RECONSIDERING THE PROPER LAW OF THE CONTRACT

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This article appraises the choice of law rule that applies where parties have either impliedly chosen, or failed to choose, the law governing their contract. It reconsiders the problems besetting the common law rule, known as the proper law of the contract, that were identified by Australia's Law Reform Commission twenty years ago. While the choice of law rule in Australia remains unchanged, it has undergone significant reform in the European Community and is now the subject of reform at the Hague Conference on Private International Law. Despite these reforms, a comparative analysis reveals that several of the common law problems persist. This article proffers a proposal for Australian legislatures based on the author's refined version of the Draft Hague Principles *and the* Rome I Regulation*. It also suggests that the Hague Conference adopt these refinements. Under this proposal, tacit choice of law is absorbed as a subset of express choice and must be clearly established by the terms of the contract or the circumstances of the case. The probative value of an exclusive jurisdiction agreement will be made apparent in the drafting of the clause on tacit choice of law itself. It is further proposed that, in the absence of choice, the closest connection test be reduced to an escape clause applicable in default of fixed rules tailored to the exigencies of commercial contracting. The reformulated test will be used to ascertain the law of the country most appropriate for determining the issues arising in the case.*

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I INTRODUCTION

The proper law of the contract is the system of law which the parties expressly or impliedly choose as the law governing their contract or, in the absence of such choice, the 'system of law with which the contract has its closest and most real connection'.[1] This common law tripartite hierarchy is traditionally seen as comprising the following tiers: express choice, inferred choice and objective choice.[2] While the High Court of Australia has held that conceptually the first and second tiers 'are but species of the one genus, that concerned with giving effect to the intention of the parties',[3] evidential differences between them[4] necessitate three distinct inquiries.[5] In 1992, the Law Reform Commission ('LRC') released its *Choice of Law Report*, which stated that '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'.[6] The LRC made numerous recommendations — modelled on the provisions of the *Rome Convention 1980 on the Law Applicable to Contractual Obligations* ('*Rome Convention*')[7] — that have not been adopted by Australian legislatures.[8] Meanwhile, this field has become increasingly dynamic at an international level. Conflict rules for contract have been the subject of significant statutory incursion in the European Community ('EC') through the *Rome I*

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1 *Amin Rasheed Shipping Co v Kuwait Insurance Co* [1984] AC 50, 69 ('*Amin Rasheed*'); *Bonython v Commonwealth* [1951] AC 201, 219 ('*Bonython*').

2 J H C Morris et al (eds), *Dicey and Morris on the Conflict of Laws* (Stevens, 10th ed, 1980) 747–75; Lawrence Collins et al (eds), *Dicey and Morris on the Conflict of Laws* (Stevens, 11th ed, 1987) 1161–97; Peter North and James Fawcett, *Cheshire and North's Private International Law* (Butterworths, 11th ed, 1987) 451–66; Edward I Sykes and Michael C Pryles, *Australian Private International Law* (Law Book, 3rd ed, 1991) 595–611; C M V Clarkson and Jonathan Hill, *The Conflict of Laws* (Oxford University Press, 4th ed, 2011) 203–4. Unless otherwise indicated, subsequent references to the common law will be to Anglo-Australian common law.

3 *Akai Pty Ltd v The People's Insurance Co* (1996) 188 CLR 418, 440.

4 Ibid 441–2.

5 Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 2nd ed, 2011) 389. See also Martin Davies, Andrew Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 8th ed, 2010) 390–402.

6 Law Reform Commission, *Choice of Law*, Report No 58 (1992) 81 [82] ('*Choice of Law Report*'). Note that from 1996 onwards, the Law Reform Commission became known as the 'Australian Law Reform Commission' ('ALRC').

7 *Rome Convention on the Law Applicable to Contractual Obligations*, opened for signature 19 June 1980, [1980] OJ L 266/2 (entered into force 1 April 1991) ('*Rome Convention*').

8 Law Reform Commission, above n 6, 40. The ALRC again recommended the implementation of the *Choice of Law Report* in Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the* Judiciary Act 1903 *and Related Legislation*, Report No 92 (2001) 39.

Regulation.[9] The *Rome I Regulation* modifies the *Rome Convention* and transforms it into a Community instrument.[10] China, Australia's largest trading partner, has similarly adopted a legislative model by introducing the *Law on the Application of Law to Foreign-Related Civil Relations* ('*Foreign-Related Civil Relations Law*'),[11] which confines party choice to an express choice of law. Further, a global model for choice of law in international contracts is currently being explored at the Hague Conference on Private International Law ('Hague Conference'). In 2011, the Working Group on Choice of Law in International Contracts ('Working Group') of the Permanent Bureau of the Hague Conference ('Permanent Bureau'), finalised the draft articles[12] of a future non-binding[13] instrument[14] for conflict rules applicable to international commercial[15] contracts. These developments provide a fresh impetus for reform in Australia.

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9 *Regulation (EC) No 583/2008 of the European Parliament and of the Council of 4 July 2008 on the Law Applicable to Contractual Obligations* [2008] OJ L 177/6 ('*Rome I Regulation*').

10 Despite its supersession, the *Rome Convention* continues to apply to all contracts concluded before 17 December 2009: ibid art 28. Accordingly, various references will be made to the *Rome Convention* in this article.

11 «中华人民共和国涉外民事关系法律适用法» [Law on the Application of Law to Foreign-Related Civil Relations of the People's Republic of China] (People's Republic of China) National People's Congress, 28 October 2010, arts 2–3 ('*Foreign-Related Civil Relations Law*'). See generally Guangjian Tu and Muchi Xu, 'Contractual Conflicts in the People's Republic of China: The Applicable Law in the Absence of Choice' (2011) 7 *Journal of Private International Law* 179.

12 Working Group on the Choice of Law in International Contracts, 'Third Meeting of the Working Group on Choice of Law in International Contracts (28–30 June 2011)' (Permanent Bureau of the Hague Conference on Private International Law, 28–30 June 2011) 1 ('*Working Group Report 28–30 June 2011*'). The Permanent Bureau was first entrusted with this mandate in 2009: Permanent Bureau, 'Report of the Council on General Affairs and Policy of the Conference of 31 March to 2 April 2009' (Preliminary Document No 1 of December 2009 for the Attention of the Council of April 2010 on the General Affairs and Policy of the Conference, Hague Conference on Private International Law, December 2009).

13 For justification as to the non-binding nature of the proposed instrument, see Permanent Bureau of the Hague Conference on Private International Law, 'Choice of Law in International Commercial Contracts' (2010) 15 (3–4) *Uniform Law Review* 883, 888.

14 The instrument is entitled *Hague Principles on Choice of Law in International Commercial Contracts* ('*Draft Hague Principles*'). A proposal on choice of law in contracts, in the form of a convention, was first explored by the Hague Conference in 1980. Its form as a convention, however, did not garner sufficient member support. See H van Loon, 'Feasibility Study on the Law Applicable to Contractual Obligations' in Permanent Bureau of the Hague Conference on Private International Law (ed), *Proceedings of the Fifteenth Session* (Hague Conference on Private International Law, 1986) Tome I, 98; 'Procès-verbal No 2 (Meeting of Tuesday 16 October 1984 (Afternoon))' in Permanent Bureau of the Hague Conference on Private International Law (ed), *Proceedings of the Fifteenth Session* (Hague Conference on Private International Law, 1986) Tome I, 199.

15 At present, the *Draft Hague Principles* are confined to commercial contracts. See Permanent Bureau, 'Feasibility Study on the Choice of Law in International Contracts' (Preliminary Document No 7, Hague Conference on Private International Law, March 2009) 8 [33]. The proposed legislative changes advanced in this article will also be confined to commercial contracts. While further discussion is outside the scope of this article, suffice it to say that contracts that are characterised by an imbalance in bargaining power, such as consumer and employment contracts, give rise to particular considerations. See generally Clarkson and Hill, *The Conflict of Laws*, above n 2, 240–5; Brian Opeskin, 'The Use of Choice of Law Rules in Statutes Affecting Contracts: A Note on the *Insurance Contracts Act 1984*' (1996) 10 *Journal of Contract Law* 231.

It is a 'perennial struggle' for the law reformer to balance the need for certain and predictable solutions against the desire for 'flexible and individualised' ones.[16] Although careening too far in one direction is undesirable, legal certainty ought to be the *point de départ* for choice of law in contracts.[17] As Scoles puts it, '[p]arties enter into contracts with the intent and expectation to mutually bind themselves. Thus … "in contracts, … there is but one basic policy, namely protection of the expectations of the parties"',[18] including those expectations as to choice of law. 'Predictability in choice-of-law … is served, and party expectations are protected, by giving effect to the parties' own choice of the applicable law (*party autonomy*)'[19] where they have expressly or tacitly[20] made a choice. In the absence of party choice, predictability and legal certainty must be tempered by the need to accommodate unanticipated or exceptional contractual arrangements in a rational and individualised manner. A further, overarching ideal is to harmonise Australia's conflict rules with those of other nation states.[21]

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16 Symeon C Symeonides, 'Codification and Flexibility in Private International Law' in K B Brown and D V Snyder (eds), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law* (Springer, 2011) (forthcoming).

17 Lutz-Christian Wolff, 'Hong Kong's Conflict of Contract Laws: *Quo Vadis*?' (2010) 6 *Journal of Private International Law* 465, 482–3; Peter North, *Private International Law Problems in Common Law Jurisdictions* (Martinus Nijhoff, 1993) 134–6; Natalie Joubert, 'Le choix tacite dans les jurisprudences nationales: vers une intérpretation uniforme du *Règlement Rome I*' in Sabine Corneloup and Natalie Joubert (eds), *Le règlement communautaire 'Rome I' et le choix de loi dans les contrats internationaux* (LexisNexis Litec, 2011) 229, 229; Maxi C Scherer, 'Le choix implicite dans les jurisprudences nationales: vers une intérpretation uniforme du règlement? L'exemple du choix tacite résultant des clauses attributives de juridiction et d'arbitrage' in Sabine Corneloup and Natalie Joubert (eds), *Le Règlement communautaire 'Rome I' et le choix de loi dans les contrats internationaux* (LexisNexis Litec, 2011) 253, 253; A J E Jaffey, 'Choice of Law in relation to *Ius Dispositivism*' in P M North (ed), *Contract Conflicts* (North-Holland, 1982) 33, 38–9; Franco Ferrari, 'Quelques remarques sur le droit applicable aux obligations contractuelles en l'absence de choix de parties' [2009] *Revue critique de droit international privé* 459.

18 Ronald A Brand, 'The *Rome I Regulation* Rules on Party Autonomy for Choice of Law: A US Perspective' (Legal Studies Research Paper No 2011-29, University of Pittsburgh School of Law, December 2011) 5 n 3 citing Eugene F Scoles et al, *Conflict of Laws* (Thomson West, 4th ed, 2004) 947 [18.1] (citations omitted).

19 Ibid (emphasis in original). On party autonomy generally, see Brand, above n 18; Wolff, above n 17, 483–4; Joubert, above n 17, 231; Permanent Bureau, 'Feasibility Study on the Choice of Law', above n 15, 6.

20 'Tacit choice' is the appropriate descriptor to denote a real choice of law and will be used in respect of the proposed Australian legislation, the *Draft Hague Principles*, the *Rome I Regulation* and the *Rome Convention*. *Contra* Jan L Neels and Eesa A Fredericks, 'Tacit Choice of Law in the Hague Principles on Choice of Law in International Contracts' (2011) 44 *De Jure* 101, 104: Neels and Fredericks suggest that neither 'tacit choice' nor 'implied choice' should be used because of the inconsistent meanings attaching to this terminology in various countries. The term 'inferred choice' will be used where reference is made to the common law.

21 See generally W J Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 *International and Comparative Law Quarterly* 485, 501–3; Wolff, above n 17, 485–8; North, *Private International Law Problems in Common Law Jurisdictions*, above n 17, 136–9.

To this end, this article posits that Australia should introduce legislation[22] modelled on the *Rome I Regulation* and the *Draft Hague Principles*.[23] Tacit choice of law will be considered, while the applicable law in the absence of choice will be addressed in Part III.

