

## THE IMPACT OF THE HAGUE PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS

MICHAEL DOUGLAS\* AND NICHOLAS LOADSMAN†

*In 2018, Australia should enact an ‘International Civil Law Act’ which would give effect to the Convention on Choice of Court Agreements (‘Hague Convention’) and the Principles on Choice of Law in International Commercial Contracts (‘Hague Principles’). This article explains how the enactment of the Hague Principles would impact Australian private international law in respect of choice of law for contracts. It is argued that, for the most part, this legislation would be consistent with existing law — although there are a few issues that would be determined differently under the legislation, and in those respects, the legislation would be welcomed. The Hague Principles provide limited exceptions to the principle of party autonomy, which allow courts to apply forum law for certain public policy reasons. It is argued that the scope of those public policy exceptions will be a focal point for choice of law disputes under an International Civil Law Act.*

### CONTENTS

I	Introduction.....	1
II	Choice of Law for Contracts under Australian Law .....	3
III	The <i>Hague Principles</i> .....	5
	A Overview .....	5
	B Scope .....	7
IV	Points of Impact.....	8
	A <i>Dépeçage</i> .....	8
	B Selection of Non-State Law.....	9
	C The Expression of the Choice of Law .....	10
	D The Law Applicable to <i>Consensus ad Idem</i> .....	12
	E Severability of a Choice of Law .....	13
	F Exclusion of Renvoi .....	14
	G Scope of the Chosen Law .....	15
	H Assignment.....	16
	I Public Policy.....	17
	1 Mandatory Forum Law.....	17
	2 Mandatory Foreign Law and Foreign Public Policy .....	20
	3 Manifest Incompatibility with Fundamental Public Policy.....	21
V	Conclusion .....	23

### I INTRODUCTION

In late 2016, Parliament’s Joint Standing Committee on Treaties recommended that Australia accede to the *Convention on Choice of Court Agreements (‘Hague Convention’)*<sup>1</sup> through a proposed ‘International Civil Law

---

\* Senior Lecturer, UWA Law School and Consultant, Bennett + Co, Perth. Email: michael.c.douglas@uwa.edu.au.

† Forensic/Litigation Paralegal, Clayton Utz, Sydney. Email: nloadsm@claytonutz.com.

<sup>1</sup> *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015) (‘*Hague Convention*’).

Act'.<sup>2</sup> Australian private international law scholars looked forward to the introduction of an International Civil Law Bill in 2017, but were left wanting. Ironically, the delay to this legislation may have been caused by another significant development for private international law: the foreign citizenship crisis that engulfed the Parliament of Australia for much of 2017.<sup>3</sup> At the time of writing, it seems likely that Parliament will enact the International Civil Law Act in 2018.

Although the focus of academic consideration of the proposed International Civil Law Act has been on the *Hague Convention* and choice of court agreements,<sup>4</sup> there is a distinct and significant dimension to this legislation. The proposed Act<sup>5</sup> would also give effect to the *Principles on Choice of Law in International Commercial Contracts* ('*Hague Principles*').<sup>6</sup> The *Hague Principles* are a soft law instrument developed by the Hague Conference on Private International Law, approved in 2015, and designed to harmonise a commercially important aspect of private international law.<sup>7</sup> As their title suggests, the *Hague Principles* deal with choice of law for international commercial contracts.<sup>8</sup> The introduction of the *Hague Principles* would be a significant change to a case-heavy area of Australian law, and would take us a

<sup>2</sup> Joint Standing Committee on Treaties, Parliament of Australia, *Report 166: Implementation Procedures for Airworthiness — USA; Convention on Choice of Courts — Accession; GATT Schedule of Concessions — Amendment; Radio Regulations — Partial Revision* (November 2016) <[http://www.aph.gov.au/parliamentary\\_Business/Committees/Joint/Treaties/ChoiceofCourts/Report\\_166](http://www.aph.gov.au/parliamentary_Business/Committees/Joint/Treaties/ChoiceofCourts/Report_166)> archived at <<https://perma.cc/4HXN-QN8S>> ('*Report 166*').

<sup>3</sup> In *Re Canavan*, the High Court affirmed the orthodoxy of *Sykes v Cleary*, where it was held that questions of foreign citizenship arising under s 44 of the *Constitution* are to be determined by the *lex patriae*, subject to a limited 'reasonable steps' public policy exception. See *Sykes v Cleary* (1992) 176 CLR 77, cited in *Re Canavan* (2017) 91 ALJR 1209, 1221–3 [61]–[69].

<sup>4</sup> See Brooke Adele Marshall and Mary Keyes, 'Australia's Accession to the *Hague Convention on Choice of Court Agreements*' (2017) 41 *Melbourne University Law Review* 246; Alex Mills, 'The *Hague Convention on Choice of Court Agreements* and Cross-Border Commercial Dispute Resolution in Australia and the Asia-Pacific' (2017) 18 *Melbourne Journal of International Law* 1; Michael Douglas, 'Choice of Court Agreements under an International Civil Law Act' (2018) 34 *Journal of Contract Law* 186.

<sup>5</sup> See *Report 166*, above n 2, 19 [3.6]. Comments by representatives of the Commonwealth Attorney-General's Department at a 2017 conference indicated that the Department was still considering the content of the International Civil Law Bill at that time. See Vivienne Bath and Michael Douglas, 'Commercial Issues in Private International Law' (Conference Program, University of Sydney Law School, 16 February 2018) 8 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3125623](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125623)> archived at <<https://perma.cc/TQ9C-AFJM>>.

