties had not expressed any choice of original law, it may also have the practical effect of relieving the court of the difficult task of ascertaining the applicable law where the facts are nicely balanced between two systems of law. This injects some certainty.

86. The Sub-Committee agrees with Assoc Prof Yeo[61] that as a matter of principle, there should not be any distinction drawn between cases of unilateral changes and changes dependent on an objective external event. Both issues should, and to a similar extent, be subject to parties' agreement.

87. The Sub-Committee also agrees with Assoc Prof Yeo that the formal validity of a contract should not be affected by a subsequent change of the proper law, and that the change of parties' choice of law should not be allowed to prejudice the rights of third parties.

88. A final issue concerns the retrospective effect of such a change of proper law; in particular whether prior invalid acts can be retrospectively validated, and whether prior valid acts can be invalidated. The Sub-Committee's views on this issue were mixed. One view was that such a change should only have prospective effect, as is the case for formal validity. The other view was that of Assoc Prof Yeo, ie. these are matters for the newly selected proper law to determine[62].

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

[61] Para [209], Assoc Prof Yeo's Paper

[62] The Oregon Law Commission recommended that unless parties otherwise provide, their choice of law should operate retrospectively to the time the parties entered into the contract. Such retrospective effect cannot however prejudice the rights of third parties. Report on Conflicts Law Applicable to Contracts (13 December 2000). The report accompanied a proposed bill to codify contract choice of law in Oregon. Legislation implementing the Commission's recommendations has been enacted (Chapter 164, Oregon Laws 2001, wef 1/1/2001

(F) The Sub-Committee's recommendation

89. The Sub-Committee agrees with the recommendations made by Assoc Prof Yeo but suggests that such reform should best be left to judicial development rather than legislative reform.

(6) LAW OF THE CONTRACTUAL PLACE OF PERFORMANCE

(A) Summary of the Present Position

90. Common law authorities provide that performance of a contract was excused (i) if it had become illegal by the proper law of the contract or (ii) necessarily involved doing an act which was unlawful by the law of the place where the act had to be done.[63] If the contract was governed by Singapore law, the latter aspect of this rule could be seen as an application of the rule of Singapore's domestic law as to the effect of supervening illegality. But it was never finally established whether this was a domestic rule, or if there was an independent rule of the conflict of laws under which illegality could be a matter for the law of the place of performance.[64] The issue was left open in *Peh Teck Quee v Bayerische Landesbank Girozentrale*[65].

91. This issue would only arise should the Singapore court be faced with a contract governed by the law of State A (not Singapore), performance of which was illegal by the law of the place of performance, State B.

(B) Rome Convention

92. The Rome Convention has no such choice of law rule. The effect of Article 8 of the Convention is that illegality is a matter for the applicable law, rather than any other system of law such as that of the place of contracting or the place of

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[63] *Libyan Arab Foreign Bank v Bankers Trust Co.* [1989] Q.B. 728

[64] See *Zivnostenska Banka v Frankman* [1950] A.C. 57 at 59 *per* Lord Reid, but *cf.* the different view expressed by Lord Reid in a companion case, *Kahler v Midland Bank* [1950] A.C. 24 at 28. In UK, the issue has been disposed off because of the Rome Convention.

[65] [2000] 1 SLR 148 (CA, Singapore)

performance.

(C) ALRC Report

93. The ALRC considered that the requirement that a contract be legal by its place of performance "is a useful and necessary rule". It recommended that the 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.[66] The ALRC's draft provision[67] reads:

"(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."

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[66] Para 8.17, ALRC Report No. 58.

[67] Draft uniform State and Territory Choice of Law Bill 1992, at Appendix of the ALRC Report.

(D) Recommendations in the Paper

94. Assoc Prof Yeo has recommended that the law should 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 obligation.

(E) The Sub-Committee's Views on the Paper's recommendations

95. The Sub-Committee agrees with Assoc Prof Yeo. Illegality, performance and discharge of contractual obligations should all be regarded as matters for the proper law. Conceptually, it is difficult to see why such a rule should be required as an independent choice of law rule. The proper law of the contract may, as in the case of the common law, already take into consideration illegality under the law of the contractual place of performance.

(F) The Sub-Committee's recommendation

96. The Sub-Committee is of the view that this issue should however best be left for judicial development rather than legislative clarification.

(3) POSSIBLE REFORM OPTIONS

97. Assoc Prof Yeo has referred to the possibility of codification of the choice of law rules for contract.[68] He stated that *"In many cases it is a matter of debate whether the changes should be done through legislation or the courts*."[69]

98. The manner or form in which choice of law rules are expressed is, in the Sub-Committee's view, a fundamental issue that requires somewhat more attention.

Legislation

99. Legislation to codify or consolidate the law has its obvious benefits. No longer will a person seeking out the law need to wade through lengthy and often scattered judgments (as such judgments may be both local as well as overseas), which may at times be difficult to assess.[70] Consolidating or codifying legislation brings the law into a coherent body that is accessible to lawyers and non-lawyers.

100. A legislative enactment is invariably the result of a long process and deliberation. Legislators debate about whether a rule is a rule; they discuss the appropriate content of the rule; they argue about the best way to formulate the rule; and they deliberate about issues of under-inclusiveness and over-inclusiveness. The argument might be made that legislation affords a better channel through which to articulate policy concerns.

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[68] Para [141], Assoc Prof Yeo's Paper

[69] Para [142], Assoc Prof Yeo's Paper

[70] Concerning the UK Contracts (Applicable Law) Act 1990, it was said that "…the main advantage to the English lawyer will be that he will be able to find the relevant law in a relatively short and succinct piece of legislation rather than have to embark on a tortuous investigation into the often ambiguous, often conflicting case law": Williams (1986) 35 I.C.L.Q.1,31.