Consistent with the approach of the High Court of Australia in *Akai Pty Ltd v The People's Insurance Co* ('*Akai*'),[24] it is proposed in Part II that tacit choice be absorbed as a narrow subset of express choice in order to give primacy to party autonomy. For this two-tiered test to operate effectively, only those choices that reflect the true will of the parties should be admissible.

In pursuit of harmonisation, it is also contended in Part II that the author's proposal on tacit choice, which refines art 3 of the *Draft Hague Principles*, be adopted by the Working Group of the Hague Conference. This is justifiable not only on the basis of harmonisation but a fortiori in light of the following. First, in order for the court to give effect to parties' tacit choice, it need only be demonstrated that the parties shared a common intention to contract with reference to the law of a particular country and not that the parties have reached a mutual binding agreement as to the same. The *circulus inextricabilis* occasioned by the use of 'agreement' in the context of formation and the possibility that a tacit choice of law agreement constitutes a source of contractual obligation both justify the preference for this common intention formulation.

Secondly, a formulation which requires a tacit choice to be *clearly established* or *clearly demonstrated* is sufficiently stringent and strikes an appropriate balance between giving effect to party autonomy on the one hand and ensuring predictability in contractual decision-making on the other. Finally, if a textual reference to an exclusive jurisdiction clause is to be made within the provision on tacit choice itself, a second explanatory sentence should be included to clarify its weight. It would also be instructive to provide clarification as to the stage, or stages, of the choice of law enquiry under which an expression of choice in a

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22 It is envisaged that Australia will adopt the approach set out in Law Reform Commission, above n 6, 25–6 [3.25]–[3.26], as modified by the recommendation contained in Australian Law Reform Commission, above n 8, 39 [3]. In brief, this would entail the enactment of uniform state and territory legislation, together with an identical federal statute confined to matters arising in federal courts rather than extending to those arising in all courts exercising federal jurisdiction. Further discussion is outside the ambit of this article.

23 The *Rome I Regulation* and *Draft Hague Principles* are suitable models on which to base the proposed Australian legislation. The *Rome I Regulation* is arguably the most comprehensive codified regime in the world governing the law applicable to contractual obligations and is the successor to the *Rome Convention* on which the recommendations in the *Choice of Law Report* were based. The *Draft Hague Principles* comprise the first universal non-binding instrument for contract conflicts. Relevantly, the Permanent Bureau envisages that, in their finalised form, the Hague Principles would serve 'as a model for legislators of countries where regulation of the law applicable to international contracts is … simply awaiting reform': see Permanent Bureau, 'Feasibility Study on the Choice of Law', above n 15, 8. This is also reflected in the Preamble to the *Draft Hague Principles*. Detailed reference to regimes elsewhere is outside the scope of this article. For a discussion of the contract conflicts regime in different countries, see Yoshihisa Hayakawa, 'New Private International Law of Japan: General Rules on Contracts' (2007) *Japanese Annual of International Law* 25; María Mercedes Albornoz, 'Choice of Law in International Contracts in Latin American Legal Systems' (2010) 6 *Journal of Private International Law* 23; and Wolff, above n 17.

24 (1996) 188 CLR 418, 442.

previous course of dealing and an expression of choice in a related transaction have relevance. This could simply be embodied in a recital.

With respect to a legislative provision in the absence of choice, it is proposed in Part III that a 'rules/approach combination'[25] be adopted by Australian legislatures. This process would involve: first, transposing the fixed categories of case enunciated in art 4(1) of the *Rome I Regulation* into legislation and potentially expanding these to encompass contracts commonly encountered in commercial transactions; secondly, adopting the presumption of characteristic performance, which mirrors art 4(2) of the *Rome I Regulation*, for all contracts falling outside or within two or more of these categories; and thirdly, providing for an escape clause. The escape clause would be activated in two situations. The first is where the law[26] cannot be determined by placing the contract within a fixed category or via the presumption of characteristic performance. The second is where the law of another country is *substantially more appropriate* for the applicable law. The judge would be required to engage in an issue-by-issue evaluation and take account of various principles enunciated in the legislation. The escape clause would be phrased with reference to the 'law of the country' — as per the *Rome I Regulation*, as opposed to the 'system of law' formulation existing at common law — in order to prevent non-state bodies of law applying in the absence of party choice.

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25 Symeonides, 'Codification and Flexibility', above n 16, 42.

26 It has been argued in Australian jurisdictions that an express or inferred choice of law in a contract should refer to the law of the chosen jurisdiction other than its rules of private international law, thus precluding the possibility of *renvoi*: Davies, Bell and Brereton, above n 5, 322–3. Interestingly, art 7 of the *Draft Hague Principles* allows for the possibility of *renvoi* where the parties expressly provide that their choice of law also refers to the rules of private international law of the chosen jurisdiction: *Working Group Report 28–30 June 2011*, above n 12, ii. There is attendant uncertainty in Australian jurisdictions, in light of the High Court decision in *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 and the decision of the Court of appeal in *O'Driscoll v J Ray McDermott SA* [2006] WASCA 25 as to whether 'law' *in the absence of party choice* contemplates both internal and choice of law rules so as to allow for the possibility of *renvoi*. See generally Mortensen, above n 5, 227–8. Accordingly, the position as to *renvoi* in contractual cases should be clarified by Australian legislatures. A total prohibition on *renvoi* could be effected by including a 'no-*renvoi*' provision analogous to art 20 of the *Rome I Regulation*. Alternatively, a partial prohibition on *renvoi* could be effected by including both a no-*renvoi* provision, applicable only to the governing law in the absence of choice, and a provision similar to that of art 7 of the *Draft Hague Principles* allowing for the possibility of *renvoi* where the parties so provide. A discussion of the relative merits of these alternatives is outside the scope of this article.

II TACIT CHOICE OF LAW

A *The Nature of the Problem*

It is almost universally[27] accepted that, subject to limited exceptions,[28] the law chosen by the parties governs a contract.[29] Accordingly, it is unproblematic to give effect to this choice where it has been made expressly. Where a choice of law is not made expressly, giving effect to that choice is significantly more difficult. In such circumstances, the common law provides that the proper law of the contract is the system of law that the parties impliedly choose as the law governing their contract. The common law model is beset by divergent conceptualisations of the implied proper law and scepticism as to the reality or artificiality of the connecting factor of inferred intention by which it is ascertained. Of equal concern is the scope of the proper law, brought about by: ambiguity surrounding the concept of 'choice'; the leniency of the standards by which a choice of law is inferred; and the probity and propriety of various indicia of inferred intention.

These issues justify a re-evaluation of: the classification of a subjective form of choice of law; the conceptualisation of choice as tantamount to mutual agreement or common intention; the extent to which a subjective choice must be demonstrated in order for the court to give it effect; and the indicators which evidence a subjective choice. To this end, a critical analysis of the reforms effected under the *Rome I Regulation* and those to be effected under the *Hague Principles* will be undertaken in Part II. To the extent that certain problems persist under these models, it is instructive to conclude with an assessment of the continuing relevance of any form of intermediate category subsisting at common law or transposed into statute.

B *Re-Evaluation of the Classification of a Subjective Form of Choice of Law*

1 *Implied Proper Law: Real or Illusory?*

Although flawed, the current test of inferred intention by which the implied proper law is determined is a welcome change from its predecessor. Under the *doctrine of implied choice*, which prevailed until the mid-1930s, the implied

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27 Parties are prevented from choosing the law applicable to their contract in some jurisdictions such as Brazil: see, eg, Dana Stringer, 'Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way' (2006) 44 *Columbia Journal of Transnational Law* 959, 968–77.

28 There are limits to an express choice of law that are beyond the scope of this article. For a discussion of the limitations at common law, see generally Mortensen, Garnett and Keyes, above n 5, 443–5. For a discussion of the limitations under the *Rome I Regulation*, see Brand, above n 18, 20–53.

29 *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, 603 (Reid LJ); *Rome Convention* art 3(1); *Rome I Regulation* art 3(1); *Foreign-Related Civil Relations Law* art 3; *Draft Hague Principles* art 2. See Neels and Fredericks, above n 20, 103–4, for a discussion of the wording of the proposed provision as to the general principle of party autonomy, and accompanying express choice of law clause, under the *Draft Hague Principles*.

proper law was determined by a presumed intention imputed to the parties.[30] By 1939, the doctrine had evolved such that the search for presumed intention was only enlivened in the absence of express intention.[31] The notion of presumed intention nevertheless came to be seen as illusory. In 1950, Carter stated that there is an 'absurd artificiality involved in attempting to apply a rule of law based on presumed common intention, to fact situations in which either such common intention is non-existent or its determination is a matter of the merest conjecture'.[32] The concept had likewise been discredited many years earlier in continental jurisdictions by the likes of Pillet,[33] Niboyet,[34] and Zitelmann.[35]

By the 1980s, the 'mythical' notion of presumed intention had been displaced by the current concept of inferred intention, as the connecting factor for the second step in the tripartite test.[36] The obvious difficulty, however, is distinguishing between inferred intention and presumed intention in so far as both concepts glean 'intention' by reference to the same 'terms and nature of the contract' and the 'general circumstances of the case'.[37]

2 *Second Tier: Subset of the Third Tier?*

Falconbridge postulates that inferred intention is 'merely a judicial mode of expressing the rule that the proper law is that of the country with which the transaction has the most real connection'.[38] In effect, this postulate conflates the second tier with the third. Cohn attributes this conflation to the rift between theory and practice.[39] While in theory, the objective test is only enlivened in the absence of inferred intention, 'in practice the implied intention disappears from the scene. There is no serious attempt to ascertain it. Where there is no express choice of law, the courts pass straight to a finding based on the "objective" test'.[40] North similarly criticises the relevance of the second tier as being nothing more than an example of the third, where 'identification of the most closely

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30 *Mount Albert Borough Council v Australasian Mutual Life Assurance Society* [1938] AC 224, 240 ('*Mount Albert*'); Peter Nygh, *Autonomy in International Contracts* (Oxford University Press, 1999) 104–5.

31 *R v International Trustee for the Protection of Bondholders AG* [1937] AC 500, 511; Nygh, above n 30, 105.

32 P B Carter, 'The Proper Law of the Contract' (1950) 3 *International Law Quarterly* 255, 259.

33 Antoine Pillet, *Principes de droit international privé* (Pedone, 1903) 429.

34 J-P Niboyet, 'La théorie de l'autonomie de la volonté' (1927-I) 16 I *Recueil des Cours* 1.

35 Ernst Zitelmann, *Internationales Privatrecht* (Ducker & Humblot, 1897) vol 2, 373. See also Ole Lando, 'The Proper Law of the Contract' (1964) 8 *Scandinavian Studies in Law* 105, 155.

36 Morris et al, above n 2, 747–75; Nygh, above n 30, 105–6.

37 Nygh, above n 30, 106. See *Mount Albert* [1938] AC 224, 240 (Lord Wright).

38 John Falconbridge, *Selected Essays on Conflict of Laws* (Canada Law Book Company, 1947) 351.

39 E J Cohn, 'The Objectivist Practice on the Proper Law of the Contract' (1957) 6 *International and Comparative Law Quarterly* 373, 387.

40 Ibid. Although Cohn's comments were made in relation to the separation between the subjective and objective limbs of the pre-war doctrine of implied choice, his comments are pertinent to the current discussion.

connected law … [is] relatively easy'.[41] Sykes and Pryles[42] and Carter[43] also express similar sentiments.

3 *Second Tier: Subset of the First Tier?*

Conversely, Nygh avers that inferred intention ought to be reconceptualised as 'tacit choice' and absorbed as 'a narrow subcategory of express choice'.[44] Indeed, this is the aim of the *Draft Hague Principles* and the *Rome I Regulation* which attempt to exorcise the spectre of inferred choice from the choice of law regime.[45] Granted, as Joubert remarks, inferred choice and tacit choice both constitute an 'unexpressed choice'.[46] The nuanced distinction between them, however, can be seen as one of inferred versus true intention. Nygh, Scherer and Joubert contend that only those situations in which there has been an actual choice made by the parties — albeit communicated through means other than a choice of law clause — fall within the ambit of tacit choice.[47] Nygh's and Joubert's conception of tacit choice is consistent with the approach envisaged by the majority of the High Court of Australia in *Akai*.[48] The majority stated:

> There is, in truth, only one question here … whether, upon the proper construction of the contract (which may include an expression of choice in direct language), the court properly may conclude that the parties exercised liberty given by the common law to choose a governing law for their contract. If the answer to this is in the negative, then the law itself will select a proper law.[49]

Australia's reclassification of tacit choice as a subspecies of express choice in *Akai*[50] — consistent with the approach taken under the *Rome I Regulation* and the *Draft Hague Principles* — not only gives primacy to party autonomy, but is a positive step towards predictability and certainty as to choice of law. However, it is clear from the operation of the *Rome Convention* that for this two-tiered test to operate effectively in Australia,[51] the scope of tacit choice must be narrowed to exclude purported choices that do not reflect the true will of the parties.

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41 North, *Private International Law Problems in Common Law Jurisdictions*, above n 17, 106.
42 Sykes and Pryles, above n 2, 600–5.
43 Carter, above n 32, 255.
44 Nygh, above n 30, 108.
45 Neels and Fredericks, above n 20, 104–5; Joubert, above n 17, 232.
46 Joubert, above n 17, 232.
47 Nygh, above n 30, 108; Scherer, above n 17, 254; Joubert, above n 17, 232.
48 (1996) 188 CLR 418.
49 Ibid 442.
50 Ibid 441–2.
51 Australian jurisdictions arguably have the same reservations to reform in this area as their English counterpart: see generally Jonathan Harris, 'Understanding the English Response to the Europeanisation of Private International Law' (2008) 4 *Journal of Private International Law* 347, 359–63.

C *Re-Evaluation of the Concept of Choice: 'Common Intention or Mutual Agreement'*[52]

If a choice is to be considered real, must it be demonstrated that the parties have reached a mutual agreement — that is, a consensus ad idem — in order for the court to give effect to their tacit choice?[53] Low argues that the answer ought to be no, asserting that if the 'parties shared a common intention that a particular system of law should apply to their transaction', then this should be sufficient.[54] This approach contests what is, according to Low, a 'widely held assumption' that the 'concept of the proper law … must be determined by an agreement as to the same by the parties'.[55] Briggs suggests that Low overstates this problem, observing that

> [t]hough there were occasions on which judges referred to an 'agreement' as having generated the proper law of the contract, the majority of judicial statements and observations lend more support to the view that it was simply common intention, expressed with sufficient clarity for the court to treat it as decisive, which determined the proper law … [F]or the court to give effect to that common intention was, for all practical purposes, for the court to give effect to an agreement on choice of law. There was no case in which an English court declined to give effect to an agreement on choice of law or refused to implement the parties' common intention as to the choice of law …[56]

While the distinction between common intention and mutual agreement might seem academic, continued consternation over the suitability of the proper law to the issue of formation necessitates a clear demarcation between the two concepts. Article 10 of the *Rome I Regulation* provides that the issue of formation is to be determined by the law that would govern the contract in the event that it were valid.[57] Several commentators, however, assert that subjective ascertainment of the applicable law is ill-suited to the issue of formation[58] for it gives 'weight to any [express or tacit] choice of law made by the parties even though the legal existence or validity of the instrument in which that choice is expressed is *ex*

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52 Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) 435.

53 Kelvin F K Low, 'Choice of Law in Formation of Contracts' (2004) 20 *Journal of Contract Law* 168, 175.

54 Ibid 170.

55 Ibid 169.

56 Briggs, *Agreements on Jurisdiction and Choice of Law*, above n 52, 435.

57 This mirrors the common law doctrine of the putative proper law: *Compania Naviera Micro SA v Shipley International Inc (The Parouth)* [1982] 2 Lloyd's Rep 351, 353 (Ackner LJ). North and Fawcett assert that the *putative proper law* is to be 'ascertained objectively' notwithstanding that the proper law of the contract may have been ascertained subjectively from an express, tacit or inferred choice in the contract: North and Fawcett, above n 2, 471–2; *Mynott v Barnard* (1939) 62 CLR 68, 80. This clearly erodes the possibility, suggested by Sykes and Pryles that 'as many facets of a contract as a possible [be] governed by the same law': Sykes and Pryles, above n 2, 613. No such distinction is drawn under the *Rome I Regulation* with the applicable law as to formation being ascertained by the usual rules in arts 3 and 4: David McClean and Kisch Beevers, *The Conflict of Laws* (Thomson Reuters, 7th ed, 2009) 382.

58 David Pierce, 'Post-Formation Choice of Law in Contract' (1987) 50 *Modern Law Review* 176, 176–83; D F Libling, 'Formation of International Contracts' (1979) 42 *Modern Law Review* 169.

hypothesi doubtful'.[59] Where those express or tacit choices are seen as constituting binding agreements, their operation is necessarily limited by the validity of the instrument which contains them. However, where express or tacit choices are construed as nothing more than an expression of the parties' common intentions as to the applicable law, it is irrelevant that the validity of an instrument merely evidencing those intentions is in doubt. Accordingly, Low avers that the use of *common intention* rather than *agreement* in this context would be instructive.[60]

'Common intention' and 'mutual agreement' are also conceptually incongruent to the extent that the latter may attract the language of private rights and reciprocal obligations.[61] Briggs analogises with jurisdiction agreements, suggesting that express choice of law agreements can be perceived as having the same dual function:

1 *expressly* communicating the parties' common intention to the court as to the proper law; and
2 'creating an implied negative stipulation' inter se that no law, other than the one *expressly* chosen, should apply to their contractual relationship so as to create 'private rights and obligations which are enforceable as such'.[62]

Granted, Briggs' comments are in the context of express, not tacit, choice of law agreements. Notwithstanding, could we similarly analogise that a tacit agreement as to choice of law has the same dualistic function of:

1 *tacitly* communicating the parties' common intention to the court as to the proper law; and
2 'creating an implied negative stipulation' inter se that no law, other than the one *tacitly* chosen, should apply to their contractual relationship so as to create 'private rights and obligations which are enforceable as such'?

Undoubtedly, significant strain is required to construe the parties' tacit choice of law agreement as a source of independent obligation giving rise to a right to sue where one party asserts that a body of law — other than the tacitly chosen one — should apply. Indeed, Brereton J in the recent decision of the New South Wales Supreme Court, *Ace Insurance Ltd v Moose Enterprise Pty Ltd*,[63] stated that '[w]here a choice of law is "inferred" rather than "express", it is not conceivable that there would be an implied negative stipulation not to invoke the jurisdiction of a court, which would apply a law other than the chosen one'.[64] His Honour used this observation to support his conclusion that an express choice of law does not constitute a contractual promise 'not to invoke the jurisdiction of a

59 McClean and Beevers, above n 57, 382.
60 Low, above n 53, 171–2.
61 Briggs, *Agreements on Jurisdiction and Choice of Law*, above n 52, 436. See T M Yeo, 'Breach of Agreements on Choice of Law' (2010) *Lloyd's Maritime and Commercial Law Quarterly* 194.
62 Briggs, *Agreements on Jurisdiction and Choice of Law*, above n 52, 436.
63 [2009] NSWSC 724 (31 July 2009).
64 Ibid [51].

court, which will not apply the chosen law' unless clear language demonstrating its promissory nature is used:

> In our system of private international law … choice of law is about ascertaining the intention of the parties as to the legal system that is to govern their contract, not about covenants or promises that a particular legal system will apply.[65]

An appraisal of a tacit choice of law agreement as a possible source of independent obligation is beyond the ambit of this article. However, the *circulus inextricabilis* occasioned by the use of 'agreement' in the context of formation[66] justifies a choice of law rule under which it need only be demonstrated that the parties shared a common intention to contract with reference to the law of a particular country, in order for the court to give effect to their tacit choice.

D *Re-Evaluation of the Extent to Which Tacit Choice Must be Demonstrated in Order for the Court to Give It Effect*

In order to give effect only to a true exercise of party autonomy, the criteria for identifying a tacit choice of law must be articulated clearly and stringently.[67] The standards required under the *Rome I Regulation*, common law and *Draft Hague Principles*, however, are 'highly divergent'.[68] Article 3(1) of the *Rome I Regulation* requires that a tacit choice be '*clearly demonstrated* by the terms of the contract or the circumstances of the case'.[69] Article 3(1) therefore comprises two elements: first, that a choice be made and secondly, that this choice be 'expressed' or clearly 'demonstrable'.[70] According to Briggs, 'this will preclude the argument that parties, as reasonable people, must have made a choice but which they did not trouble to express'.[71] On this interpretation, art 3(1) seems to accord with the two-tiered tacit choice approach advanced by Nygh.[72] It thus establishes a higher threshold than the traditional common law test, as declared by Lord Diplock for the House of Lords in *Amin Rasheed Shipping Co v Kuwait Insurance Co* ('*Amin Rasheed*'),[73] since Lord Diplock required a 'necessary' implication of choice.[74]

Neels and the Working Group of the Hague Conference, of which he is a member, assert that the word 'demonstrated', as per the *Rome I Regulation*, has an undesirable procedural connotation and therefore ought to be avoided in the formulation of the *Draft Hague Principles*.[75] The proposed

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65 Ibid.
66 Low, above n 53, 175.
67 Nygh, above n 30, 111.
68 Ibid 109.
69 *Rome I Regulation* art 3(1) (emphasis added).
70 Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 2nd ed, 2008) 166. Briggs espoused these two elements in respect of art 3(1) of the *Rome Convention*, which requires that a tacit choice be 'demonstrated with reasonable certainty'. It is clear that Briggs' analysis of art 3(1) of the *Rome Convention* is directly transferable to art 3(1) of the *Rome I Regulation*, with the sole addition that the choice be *clearly* demonstrated.
71 Ibid 166.
72 See Part II(B)(3) above.
73 [1984] AC 50, 60–5.
74 Cf Peter Stone, *The Conflict of Laws* (Longman, 1995) 237.
75 Neels and Fredericks, above n 20, 106.

alternatives — '*manifestly* clear'[76] or '*evident* from'[77] — could equally give rise to such criticisms in so far as they concern proof. Accordingly, the provisional proposal of the Working Group is that the 'choice … must … *appear clearly* from the provisions of the contract or the circumstances'.[78] While this formulation avoids any intimation of procedure, the term 'appear', which is defined as 'to become visible … especially without apparent cause',[79] is unsuitable. A more persuasive formulation is that the choice must be *clearly established*[80] by the provisions of the contract or the circumstances of the case. The use of the adverb 'clearly' as sub-modifier simply means 'in a clear manner; with clarity'.[81] Additionally, fewer procedural connotations attach to the word 'established'. Alternative formulations adopted in other instruments include 'demonstrated with sufficient certainty'[82] and 'established "beyond doubt"'.[83]

For Nygh, the difference between these various formulations is 'one of onus',[84] although by that he means standard of proof. He states that

> if the existence of the tacit choice must be established 'without doubt', it is clear that the court has very little leeway for speculation whether or not the choice was made … However, if the tacit choice need only be established 'with reasonable certainty', the court need only be satisfied that it was more likely than not the choice was made.[85]

It is clear that under the former, the court would seldom be in a position to discern unequivocally that the choice had been made, with the result that true exercises of party autonomy would yield to an objective determination. Conversely, under the latter formulation of 'reasonable certainty' courts are inclined to readily deduce tacit choices. The effect of this is two-fold: first, parties are unable to predict the outcome of their contractual decisions; and secondly, the mechanism provided by the law to determine the applicable law in the absence of party choice is undermined.[86] Under this regime, the mere presence of a jurisdiction clause selecting the courts of a specific

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76 Ibid 108–9 (emphasis added).

77 Ibid (emphasis added).

78 *Draft Hague Principles* art 3; *Working Group Report 28–30 June 2011*, above n 12, ii (emphasis added).

79 Judy Pearsall (ed), *Oxford Dictionaries Pro* (Oxford University Press, 2012).

80 Or 'clearly inferred', as proposed in Law Reform Commission, above n 6, 84.

81 Pearsall, above n 79.

82 Nygh suggests that this phrase would be the English translation of 'mit hinreichender Sicherheit' contained in the German version of the *Rome Convention*: Nygh, above n 30, 110.