101. Legislation also has a comparatively high degree of visibility, unlike the common law which because of its incremental or ad hoc nature tends to disengage public scrutiny in the vast majority of cases.

102. Another benefit of a legislative response is that one would not have to wait indefinitely for an appropriate case to arise which gives the courts the opportunity to formulate an appropriate response. The common law is, to a large degree, a reactive mechanism and will always lag behind the need for change. Legislation meets any urgent necessity for reform or for greater legal certainty, especially in sectors of major economic importance.

103. Finally, legislation also plays an important role in the development of unified conflict rules, whether the need for such unification arises between states in the same country or within a union of nations like the European Union. Legislation provides a vocabulary and structure within which jurisdictions can negotiate. After the approach is decided on, it will be necessary to realize this through written law. We believe that the significant co-ordinating role reflects the apparent trend in favour of codification as seen in the Rome Convention as well as the ALRC's draft Bill.[71]

Court initiated reform

104. The other option is to leave the adoption of the reforms suggested in this paper to the Singapore courts.

105. The main argument behind this approach is the much vaunted flexibility of the common law. The common law has:

[71] The ALRC did not even raise the issue in their report; the legislative route could have simply been assumed because the object was to unify conflicts laws in the various States.

> "the incalculable advantage of being capable of application to new combinations of circumstances, perpetually occurring, which are decided, when they arise, by inference and analogy to them and upon the principles on which they rest."[72]

106. Legislation has its limitations, and no matter how much care and thought may have gone into drafting a piece of legislation, it is simply not possible to foresee every type of problem that is likely to arise. The common law, however, has nearly always provided an answer to the problems posed by new circumstances. It has also been described as "self-correcting"[73].

International Trends

107. According to Francois Rigaux[74], the last hundred years have been a "century of codification" of private international law, with the last thirty years the "thirty glorious years of recording private international law on the statutory books". In Europe, the Swiss in 1987, the Italians in 1995, Liechtenstein in 1997 and Russia have codified various aspects of their private international law, with Belgium soon to follow. Most of these countries appear to be civil law jurisdictions, with the exception of UK, which is a member of the European Community.

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[72] James Crankshaw, *The Criminal Code of Canada …. With commentaries, annotations, forms, etc, etc….* 3rd ed. (Toronto: Carswell, 1910), Introduction at xci-ii.

[73] Anne McGillivray, *Better Living Through Legislation? Parens Patriae Reconsidered* (in "Perspectives on Legislation", a collection of papers funded by Legal Dimensions Initiative 1999 and posted on the Law Commission of Canada's website at http://www.lcc.gc.ca/en/themes/gr/rl/ldi1999.pdf)

[74] Professor Emeritus of the Universite catholique de Louvain. See his article at 60 La. L. Rev. 1321 (Louisiana Law Review)

108. In the common law world[75], and in most parts of the United States[76], however, conflicts law and legislation are still perceived as antithetical themes[77].

[75] With the exception of UK and Quebec. Both Quebec and Louisiana (see fn below) had, very early in the 19th Century, imported a French inspired Civil Code.

[76] With the exception of Louisiana (Louisiana Act 923 of 1991) and Oregon (Chapter 164, Oregon Laws 2001, wef 1/1/2001). While the Louisiana Act was the first comprehensive attempt at conflicts codification in the United States, Louisiana had always provided statutorily for problems of conflict of laws. As early as 1808, Louisiana followed the civil-law tradition and included choice-of-law rules in the Preliminary Title of its first civil code, the Digest of 1808.

[77] Symeon C. Symeonides, *Private International Law Codification in a Mixed Jurisdiction: The Louisiana Experience*, 57 RabelsZ 460, 461 (1993).

The Sub-Committee's Views

109. The Subcommittee considers that the common law has generally worked well and that while there may be certain shortcomings that might be amenable to reform, these involve only small extensions of existing rules, rather than a major revision with complex ramifications.[78] The issues raised in section 2 do not, in the Sub-Committee's view, call for any broad-based, radical, comprehensive reform.

110. There is also, it is suggested, no particular urgency for such reform. As such, it is suggested that the better approach would be to leave law reform to the integrational, incremental and gradual evolution of the common law.

111. However, should there be an urgent need to reform the law to deal with one or more specific legal issues, it would then be appropriate to consider whether there should be specific legislation to address just those issues or whether a more comprehensive legislation is justified.

112. The Subcommittee does *not* recommend an exhaustive codification of the choice of law rules as there is no compelling reason to do so. Singapore should not be sacrificing the flexibility of the common law, which has served us so well for so long. In Australia, there has been no such codification notwithstanding the views of the Australian Law Reform Commission. The United Kingdom adopted the Rome Convention in view of the European Union. Even then, Lord Wilberforce lamented at the third reading of the Contracts (Applicable Law) Bill[79]:

> "I regard this Bill as unfortunate and unnecessary. It brings into English law the effect of a European Convention in an area that in English law is perfectly

[78] Echoing the same conclusion of Peter North, who was of the view that "No sensible claim could be made that common law choice of law rules in contract are seriously defective and that the need for reform is overwhelming." (*Private International Law in Common Law Jurisdictions* at page 139.

[79] HL Debs. Vol.518, col.438, 24 April 1990.

satisfactory, has been controlled by the judges and is now to be set into the cement of statutory legislation."

Dated this 16th September 2003

JUSTICE WOO BIH LI
CHAIRMAN