83 *Convention on the Law Applicable to International Sales of Goods*, opened for signature 15 June 1955, 510 UNTS 147 (entered into force 1 September 1964) art 2; *Law No 105/1992 on the Settlement of Private International Law Relations* (Romania) art 74, cited in Nygh, above n 30, 109 n 25.

84 Nygh, above n 30, 111.

85 Ibid.

86 Jan L Neels and Eesa A Fredericks, 'Revision of the *Rome Convention* on the Law Applicable to Contractual Obligations (1980): Perspectives from International Commercial and Financial Law' (2004) 1 *Euredia: Revue européenne de droit bancaire et financier* 173, 179.

jurisdiction — in the absence of other supporting indicators — may suffice to establish the existence of a tacit choice.

Instead, a formulation which commands that a tacit choice be 'clearly established' or 'clearly demonstrated' effectively carves out an appropriate middle-ground.[87] Such a formulation strikes the appropriate balance between giving effect to party autonomy on the one hand and ensuring predictability in contractual decision-making on the other.

E *Re-Evaluation of the Indicators that Evidence a Tacit Choice*

The traditional common law indicators that give content to these formulations are well known,[88] though no one indicator can be considered as conclusive of the parties' common intention. The court may infer intention from the terms of the contract — notably, an exclusive jurisdiction[89] or arbitration clause or from the fact that the contract itself is in a standard form 'known to be governed by a particular system of law'.[90] The parties' intention can equally be inferred from the circumstances of the case, for example where an express choice has been made in a related transaction. While broadly these indicators remain the relevant criteria under the *Rome I Regulation* and the *Draft Hague Principles*, their

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87 The revision from the 'reasonable certainty' test under the *Rome Convention* to the 'clearly demonstrated' test under the *Rome I Regulation* was an attempt by the European Commission to quash the practice of the English and German courts in readily discerning a tacit choice where their French counterparts would not: Joubert, above n 17, 243–7; Commission of the European Communities, 'Green Paper on the Conversion of the *Rome Convention* of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation' (Green Paper No COM(2002) 654 final, Commission of the European Communities, 14 January 2003) 24 [3.2.4.2]. This practice is arguably attributable to the continuing influence of their pre-*Rome Convention* regimes and 'to a slightly more flexible form of words' in the German and English language versions of the *Rome Convention*. See also McLean and Beevers, above n 57, 360. The French language version of the test, which requires that the choice of law result 'de façon certaine des dispositions du contrat ou des circonstances de la cause', remained unchanged in the transition from the *Rome Convention* to the *Rome I Regulation*.

88 Mario Giuliano and Paul Lagarde, *Report on the* Convention on the Law Applicable to Contractual Obligations [1980] OJ C 282/1 17 ('*Giuliano-Lagarde Report*').

89 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 224–5 (Brennan J).

90 *Guiliano-Lagarde Report*, above n 88, 17. A Lloyd's Policy of Marine Insurance or a Lloyd's Standard Form of Salvage agreement would be the most obvious examples.

application is significantly altered. Other indicia,[91] employed to varying degrees under each of the regimes, will not be considered.[92]

1 Qui elegit judicem elegit jus*?*

The choice of a particular forum may indicate that the parties intend the contract to be governed by the law of that forum. At common law, an exclusive jurisdiction or forum clause is considered to be 'a weighty indication[93] of the parties' common intention, albeit 'one which may yield to others'.[94] The *Rome I Regulation* is more restrictive,[95] providing, by way of recital 12, that

> [a]n agreement between the parties to confer on one or more courts or tribunals of a Member State[96] exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.[97]

This recital was initially formulated as a presumption in favour of the law of the selected member-state forum but this presumption was subsequently abandoned. Framed as a presumption, it would have represented a substantive change in the

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91 This section is not intended to provide an exhaustive discussion of the potential indicia of tacit choice. Of note are: a reference to articles of a foreign act or code, which may simply amount to an incorporation by reference (Nygh, above n 30, 118; James Fawcett, Janeen Carruthers and Peter North (eds), *Cheshire, North and Fawcett: Private International Law* (Oxford University Press, 14th ed, 2008) 702 n 309); and 'the fact that the contract is in a form known to one country such as a trust, and not the other' (Nygh, above n 30, 118). Other indicators discussed at length in the literature include: the principle of validity (see Stone, above n 74, 241; Low, above n 53, 182); pre-contractual negotiations (see Joubert, above n 17, 244); and the behaviour of the contracting parties (see Joubert, above n 17, 244). The latter indicator was abandoned in the final draft of the *Rome I Regulation*.

92 The author chose to confine discussion to these two indicators in order to reflect the focus of a recent French language publication, arising out of a colloquium held in Dijon, France in September 2010, in which a separate chapter is dedicated to each: Scherer, above n 17, 253; Sabine Corneloup, 'Choix de loi et contrats liés' in Sabine Corneloup and Natalie Joubert (eds), *Le règlement communautaire 'Rome I' et le choix de loi dans les contrats internationaux* (LexisNexis Litec, 2011) 285.

93 *John Kaldor Fabricmaker Pty Ltd v Mitchell-Cotts Freight (Australia) Pty Ltd* (1989) 18 NSWLR 172, 187; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572, 587–91, 593, 596–600, 604–7 ('*Compagnie d'Armement*').

94 *Compagnie d'Armement* [1971] AC 572, 596 (Lord Wilberforce).

95 The restrictive nature of recital 12 of the *Rome I Regulation* can be explained by reference to the practices of the English courts under the *Rome Convention*. Under the auspices of the *Guiliano-Lagarde Report*, above n 88, 16, which states that: 'in some cases the choice of a particular forum may show in no uncertain manner that the parties intend the contract to be governed by the law of that forum [though] this must always be subject to the other terms of the cntract [sic] and all the circumstances of the case'. English courts continued to conform to the common law belief that a forum clause was a 'weighty indicator' when ascertaining tacit choice pursuant to the *Rome Convention*. While the German courts followed a similar trajectory, other contracting states, notably France, were loath to draw the inference. For a detailed discussion, see Scherer, above n 17, 259–66, 277.

96 Neels and Fredericks note that the 'reference to a member state is surprising as *Rome I* also determines that a law specified by the *Regulation* shall be applied whether or not it is the law of a member state' under art 2 of the *Rome I Regulation*: Neels and Fredericks, above n 20, 107.

97 *Rome Regulation* art 3(1) (recital 12).

law[98] and arguably, a reinstatement of the old English presumption *qui elegit judicem elegit jus*.[99]

Unlike the *Rome I Regulation*, which refers to the effect of a forum clause only in a recital, the *Draft Hague Principles* contain a direct reference as to the effect of a forum clause on tacit choice within the text of art 3 itself. The proposed wording is as follows: '[a]n agreement between the parties to confer jurisdiction on a court or an arbitral tribunal [in a given state] to determine disputes under the contract is *not in itself equivalent* to a choice of law'.[100] This wording is ambiguous in light of the divergent interpretations which have been given to a similarly negatively-worded formulation in the *Inter-American Convention on the Law Applicable to International Contracts* ('*Mexico Convention*'),[101] namely that a choice of 'forum does *not necessarily entail* selection of the applicable law'.[102] Neels and Fredericks, on the one hand, view the *Mexico Convention* as permissive, asserting that 'forum selection on its own *may* therefore, depending on the particular circumstances, indicate a tacit … choice of law'.[103] Nygh, on the other hand, perceives this as proscriptive, stating that the '*Mexico Convention* betrays a reluctance to accept a choice of jurisdiction clause as likely to indicate a choice of law'.[104]

It is therefore conceivable that under the *Draft Hague Principles*, a state such as France, with an historical reticence towards forum clauses as an indicator, might adopt an interpretation akin to that of Nygh while an Australian state or territory, holding fast to its common law roots,[105] might prefer an interpretation similar to that of Neels and Fredericks. Accordingly, in order to achieve harmonisation, if a reference to a jurisdiction clause is to be included within the text of the article itself,[106] the *Draft Hague Principles* should be amended by including a second explanatory sentence clarifying the weight to be afforded to

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98 Fawcett, Carruthers and North, above n 91, 707.

99 *Tzortzis v Monark Line A/B* [1968] 1 WLR 406, 413 (Salmon J).

100 *Draft Hague Principles* art 3; *Working Group Report 28–30 June 2011*, above n 12, ii (emphasis added).

101 *Inter-American Convention on the Law Applicable to International Contracts*, opened for signature 17 March 1994, 33 ILM 733 (entered into force 15 December 1996) ('*Mexico Convention*') art 7 (emphasis added).

102 Juenger states that art 7(2) of the *Mexico Convention* '[t]hough phrased negatively, … in effect incorporates the English presumption *qui elegit judicem elegit ius*': Friedrich K Juenger, 'The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons' (1994) 42 *American Journal of Comparative Law* 381, 388. It would perhaps be more correct to say that this is an attempt to prevent the presumption of *qui elegit judicem elegit ius* from being applied. The *Draft Hague Principles* could be seen as attempting to do the same.

103 Neels and Fredericks, above n 20, 107 (emphasis in original).

104 Nygh, above n 30, 117.

105 See generally Harris, above n 51, 347.

106 Dickinson felt that reference to the effect of a jurisdiction clause in the provision itself was unnecessary. He postulated that the wording of the section '[c]oupled with the guidance provided … by the *Giuliano-Lagarde Report* and by national courts … provide[d] a sufficiently clear criterion': Andrew Dickinson, Submission to the Commission of the European Communities, *Response to Green Paper on Law Applicable to Contractual Obligations ('Rome I')*, 16 October 2003, 5.

it. The following formulation would elucidate the impact of a jurisdiction clause on tacit choice:[107]

> A contract is[108] governed by the law chosen by the parties. That choice must be made expressly or must be *clearly established* by the terms of the contract or the circumstances of the case.[109] An agreement to confer *exclusive* jurisdiction on a court or arbitral tribunal in a given State, to determine disputes *arising out of or in connection with*[110] the contract, *does* not in itself *clearly establish* a choice of law of that State. *However, such an agreement is a probative indicator when corroborated by other indicators*.

(a) Characterisation and Probative Value of a Jurisdiction Clause

Contrary to Neels and Fredericks' contention,[111] and the provisional proposal of the Working Group,[112] the *Draft Hague Principles* should be confined to *exclusive* jurisdiction clauses, as so characterised at common law. The cogency of an exclusive jurisdiction clause, as an indicator of tacit choice of law, is attributable to its status as an immediate and bilateral agreement[113] not to sue in a jurisdiction other than the one selected. In other words, from a choice of law perspective, the probative value of an exclusive jurisdiction clause is in the mutual implied negative obligation attached thereto; an obligation traditionally viewed as absent from a non-exclusive jurisdiction clause.[114] Briggs, however, contests the view that non-exclusive jurisdiction clauses are devoid of negative obligation. He suggests that a clause which states that 'the parties agree that the courts of Ruritania are to have non-exclusive jurisdiction'[115] may give rise to several interpretations:

> (1) that either side may seise the nominated court, but … the freedom of the other side to seise any other court or courts is unrestricted; or (2) that either side may seise the nominated court, and once this is done, making it the first court to be seised, the jurisdiction of that court becomes exclusive; or (3) that either side may

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107 The italicised text represents the author's proposed additions and modifications to the *Draft Hague Principles*.

108 See Neels and Fredericks, above n 20, 103, for a discussion as to the exclusion of imperative language. Neels and Fredericks suggest that there is no need for the use of the word 'shall' as per the *Rome I Regulation*.

109 The *Draft Hague Principles* suggests the removal of the words 'of the case', instead preferring the word 'circumstances' in the abstract: *Draft Hague Principles* art 3; *Working Group Report 28–30 June 2011*, above n 12, ii. It is submitted that this would create unnecessary ambiguity.

110 The words 'arising of out of or in connection with' the contract should be adopted, as opposed to 'under' the contract as per the *Draft Hague Principles*, in order to reflect the wide drafting which typifies exclusive jurisdiction clauses. See, eg, *Incitec Ltd v Alkimos Shipping Co* (2004) 138 FCR 496; *Ethiopian Oilseeds & Pulses Export Corporation v Rio Del Mar Foods Inc* [1990] 1 Lloyd's Rep 86.

111 Neels and Fredericks, above n 20, 107.

112 *Draft Hague Principles* art 3; *Working Group Report 28–30 June 2011*, above n 12, ii.

113 Briggs, *Agreements on Jurisdiction and Choice of Law*, above n 52, 111.

114 Richard Garnett, 'The Enforcement of Jurisdiction Clauses in Australia' (1998) 21 *University of New South Wales Law Journal* 1, 5; Mary Keyes, 'Jurisdiction under the Hague *Choice of Courts Convention*: Its Likely Impact on Australian Practice' (2009) 5 *Journal of Private International Law* 181, 202.

115 Briggs, *Agreements on Jurisdiction and Choice of Law*, above n 52, 116–17.

> institute proceedings, in any court, but if either party then seises the nominated court, any proceedings in the first court will be discontinued and the defendant will appear and defend in the nominated court.[116]

Even if there is, as Briggs hypothesises, an implied negative obligation attaching to interpretations (2) and (3), this is at best conditional (in that performance is due only if or when the plaintiff avails itself of the nominated jurisdiction)[117] and unilateral[118] (in that that only the defendant is enjoined). We could liken a non-exclusive jurisdiction clause to an option, albeit with either party as the potential option-holder; an agreement not to sue elsewhere, conditional on the exercise of the option by the claimant to invoke the jurisdiction of the nominated court. While this analogy effectively posits an exclusive characterisation of the clause from the outset,[119] and thus contemplates performance of the negative obligation, performance is nonetheless conditional and it is this conditionality that undermines the clause's evidential utility as an expression of the parties' mutual intention. The fact that either party may or may not elect to exercise the option to invoke the named jurisdiction renders untenable a deduction that the parties, as rational actors, tacitly chose the named jurisdiction as the applicable law. It follows that the *Draft Hague Principles* in their current form — which allow for non-exclusive jurisdiction clauses to be used as indicators of choice — are incompatible with the concept of actual intent that underlies tacit choice of law.

The above analysis turns on the common law conceptualisation of exclusivity, as distinct from that proffered by the *Hague Convention on Choice of Court Agreements* ('*Choice of Court Convention*')[120] which Australia has not yet ratified. While, in principle, exclusivity under art 3 of the *Choice of Court Convention* is characterised by a negative obligation comparable to the common law,[121] it is in fact much broader. Provided a jurisdiction agreement refers to only one *contracting state*, it will be deemed exclusive unless otherwise expressly stated.[122] As Mortensen notes, this means that an agreement to 'submit to the jurisdiction of any competent court in the Commonwealth of Australia' would be construed as exclusive under the *Choice of Court Convention*, despite constituting a submission to the courts of eight jurisdictions.[123]

Whereas the *Choice of Court Convention* effectively creates a presumption of exclusivity if only one contracting state is named,[124] and thus goes beyond actual

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116 Ibid (citations omitted).

117 Ibid 119–20.

118 This is a reference to 'unilateral' in the ordinary sense of the word, and is not to be confused with its meaning in the context of unilateral contracts.

119 This analogy posits an exclusive characterisation in the same way that an option to purchase is characterised as a contract for the sale at the outset: *Goldsborough, Mort & Co Ltd v Quinn* (1910) 10 CLR 674, 678–9, 685 (Griffith CJ and Connor J).

120 *Hague Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (not yet in force) ('*Choice of Court Convention*').

121 Ibid art 3(a).

122 Ibid art 3(b); Reid Mortensen, 'The Hague and the Ditch: The Trans-Tasman Judicial Area and the *Choice of Court Convention*' (2009) 5 *Journal of Private International Law* 213, 230.

123 Mortensen, above n 122, 231.

124 Ibid 230–1.

intent, the common law principles dictate that the language of the clause must be construed in order to determine whether the parties, as rational actors, promised that no court other than that nominated would be seised with jurisdiction.[125] Only if this negative obligation is established will an exclusive characterisation be ascribed to the clause at common law. Accordingly, a forum clause should only be afforded probative value for the purposes of choice of law to the extent that it is a manifestation of intent and not merely by virtue of its 'exclusive' status under the *Choice of Court Convention*. It is clear that a presumption about what the parties 'must rationally have wanted',[126] in the *Choice of Court Convention*, is markedly different to the *Draft Hague Principles*' emphasis on actual intent in tacit choice of law. This divergence in approach at the Hague Conference preserves the traditional distinction in private international law between choice of law and choice of forum, and reflects the disparate considerations to which each gives rise.[127]

2 *Choice of Law Clauses in Related Transactions*

According to Collins et al, the common law contemplates two situations from which an inference of inferred choice may be drawn, namely:

1. an expression of choice in a previous course of dealing between the same parties; and
2. an expression of choice in a related transaction[128] between different parties.[129]

The first situation would permit an *inferred* choice to be drawn in contract A from an *express* choice of law clause contained in contract B, which arises out of a prior course of dealing between identical parties.[130] However, as Aikens LJ noted in *FR Lurssen Werft GmbH & Co KG v Halle*,[131] there seems to be no Anglo-Australian[132] common law authority in support of this proposition. The two decisions cited[133] by Collins et al rely on a choice of law contained in contract B not as an indicator of an inferred choice of law in contract A, but of an objective choice of law in contract A. One of these decisions, *Re United*

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125 Ibid; Briggs, *Agreements on Jurisdiction and Choice of Law*, above n 52, 111.

126 Briggs, *Agreements on Jurisdiction and Choice of Law*, above n 52, 115.

127 The High Court of Australia has emphasised the distinction between issues of jurisdiction and choice of law. See *John Pfeiffer Pty Ltd v Rogerson* (2002) 203 CLR 503, 521 [25] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 498 [7], 499 [10] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

128 For a detailed discussion of the types of contract that could be considered 'related' for the purposes of the *Rome Convention* and *Rome I Regulation*, see Corneloup, above n 92, 287,

129 Lawrence Collins et al (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet and Maxwell, 14th ed, 2006) 1574.

130 Ibid.

131 [2010] EWCA Civ 587 (23 April 2010) [18]–[19].

132 That is to say, in relation to England, there seems to be no authority that preceded the *Rome Convention*.

133 *Re United Railways of Havana and Regla Warehouses Ltd* [1960] Ch 52 ('*Re United Railways*'); *Diskmal Shipping Co SA v International Transport Workers Federation* [1986] 2 Lloyds Rep 165 ('*The Evia Luck*').

Railways,[134] refers to an *inferred* choice in a lease as an indicator of an *objective* choice in a trust agreement. The other, *The Evia Luck*,[135] relies on an *express* choice of law clause in a letter of undertaking as an indicator of *objective* choice in several other agreements. The *Rome Convention* unambiguously provided for an expression of choice in a previous course of dealing between the same parties to be an indicator of tacit choice in circumstances that did not indicate 'a deliberate change of policy by the parties'.[136] There is no apparent reason why this should not be the case under the proposed Australian legislation.

An expression of choice in a related transaction between different parties is the second situation suggested by Collins et al.[137] It would permit, for example, an inference of inferred choice to be drawn in contract A from an *express* choice of law clause contained in contract B,[138] where contract B is the principal agreement and contract A is a contract of guarantee, particularly where the guarantor is related to the party 'whose performance is guaranteed'.[139] The common law also provides for an *inferred* choice to be drawn in contract B from an *inferred* choice in contract A,[140] and, in doing so, careens away from legal certainty for contracting parties. Where the parties to contracts A and B are not identical, it would be improbable — in the absence of contrary indications — that the parties' common intention as to the law applicable to their contract was that the *tacitly-chosen* law of a related contract, to which they were not party, should govern.[141] Accordingly, where the parties are different, but the contract is part of a related transaction, the proposed Australian legislation should be limited to a *tacit* choice to be discerned in contract B from an *express* choice in contract A.

While the situations envisaged under Anglo-Australian law substantially accord with those contemplated by the *Rome Convention*,[142] their relevance to tacit choice under the *Rome I Regulation* is somewhat more doubtful. Recitals 20 and 21 of the *Rome I Regulation* expressly provide that an expression of choice in a previous course of dealing or a related transaction[143] may be used to support an objective finding of choice of law pursuant to art 4(5). This arguably casts doubt on the continued applicability of these indicators to the tacit choice inquiry under art 3(1) of the *Rome I Regulation*. Corneloup, however, suggests that

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134 *Re United Railways* [1960] Ch 52, 91–4.

135 [1986] 2 Lloyds Rep 165, 172–3.

136 *Giuliano-Lagarde Report*, above n 88, 17; *Lurssen Werft GmbH and Co KG v Halle* [2010] EWCA Civ 587 (23 April 2010) [20]–[21].

137 Collins et al, above n 129, 1574.

138 See *Mitsubishi Corporation v Alafouzos* [1988] 1 Lloyd's Rep 191; *Wahda Bank v Arab Bank Plc* [1996] 1 Lloyd's Rep 470; *Nicom Interiors Pty Ltd v Circuit Finance Pty Ltd* [2004] NSWSC 728 (6 August 2004).

139 Collins et al, above n 129, 1574.

140 See *Broken Hill Pty Co Ltd v Xenakis* [1982] 2 Lloyd's Rep 304, 306.

141 Corneloup, above n 92, 302. Nonetheless, a decision of the German Federal Court of Justice — in which the contract, from which the inference was to be drawn, contained only a tacit choice of law and under which the parties were different — would indicate otherwise, suggesting that this is not a phenomenon confined to the common law: Bundesgerichtshof-Zivilsachen [German Federal Court of Justice], VII ZR 404/99, 7 December 2000 reported in (2001) 27 NJW 1936.

142 See *Giuliano-Lagarde Report*, above n 88, 17.

143 *Rome I Regulation* (recitals 20–1).

recitals 20 and 21 should not be construed as precluding a 'solution founded on party autonomy [where] the conditions of tacit choice are satisfied'.[144] Clarification under the proposed Australian legislation as to the stage or stages of the choice of law enquiry under which these situations have relevance — whether under tacit choice, objective choice, or both — would be instructive. This is also an issue that warrants further discussion in the forthcoming commentary to the *Draft Hague Principles*.[145]

F *Re-Evaluation of the Continuing Relevance of Any Form of Intermediate Category*

It is clear that the *Rome I Regulation*, the *Draft Hague Principles*, and arguably, the High Court of Australia in *Akai*, a priori envisage a 'rigid separation' between tacit choice and the absence of choice.[146] The potential for the dividing line to become blurred in practice, however, is worrisome. Of particular concern, as Fawcett, Carruthers and North point out, is the attendant uncertainty as to 'how the inference to be drawn from the terms of the contract and the circumstances of the case stands in relation to the objective connections that the contract has with different countries'.[147]

1 *Indicators of Tacit Choice Inter Se*

The counsel of the *Guiliano-Lagarde Report* is that any inference that is drawn from a choice of jurisdiction clause is to 'always be subject to the other terms of the cntract [sic] and all the circumstances of the case'.[148] While this advice was issued in relation to the *Rome Convention*, there is nothing to suggest that it would differ with respect to the *Rome I Regulation*.[149] Thus an inference that parties intended the law of a given jurisdiction to govern their agreement can only be challenged by a conflicting inference. For example, an inference drawn from an express choice of law clause, contained in a related contract, can seemingly only be challenged by an exclusive jurisdiction clause or another indicator that evinces a true intention. Where such inferences conflict, however, it could hardly be said that a tacit choice has been 'demonstrated with reasonable certainty', let alone 'clearly demonstrated'.

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144 Corneloup, above n 92, 300–1 [author's trans]: 'solution fondée sur la volonté des parties … si les conditions [d'un choix implicite] sont remplies'.

145 The Working Group has indicated its intention to produce such a document: *Working Group Report 28–30 June 2011*, above n 12, 1.

146 Fawcett, Carruthers and North, above n 91, 705–6.

147 Ibid 705.

148 *Giuliano-Lagarde Report*, above n 88, 17.

149 See Fawcett, Carruthers and North, above n 91, 704–7.

In essence then, where indicators are of equal weight, a strict conceptualisation of the position would be thus:

1 An inference of tacit choice in favour of the law of a given jurisdiction will be inadmissible unless supported by another inference in favour of the law of that jurisdiction.
2 The corollary is that an inference of tacit choice will be extinguished by a conflicting inference of tacit choice.
3 Therefore, a tacit choice will be clearly established where there are two or more corroborating indicators giving rise to the same inference.

2 *Indicators of Tacit Choice and Their Relationship to Objective Connecting Factors*

A 'robust' conceptualisation of the position would be to construe those objective connections, ordinarily employed under art 4 of the *Rome I Regulation*, as 'circumstances of the case' under art 3, thereby bringing additional corroborating and conflicting indicators into the fray.[150] Indeed this was the conceptualisation to which Mance J alluded in *Egon Oldendorff*[151] in the context of the *Rome Convention*. It may be overly optimistic to expect that the stricter formulation under the *Rome I Regulation* and more rigorous approach under the *Draft Hague Principles* will ameliorate this troublesome conceptualisation.

It is arguable that any form of unexpressed choice[152] ought to be abolished, leaving only 'expressed choice' and 'no choice' be it in a common law or statutory framework. As to the common law, North,[153] Fawcett[154] and Clarkson and Hill[155] advocate the subsumption of the second tier of the traditional common law tripartite test by the third. They suggest that the traditional indicators of inferred intention — a choice of forum or arbitration clause, or technical language — should be viewed as 'purely objective factors, albeit important ones'.[156] As to a statutory framework, this appears to be the effect of art 3 of the Chinese *Foreign-Related Civil Relations Law*, which limits party choice to an 'explicit' choice of law.[157] Joubert concedes that this is an

150 Ibid 706.
151 *Egon Oldendorff v Liberia Corporation* [1995] 2 Lloyd's Rep 64, 68–70. With respect, this is impermissible on a strict reading of art 3 of the *Rome Convention*, which allows an inference drawn from one tacit indicator, only to be countered by an inference drawn from another tacit indicator; Fawcett, Carruthers and North, above n 91, 706.
152 Thompson goes so far as to suggest that even express choice ought to be abolished: A Thompson, 'A Different Approach to Choice of Law in Contract' (1980) 43 *Modern Law Review* 650.
153 North, *Private International Law Problems in Common Law Jurisdictions*, above n 17,106.
154 North and Fawcett, above n 2, 461.
155 C M V Clarkson and Jonathan Hill, *Jaffey on the Conflict of Laws* (Butterworths, 1997) 204; Clarkson and Hill, *The Conflict of Laws*, above n 2, 217.
156 North and Fawcett, above n 2, 461.
157 *Foreign-Related Civil Relations Law* art 3.

ever-present possibility,[158] although it would be a 'serious blow' to party autonomy. It may, nonetheless, bring greater certainty and predictability on the basis that the governing law is determined objectively when the parties have been careless in expressing their choice or have failed to make one. Adopting the Chinese solution, however, would not be a panacea, given the problems that beset the objective choice of law enquiry.

III APPLICABLE LAW IN THE ABSENCE OF CHOICE

A *The Nature of the Problem*

In the absence of express or inferred choice, the common law provides that the proper law of the contract is 'the system of law with which the transaction has its closest and most real connection'.[159] Sykes and Pryles,[160] Davies, Bell and Brereton,[161] and Mann[162] all criticise the 'hallowed'[163] closest and most real connection test for its lack of content and difficulty in application. Kincaid[164] and the Australian Law Reform Commission ('ALRC')[165] cite the uncertainty and unpredictability for contracting parties that arises out of the test — particularly when physical connecting factors are 'evenly balanced' — as one of its main shortcomings. The *Rome I Regulation* substantially preserves this test though in the form of an 'escape clause'.[166] The wording of the test, however, has been modified such that the governing law is the law of the country with which the contract is most closely connected.[167] Despite some suggestion by the Permanent Bureau that it would be desirable for the *Draft Hague Principles* to contain rules on the applicable law in the absence of an express or tacit choice,[168] the *Draft Hague Principles* do not.[169]

While in the Australian context, the ALRC concedes that 'the problem of evenly balanced [connecting] factors has not created any significant problems',[170] the common law test has been the subject of significant criticism

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158 Joubert, above n 17, 252. This solution was adopted in: *Société des Fourrures Renel c/Allouche*, Cour de cassation [French Court of Cassation], 6 July 1959 reported in (1959) *Revue critique de droit international privé* 708.

159 *Bonython* [1951] AC 201.

160 Sykes and Pryles, above n 2, 611.

161 Davies, Bell and Brereton, above n 5, 399.

162 Mann made this criticism at first instance in 1950: F A Mann, 'The Proper Law of the Contract' (1950) 3 *International Law Quarterly* 60, 69–70.

163 Davies, Bell and Brereton, above n 5, 399.

164 Peter Kincaid, 'Choice of Law in Contract: the ALRC Proposals' (1995) 8 *Journal of Contract Law* 231, 241.

165 Law Reform Commission, above n 6, 94.

166 *Rome I Regulation* arts 4(3), 4(4). The escape clause has also been referred to as a 'rule of displacement': Andrew Dickinson, 'Rebuttable Assumptions' (2010) *Lloyd's Maritime and Commercial Law Quarterly* 27, 32.

167 *Rome I Regulation* arts 4(3), 4(4).

168 See Permanent Bureau of the Hague Conference on Private International Law, above n 13, 899–901.

169 *Working Group Report 28–30 June 2011*, above n 12.

170 *Choice of Law Report*, above n 6, 94.

and calls for reform.[171] The criticisms broadly relate to two distinct issues. The first concern is the vacuous nature of the test, the consequent discretion afforded to a judge and the uncertainty thereby created. The second issue relates to the suitability of drawing connections with a 'system of law' as opposed to the 'law of a country'. This question is of practical importance when we consider that increasingly prominent non-national legal orders could be construed as 'systems of law'.

B *The Proposed Solution*

The author's proposed solution for Australian legislatures is to circumscribe the broad judicial discretion inherent in the application of the common law test by reducing it to an escape clause. The escape clause is only activated in default of the first two steps in the process. While the proposed regime broadly mirrors that established under the *Rome I Regulation*, several key differences exist. The first step is to not only transpose the fixed categories of case enunciated in art 4(1) of the *Rome I Regulation* into legislation, but also to potentially expand these to encompass contracts commonly encountered in commercial transactions. Through fixed rules for common commercial contracts, parties are better able to predict the legal consequences of their decisions in advance. The second step is to adopt the presumption of characteristic performance, which mirrors art 4(2) of the *Rome I Regulation*, for all contracts falling outside or within two or more of these categories. This is an appropriate mechanism to deal with bespoke contracts that fall within several fixed categories and which may have multiple connections with several jurisdictions. The third step is to provide for an escape clause, to allow for a controlled measure of judicial flexibility that is triggered in two distinct situations.[172] The first situation is where the law cannot be determined by placing the contract within a fixed category (as discussed in step 1) or via the presumption of characteristic performance (as discussed in step 2). The second situation is where the law of a country other than that determined under steps 1 or 2 is *substantially more appropriate* for the applicable law. The discretion afforded to a judge under the escape clause will be circumscribed to the extent that he or she must take into account various guiding principles. The escape clause also provides for issue-by-issue evaluation and therefore contemplates a qualitative determination in light of the facts of the case. The escape clause will be phrased with reference to the 'law of the country', as per the *Rome I Regulation*, as opposed to the 'system of law' formulation existing at common law. Each of these steps will be analysed in turn.

1 *Step 1: Provision for, and Potential Expansion of, Fixed Categories of Contractual Case*

When compared to the common law, the *Rome I Regulation* radically changes the process by which the applicable law in the absence of choice is to be ascertained. The process begins with art 4(1), which provides 'hard and fast

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171 North, *Private International Law Problems in Common Law Jurisdictions*, above n 17, 106.

172 *Rome I Regulation* arts 4(3), 4(4); P M North and J J Fawcett, *Cheshire and North's Private International Law* (Butterworths, 13th ed, 1999) 572–3.

rules' to determine the governing law for eight types of contract.[173] For all contracts falling outside or within more than one of these categories, art 4(2) provides for the presumption of characteristic performance to apply. For the reasons discussed below, those types of agreement commonly encountered in commercial contracting, including, but not limited to, joint venture agreements and contracts of exchange, fall outside the ambit of arts 4(1) and (2) of the *Rome I Regulation*.[174] As such, these agreements are subjected to an escape clause virtually identical to the common law closest connection test.[175] Accordingly, the contractual categories envisaged in art 4(1) could be expanded under the proposed instrument for Australian legislatures to reflect the exigencies of commercial practice.

Joint venture agreements and contracts of exchange could comprise additional, separate categories of case. There are, however, no clear solutions of general application for these categories of case as yet.[176] One possible solution for a joint venture contract could be to employ the tool of objective *dépeçage*[177] in order to 'split the joint venture contract'[178] into its component parts, for example, 'an intellectual property licence, a training framework for staff [and inter alia] the construction of production sites involving transfer of know-how'.[179] The law governing each of them could then be determined using a fixed rule under art 4(1) (where applicable) for one of the component parts and 'the characteristic performance technique'[180] for the remainder of the parts.[181]

2 *Step 2: The Presumption of Characteristic Performance*

Where a contract falls outside, or within two or more of the eight categories listed in art 4(1) of the *Rome I Regulation*, the presumption of characteristic performance is applied to ascertain the applicable law. This presumption provides that a 'contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence'.[182] While perspectives on this presumption are divergent,[183] it

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173 See generally Jonathan Hill and Adeline Chong, *International Commercial Disputes* (Hart, 4th ed, 2010) 524.

174 Clarkson and Hill, *The Conflict of Laws*, above n 2, 222; Ulrich Magnus, 'Article 4 *Rome I Regulation*: The Applicable Law in the Absence of Choice' in Franco Ferrari and Stefan Leible (eds), Rome I Regulation: *The Law Applicable to Contractual Obligations in Europe* (Sellier European Law, 2009) 27, 49–50; Zheng Tang, 'Law Applicable in the Absence of Choice — The New Article 4 of the *Rome I Regulation*' (2008) 71 *Modern Law Review* 785, 792–3.

175 Ibid.

176 Fiorella F Alvino, 'Italy' in Dennis Campbell and Antonida Netzer (eds), *International Joint Ventures* (Kluwer Law International, 2009) 197, 213–15; James J Fawcett and Paul Torremans, *Intellectual Property and Private International Law* (Oxford University Press, 2nd ed, 2011) 762–7. This is undoubtedly an area that requires further development.

177 Objective *dépeçage* is explained in detail in Part III(B)(3) below.

178 Fawcett and Torremans, above n 176, 763.

179 Ibid.

180 Ibid.

181 The rule could read as follows: 'art 4(1)(i): a joint venture contract shall be split into its component parts with each part being governed by the law applicable to that part as determined by points (a)–(h) above or by paragraph 2'.

182 *Rome I Regulation* art 4(2).

has for the most part been supported as a welcome attempt to 'elucidate the vague notion of closest and most real connection'.[184] Yet in most modern international contracts, which by their very nature are complex, the characteristic performer under art 4(2) will either be difficult, or impossible, to ascertain. In relation to the former, recital 19 of the *Rome I Regulation* imparts guidance as to how to determine the characteristic performer in a complex contract 'consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract'.[185] This guidance is premised on the court first ascertaining the 'centre of gravity' of the contract. Yet, as Hill and Chong note, the law to which the centre of gravity test points is not necessarily the law that will apply because 'it is not the place of characteristic performance which is important but the territorial connection of the characteristic performer'.[186] Where it is impossible to ascertain the characteristic performer, such as where both parties agree to perform obligations of the same kind,[187] the applicable law will invariably be identified by the closest connection test under the escape clause in art 4(4). Indeed, the German and Italian experience indicates that where the contract in question is part of a related transaction, it will be dealt with by the escape clause using the related contract as a connecting factor.[188]

Given the failure of the process under art 4(2) of the *Rome I Regulation* to 'clearly … provide the answer for the most common types of international contract',[189] the author urges Australian legislatures to explore the possibility of expanding the fixed contractual categories envisaged in art 4(1), per step 1

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183 See, eg, J G Collier, *Conflict of Laws* (Cambridge University Press, 1987). Collier labels it a 'novel and cumbersome provision' and 'an unnecessary insertion into the Convention': at 178; cf Lawrence Collins, 'Practical Implications in England of the *EEC Convention on the Law Applicable to Contractual Obligation*s' in Peter North (ed), *Contract Conflicts* (North-Holland, 1982) 205, 209; Collins argues that the presumption unduly prefers the law of the country of residence of the party who is the characteristic performer. This is consistent with the submission of Stone, that 'the presumption amounts to an arbitrary preference, of uncertain strength, for the law of the seller or other supplier's country': Stone, above n 74, 245. *Contra* Paul Lagarde, 'Le nouveau droit international privé des contrats après l'entrée en vigeur de la Convention de Rome du 19 juin 1980' (1991) *Revue critique de droit international privé* 287, 294; Clarkson and Hill, *Jaffey on the Conflict of Laws*, above n 155, 208: Lagarde and Clarkson and Hill take the opposing viewpoint, asserting that it prioritises the legitimate expectations and convenience of the parties. Pryles makes similar remarks: Michael Pryles, 'Reflections on the *EEC Contractual Obligations Convention* — An Australian Perspective' in P M North (ed), *Contract Conflicts* (North-Holland, 1982) 323, 327. According to Clarkson and Hill, this preference is justifiable on the basis that the characteristic performer is more likely to have recourse to the law in fulfilling its obligation: Clarkson and Hill, *Jaffey on the Conflict of Laws*, above n 155, 208. Lando cites economic efficiency as justification, opining that in international contracts for the sale of goods the application of the seller's law may be supported on the ground that 'mass bargaining like mass production, brings down the cost and the price': Ole Lando, 'The *EEC Convention on the Law Applicable in Contractual Obligations*' (1987) 24 *Common Market Law Review* 159, 202.

184 Lagarde, above n 183, 294 [author's trans]: 'La convention a cherché à concrétiser la notion trop vague de liens les plus étroits'. See also Sykes and Pryles, above n 2, 611.

185 *Rome I Regulation* (recital 19).

186 Hill and Chong, above n 173, 525.

187 *Apple Corps Ltd v Apple Computer Inc* [2004] EWHC 768 (Ch) (7 April 2004) [53]–[56]; Clarkson and Hill, *Conflict of Laws*, above n 2, 222.

188 Corneloup, above n 92, 289.

189 North, *Private International Law Problems in Common Law Jurisdictions*, above n 17, 140.

above. That is not to say, however, that the presumption of characteristic performance is entirely redundant. On the contrary, if art 4(1) were expanded to provide for joint venture contracts by separating out their component parts, the law applicable to some of those parts would fall to be determined by the presumption of characteristic performance. Moreover, the presumption is an appropriate mechanism to deal with the burgeoning trend of bespoke contracts[190] that undoubtedly fall within several categories under art 4(1) and which may have a myriad of connections with several jurisdictions. It is for these reasons that the presumption of characteristic performance should be incorporated as the second step in the process in the proposed Australian legislation.

3 *Step 3: Escape Clause*

Where the applicable law cannot be determined under the fixed rules in art 4(1) of the *Rome I Regulation* or via the presumption of characteristic performance in art 4(2), the closest connection test applies per art 4(4). This may be classified as an 'Impossibility Escape Clause'. What may be termed the 'Displacement Escape Clause' is triggered in an entirely different situation: where it is apparent from all the circumstances that a contract is *manifestly* more closely connected to the law of a country other than the law indicated under art 4(1) or (2) of the *Rome I Regulation*, the law of that country will apply per art 4(3). Put another way, the Impossibility Escape Clause is only activated in default of one of the first two steps in the proposed process, whereas the Displacement Escape Clause is triggered despite the satisfaction of one of the first two steps.

The primary advantage of employing the closest connection test as an escape clause (per the *Rome I Regulation*), rather than as the principal connecting factor for the choice of law rule (per the common law), is that it allows for controlled judicial flexibility.[191] Both the common law and the *Rome I Regulation* use the 'closest connection' as a 'soft' connecting factor, providing for an individualised solution to be developed in light of the circumstances of the particular case.[192] Accordingly, the judge is afforded 'considerable discretion in identifying the state of the applicable law'.[193] Deployed as an escape clause, however, the closest connection test plays a residual role, applicable only in cases not covered by the choice of law rules set out in art 4(1) or (2) or in cases where it is apparent that a contract is *manifestly* more closely connected to the law of a country other than the law indicated under arts 4(1) or (2). As such, the *Rome I Regulation* seems to accord less judicial discretion than the common law test.[194]

According to Symeonides, 'the two problematic features of the escape under the *Rome I Regulation* are that the escape is: (a) phrased in exclusively geographical or quantitative terms; and (b) does not permit issue-by-issue

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190 Of course, the characteristic performer may be impossible to identify in some bespoke contracts in which case the escape clause will be triggered.

191 Symeonides, 'Codification and Flexibility', above n 16, 16.

192 Ibid 15.

193 Ibid 17.

194 Ibid 28. Symeonides reaches this conclusion by relying on the 'basic principles regarding the burden of persuasion'.

evaluation'.[195] The risk that its application will degenerate into a 'mechanical counting' of connecting factors is ever-present.[196] Equally problematical is the impasse that emerges when these factors are evenly balanced. In an effort to alleviate the first problem, the proposed Australian legislation should provide for a '*most appropriate* test' loosely modelled on the English statute for torts conflicts[197] which preceded the *Rome II Regulation*.[198] It would invite a 'qualitative analysis'[199] of connecting factors, from a series of guiding principles embodied in the legislation, for the two types of escape clauses defined above.

In an attempt to address the second problem, both escape clauses would provide for the applicable law to be that which is most appropriate to the resolution of *each of the issues arising in the case*. There is, of course, a possibility that this may result in the law of one country being applied to one issue and the law of a different country being applied to another, a phenomenon known as objective *dépeçage*. A second breed of objective *dépeçage*, referred to in step 1 above, is where the law of one country is applied to one part of the contract and law of a different country is applied to another. For ease of distinction, we shall refer to the former type as issue-based objective *dépeçage* and the latter as contract-based objective *dépeçage*.

Whether the *Rome I Regulation* permits either type of objective *dépeçage* is contested.[200] Contract-based objective *dépeçage* was expressly authorised under art 4 of the *Rome Convention* which provided that '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'. This textual reference was not included in the *Rome I Regulation* and its proposed omission did not comprise one of the twenty questions posed in the Green Paper.[201] Consequently, art 4 of the *Rome I Regulation* is silent on contract-based objective *dépeçage*.[202] It seems, however, that both escape clauses currently contained in art 4 of the *Rome I Regulation* are phrased in such a way as to designate a law applying to the whole of the contract, 'not to parts or aspects of it'.[203] The *Rome I Regulation* is also silent on issue-based objective *dépeçage*.

Equally contested is whether the common law permits *dépeçage* of a contract. The traditional view advanced by Evatt J in *Wanganui-Rangitikei Electric Power*

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195 Ibid 37.

196 Ibid.

197 *Private International Law (Miscellaneous Provisions) Act 1995* (UK) c 42, s 12.

198 *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations* [2007] OJ L 199/40 ('*Rome II Regulation*').

199 Symeonides, 'Codification and Flexibility', above n 16, 27.

200 For an extensive discussion, see Cyril Nourrissat, 'Le Dépeçage' in Sabine Corneloup and Natalie Joubert (eds), *Le règlement communautaire 'Rome I' et le choix de loi dans les contrats internationaux* (LexisNexis Litec, 2011) 205.

201 Commission of the European Communities, 'Green Paper', above n 87, 6–7.

202 Nourrissat, above n 200, 211.

203 Concerning the equivalent 'all or nothing' proposition in the *Rome II Regulation* see the comments of: Symeonides, 'Codification and Flexibility', above n 16, 39. See also Symeon C Symeonides, 'The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons' (2008) 82 *Tulane Law Review* 1741, 1783–4.

Board v Australian Mutual Provident Society[204] is that it does not. This position is questionable, however, in light of *Weckstrom v Hyson*,[205] which contemplated the possibility of contract-based objective *dépeçage*, and *Libyan Arab Foreign Bank v Bankers Trust Co*,[206] the result of which seems to be contract-based objective *dépeçage*.[207]

Whatever the true position on objective *dépeçage* at common law and under the *Rome I Regulation*, Symeonides' reasoning suggests that both systems sanction issue-based objective *dépeçage*, albeit obliquely, in so far as they provide for one law to potentially apply to the issue of consent and material validity[208] and another to formal validity.[209] In any event, confining the issues in dispute to those in respect of which a conflict exists and applying the law most appropriate for their resolution at the escape clause stage is sufficiently cautious and 'more conducive to a nuanced, individualized, and thus, more rational, resolution of conflicts problems'.[210] It is likely that this would also reduce the risk of deadlock arising out of evenly balanced connecting factors because only those factors relevant to a given issue will fall to be considered.

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204 (1934) 50 CLR 581, 604.

205 [1966] VR 277, 284–5.

206 [1989] QB 728, 747.

207 See generally Mortensen, Garnett and Keyes, above n 5, 452.

208 Article 10 of the *Rome I Regulation* provides that

> a party, in order to establish that he [or she] did not consent, may rely upon the law of the country in which he [or she] has his [or her] habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his [or her] conduct in accordance with the law [that would govern it under the *Regulation* if the contract or term were valid].

As to the common law, where the issue is whether the contract is void ab initio, it is unclear whether the reality of consent is determined by the putative proper law or the *lex fori*: see *Mackender v Feldia AG* [1967] 2 QB 590; Mortensen, Garnett and Keyes, above n 5, 456.

209 Article 11(2) of the *Rome I Regulation* provides that a

> contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under th[e] Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his [or her] habitual residence at that time.

As to the common law, the decision of *Oceanic Sun Line Special Shipping Co Inc v Fay* (1998) 165 CLR 197 suggests that issues of formation should be determined in accordance with the *lex fori* as opposed to the putative proper law, per *Compania Naveria Micro SA v Shipley International Inc (The Parouth)* [1982] 2 Lloyd's Rep 351, 353 (Ackner LJ).

210 Symeonides, 'The American Revolution and the European Evolution in Choice of Law', above n 203, 1782.

The proposed drafting of the clauses is as follows:

Impossibility Escape Clause:

> 4(3) Where the applicable law cannot be determined pursuant to paragraphs 1 or 2,[211] the contract shall be governed by the law of the country that is most appropriate for determining each of the issues arising in the case, having regard to the principles enunciated in paragraph 5.

Displacement Escape Clause:

> 4(4) Where it appears, in all the circumstances, from a comparison of —
>
> (a) the significance of the factors which connect a contract with the country whose law would be the applicable law under paragraphs 1 or 2; and
>
> (b) the significance of any factors connecting the contract with another country,
>
> that it is substantially more appropriate, having regard to the principles enunciated in paragraph 5, for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the law — as determined under paragraphs 1 or 2 — is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

Guiding Principles:

> 4(5) In determining the applicable law under section 4(3) or (4), 'account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts',[212] of the 'guidelines, customs, and principles of international commercial law',[213] of 'commercial usage and practices',[214] and of 'factors relating to the parties'.[215]

(a) Law of the Country, System of Law or Rules of Law?

As presented in the above drafting, the escape clause should be phrased with reference to the 'law of the country', as opposed to the 'system of law' formulation at common law. The common law provides that where the parties have made no choice, the proper law is the system of law most closely connected

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211 Paragraphs 1 and 2 are those providing for fixed rules and the presumption of characteristic performance respectively.

212 *Rome I Regulation* (recitals 20, 21).

213 *Mexico Convention* art 10.

214 Ibid.

215 *Private International Law (Miscellaneous Provisions) Act 1995* (UK) c 42, s 12(2).

to the transaction,[216] rather than the law of the country most closely connected to the contract under art 4 of the *Rome I Regulation*.[217] This distinction is of no small significance. Nygh and Davies state that the effect of the 'system of law' formulation is that 'the form and content of the contract assumes greater importance'.[218] The corollary is that under the 'country' formulation, terminology typical of a certain legal system may be 'render[ed] less relevant'.[219] Moreover, under the 'country' formulation, the place of contracting and the place of performance would carry greater weight.[220] Stone, relying on the speech of Lord Wilberforce in *Amin Rasheed*,[221] avers that the 'system of law' formulation effectively restores the pre-war 'doctrine of implied choice[222] under a pseudonym'.[223] Stone's argument is consistent with that of Briggs, who states that art 4 of the *Rome I Regulation* 'makes it difficult to give effect to what may be seen to have been the implied intention as regards the governing [*system of*] *law* if the balance of factual connections points to a different *country*'.[224] Stone asserts that the 'country' formulation in art 4 'seems designed to discourage courts from adopting the appropriate perspective'; that is, according to Stone, one where the inferred intentions of the parties inform the objective proper law inquiry.[225] Contrary to Stone, it is suggested that the 'country' formulation, divorced from any concept of intention, is more befitting.

The distinction is also apparent from a discussion of the case law. North and Fawcett refer to the decision in *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd*,[226] suggesting that if the 'system of law' formulation were adopted, it is likely that English law would be the proper law whereas, pursuant to the 'country' approach, other indicators would point more conclusively to Scotland.[227] Similarly, Sykes and Pryles cite the decision of *Rossano v Manufacturers' Life Insurance Company*[228] where the court held that the proper law, under the 'system of law' conception, was the law of Ontario, but remarked that the 'country' formulation would have yielded a proper law of Egypt.[229] For Briggs, this is the correct result. He laments that under the

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216 Some commentators suggest that it has not been entirely clear whether the search at common law is one for the system of law or the country or a combination of both, with which the transaction must have its closest connection: see North and Fawcett, above n 2, 463, and Sykes and Pryles, above n 2, 609. However, recent commentaries promote the 'system of law' formulation relying on clarification provided in *Amin Rasheed* [1984] AC 50: see, eg, Davies, Bell and Brereton, above n 5, 399,

217 *Rome I Regulation* art 4; Stone, above n 74, 239.

218 Peter Nygh and Martin Davies, *Conflict of Laws in Australia* (LexisNexis Butterworths, 2002, 7th ed) 367.

219 North, *Private International Law Problems in Common Law Jurisdictions*, above n 17, 127.

220 Sykes and Pryles, above n 2, 609.

221 [1984] AC 50, 68–72.

222 See above Part II(B)(1).

223 Stone, above n 74, 239.

224 Briggs, *The Conflict of Laws*, above n 70, 170 (emphasis in original). Briggs makes this comment in respect of identical words in the *Rome Convention*.

225 Stone, above n 74, 240.

226 [1970] AC 583.

227 North and Fawcett, above n 2, 463.

228 [1963] 2 QB 352.

229 Sykes and Pryles, above n 2, 609.

'country' formulation, 'although a contract is most closely connected to English *law*, it may still be more closely connected to another *country*, and it will be the latter which identifies the governing law'.[230]

Many of the competing concerns between formulations would be allayed under the proposed model. These largely concern the relative weight to be afforded to traditional connecting factors and how they may be balanced, the significance of which would be diminished under the proposed model to the extent that it provides for issue-by-issue evaluation and invites non-geographical considerations to enter the fray. That said, the distinction between the 'system of law' and 'law of the country' formulations is not merely academic; it has practical significance if we consider the possibility that non-national legal orders, international law[231] or rules of law, may be construed as 'systems of law'.[232]

Recent adjudication, pursuant to both the *Rome Convention*[233] and common law,[234] has rejected the express or tacit choice of a non-national system of law, such as sharia[235] or halakhah,[236] as the governing law.[237] Dang suggests that it is at least arguable that the *Rome I Regulation*, construed widely, could permit a choice of a non-national law:

> on the basis that the restriction to the "laws of different countries" in article 1(1) of the *Rome Convention* has been removed and the word "law" in article 3(1) [of the *Rome I Regulation*] could be broadly construed to include any system of law.[238]

This is unlikely, however, given that art 3(2) of the draft *Rome I Regulation* — which permitted the parties to 'choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community'[239] — was not included in the final instrument. Given that a non-national system of law cannot be expressly or tacitly chosen by the parties under the common law and the *Rome I Regulation*, it follows that a non-national system of law ought not to be imputed to the parties in the absence of choice.

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230 Briggs, *The Conflict of Laws*, above n 70, 169 (emphasis in original).

231 See Hop Dang, 'The Applicability of International Law as Governing Law of State Contracts' (2010) 17 *Australian International Law Journal* 133.

232 While *Bonython* has not yet been relied upon to argue in favour of the application of non-national law as a 'system of law', it certainly carries this potential. This is particularly so in light of the growing interest in non-state-based regulation.

233 *Halpern v Halpern* [2007] EWCA Civ 291(3 April 2007) [21]–[29] ('*Halpern*').

234 *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch) (14 December 2007) [2]; *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ 291 (28 January 2004).

235 Ibid.

236 *Halpern* [2007] EWCA Civ 291 (3 April 2007) [21]–[29].

237 Unless the non-national system is integrated into a municipal system of law or discernable rules of the non-national system are incorporated as contractual terms: Mortensen, Garnett and Keyes, above n 5, 437 n 1; *Engel v The Adelaide Hebrew Congregation Inc* (2007) 98 SASR 402, 409 (Doyle CJ); ibid [31]–[36].

238 Dang, above n 231, 139–40 (citations omitted).

239 Commission of the European Communities, 'Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations *(Rome I)*' (Proposal No COM(2005) 650 final, Commission of the European Communities, 15 October 2005, 14.

Even if it were the case that the parties could choose a non-national system of law to govern their contract, it does not follow that a non-national system of law should be imputed to the parties in the absence of choice. That is to say, even where an instrument allows parties to expressly or tacitly choose non-state based rules of law,[240] as is the case under the *Draft Hague Principles*,[241] the provision designating the applicable law in the absence of choice should be the law of a country. This limitation is justified because party autonomy — the raison d'être[242] of a provision that allows for parties to choose non-state rules of law — has not been exercised. The draft *Rome I Regulation* appears to allude to such a limitation. Indeed, art 3(2) of the draft *Rome I Regulation* provides that

> questions relating to matters governed by … [non-state] principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, *in accordance with the law applicable in the absence of a choice* under this *Regulation*.[243]

The fact that the law applicable in the absence of choice would apply in default of any selected non-state rules suggests that the law in the absence of choice *itself* could not be a set of non-state rules. Such a limitation also exists in the context of arbitration. The *UNCITRAL Model Law on International Commercial Arbitration* provides that where the parties have failed to designate *rules of law* — a phrase intended to encompass all forms of non-national law — the tribunal will apply the *law*, meaning the national law, 'as determined by the conflict of laws rules which it considers applicable'.[244]

Whether parties are able to *choose* non-state rules of law to govern their contract or not, the 'law of the country' formulation, *in the absence of party choice*, is most compatible. The 'system of law' formulation used at common law may denote a non-national system of law or rules of law and it is for this reason that the 'law of the country' formulation is to be preferred.

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240 This may include, for example, religious law or the *UNIDROIT Principles of International Commercial Contracts 2010*: see International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts 2010* (UNIDROIT, 2010). The Working Group notes that the *Draft Hague Principles* neither define nor restrict the phrase 'rules of law' citing party autonomy as justification: *Working Group Report 28–30 June 2011*, above n 12, 3. However, the Working Group has indicated its intention to survey the literature on the concept of 'rules of law' in its forthcoming commentary.

241 *Working Group Report 28–30 June 2011*, above n 12, ii.

242 The substantive issue of whether parties should be able to choose non-state rules of law as the governing law of their contract is outside the scope of the present discussion.

243 Commission of the European Communities, 'Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations *(Rome I)*', above n 239, 14 (emphasis added).

244 United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration* (United Nations, 2008) art 28(2). See also GA Res 61/33, UN GAOR, 61st sess, 64th plen mtg, Agenda Item 77, UN Doc A/RES/61/33 (4 December 2006); *Report of the United Nations Commission on International Trade Law on the Work of Its Thirty-Ninth Session*, UN GAOR, 6th Comm, 61st sess, Agenda Item 77, UN Doc A/61/453 (2 November 2006).

IV CONCLUDING REMARKS

Dickinson sanguinely observed last year that '[t]he common law rules governing the law applicable to contractual obligations seem … in the character of a pre-fabricated bungalow, full of character but ripe for renovation or rebuilding'.[245] The law in this area has languished in Australia for the last twenty years despite significant reform in the EC and China, and prolific growth in intercontinental commercial transactions.

As this article has demonstrated, the problems attending the proper law of the contract, as identified by the ALRC in 1992, persist in Australia. These problems are particularly poignant where the parties have either impliedly chosen, or failed to choose, the law governing their contract. This article has thus proffered a reform proposal on tacit choice of law and the applicable law in the absence of choice for consideration by Australian legislatures.

It is suggested that the author's formulation on tacit choice, which constitutes a gloss on the *Rome I Regulation* and the *Draft Hague Principles*, be equally adopted by the Working Group of the Hague Conference. The most exigent changes in this respect are threefold. First, jurisdiction clauses, as indicators of tacit choice, ought to be restricted to exclusive jurisdiction clauses, as so characterised at common law, for their probative value lies in the mutual obligation not to sue in a jurisdiction other than the one selected. Such an obligation does not attach to non-exclusive jurisdiction clauses. Secondly, an exclusive jurisdiction clause should only be considered probative, for the purposes of tacit choice of law, to the extent that it is a manifestation of intent and not merely by virtue of its 'exclusive' appellation under the *Choice of Court Convention*. Importing the effective presumption of exclusivity contained in the *Choice of Court Convention* would be at odds with the concept of party autonomy which is the raison d'être of tacit choice. Thirdly, in pursuit of harmonisation, the *Draft Hague Principles* should be amended by including a second explanatory sentence clarifying the weight to be afforded to an exclusive jurisdiction clause. This inclusion will serve to eliminate the divergence in approach to tacit choice, as between nation states, which persists under the *Rome I Regulation*.

With respect to the governing law in the absence of choice, the proposed changes aim to circumscribe the broad judicial discretion inherent in the application of the common law test. The proposed solution gives primacy to legal certainty, while providing for the requisite flexibility in unanticipated cases. Through fixed rules for common commercial contracts, parties are better able to predict the legal consequences of their decisions in advance. When dealing with bespoke contracts, however, which fall within several fixed categories and which may have multiple connections with several jurisdictions, the presumption of characteristic performance is the appropriate mechanism. In an unanticipated or exceptional case where the applicable law cannot be determined through the application of the fixed rules or the presumption of characteristic performance, or where the law of another country is substantially more appropriate for the

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[245] Andrew Dickinson, 'The Future of Private International Law in Australia' (Legal Studies Research Paper No 11/30, Sydney Law School, University of Sydney, 16 May 2011) 7 n 21.

applicable law, judicial discretion may be exercised via an escape clause. This measure of flexibility is controlled, however, in so far as the judge is required to engage in issue-by-issue evaluation and take account of various guiding principles enunciated in the legislation. Although the Permanent Bureau did not necessarily intend for the *Draft Hague Principles* to be comprehensive,[246] it would be desirable if they were to similarly contain rules on the applicable law in the absence of an express or tacit choice. At a minimum, the forthcoming commentary ought to explain why the *Draft Hague Principles*, in their finalised form, contain no such rules.[247]

The momentum presently occurring at the Hague Conference ought to engender discussion of legislative reform in Australia. The fear of 'the paralysing hand of the parliamentary draftsman'[248] can no longer be countenanced. To use the analogy of Sir Peter North, '[c]odes are not monsters … [and] [e]ven if they are',[249] 'small doses of flexibility'[250] — carefully administered — can train the beasts.

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246 See Permanent Bureau, 'Feasibility Study on the Choice of Law', above n 15, 7. But see at 10.

247 *Working Group Report 28–30 June 2011*, above n 12, does not suggest that this is an issue on which the commentary and/or Policy Document will elaborate.

248 G C Cheshire, *Private International Law* (Clarendon Press, 1935) vii.

249 Peter M North, 'Problems of Codification in a Common Law System' (1982) 46 *Rabels Zeitschrift für Ausländisches und Internationals Privatrecht* 490, 500.

250 Symeonides, 'Codification and Flexibility', above n 16, 45.