<sup>6</sup> Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts* (adopted 19 March 2015) <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>> archived at <<https://perma.cc/R4ML-4ZCE>> ('*Hague Principles*').

<sup>7</sup> On the history of the *Hague Principles*, see Marta Pertegás and Brooke Adele Marshall, 'Party Autonomy and Its Limits: Convergence through the New *Hague Principles on Choice of Law in International Commercial Contracts*' (2014) 39 *Brooklyn Journal of International Law* 975, 980–1. See also Symeon C Symeonides, 'The *Hague Principles on Choice of Law for International Contracts*: Some Preliminary Comments' (2013) 61 *American Journal of Comparative Law* 873, 875–8.

<sup>8</sup> On the interaction between the *Hague Principles* and the *Hague Convention*, see Andrew Dickinson, 'Oiling the Machine: Overriding Mandatory Provisions and Public Policy in the *Hague Principles on Choice of Law in International Commercial Contracts*' (2017) 22 *Uniform Law Review* 402, 411–16.

step closer to a truly private *international* law.<sup>9</sup> The very fact that this instrument has been deemed worth legislating indicates that Australian law is not completely aligned with the international community. Against that backdrop, this article considers how the introduction of the *Hague Principles* via domestic legislation would impact Australian law. It is argued that, for the most part, this legislation would be consistent with existing law — although there are a few issues that would be determined differently under the legislation, and in those respects, the legislation would be welcomed.

The article is structured as follows. Part II contextualises the article by outlining how choice of law issues are determined for contracts under Australian law. Part III provides an overview of the *Hague Principles* and considers their scope. Part IV drills down and addresses issues covered by the *Hague Principles* that are perhaps most significant for Australian law. Part IV considers so-called ‘*dépeçage*’; the selection of non-state law; the expression of the choice of law; the law applicable to matters of *consensus ad idem*; the severability of a choice of law; renvoi; the scope of the chosen law; assignment; and public policy, including the treatment of forum statutes.

## II CHOICE OF LAW FOR CONTRACTS UNDER AUSTRALIAN LAW

When William Prosser described the conflict of laws as a ‘a dismal swamp, filled with quaking quagmires’,<sup>10</sup> he was referring to the choice of law problem that may arise in a case with a foreign element.<sup>11</sup> Such a problem arises where a party to civil litigation relies on a principle of domestic law, known as a choice of law rule, that determines that principles of foreign law should apply.<sup>12</sup> Fortunately, when it comes to the choice of law principles applicable to contracts, Australian law is not as dismal as one might think. It is *common* law, and it follows common sense notions familiar to contract lawyers and contracting parties.

Generally, Australian private international law gives effect to the common sense principle that contracting parties may choose the system of law by which their contract is governed.<sup>13</sup> Parties will commonly do so by a choice of law clause, such as that considered in *Continental Bank NA v Aeakos Compania*

---

<sup>9</sup> Cf Alex Mills, who argues that the claim that private international law is domestic law, and not actually international, is a myth: Alex Mills, ‘The Private History of International Law’ (2006) 55 *International and Comparative Law Quarterly* 1.

<sup>10</sup> William L Prosser, ‘Interstate Publication’ (1953) 51 *Michigan Law Review* 959, 971, cited in Roger Wilkins and Thomas John, ‘Facing Outwards: Australian Private International Law in the 21<sup>st</sup> Century’ in Andrew Dickinson, Mary Keyes and Thomas John (eds), *Australian Private International Law for the 21st Century* (Hart Publishing, 2014) 3, 6–7.

<sup>11</sup> On the distinction between a ‘conflict of laws’ and ‘choice of law’, see *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 527 [43] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) (‘*Pfeiffer*’).

<sup>12</sup> Common law courts will only consider choice of law if a party puts it in issue on the pleadings: *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 517 [68] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) (‘*Renault v Zhang*’).

<sup>13</sup> See, generally, *Akai Pty Ltd v People’s Insurance Co Ltd* (1996) 188 CLR 418 (‘*Akai*’); *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565; *Vita Food Products v Unus Shipping Co Ltd* [1939] AC 277, 290 (Lord Wright) (‘*Vita Food*’).

*Naviera SA*: ‘This agreement shall be governed by and construed in accordance with English law’.<sup>14</sup>

Parties are not required to explicitly select an applicable law (*lex causae*) with such a clause, but every contract has an applicable law. As Lord Diplock explained in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co*, a contract is ‘incapable of existing in a legal vacuum’.<sup>15</sup> In the absence of an express choice of law, a court may infer a choice of law. In *Akai Pty Ltd v People’s Insurance Co Ltd* (*‘Akai’*), the plurality described this process as follows:

It is not a question of implying a term as to choice of law. Rather it is one of whether, upon the construction of the contract and by the permissible means of construction, the court properly may infer that the parties intended their contract to be governed by reference to a particular system of law.<sup>16</sup>

If the court cannot determine the parties’ intention as to the applicable law, it will ascribe a ‘proper law of the contract’ through an objective process.<sup>17</sup> The objective proper law is denoted by the aphorism ‘the system of law with which the transaction has its closest and most real connection’.<sup>18</sup> The task of determining the proximity between a transaction and a system of law is determined with reference to ‘factors’, such as the place where the contract was concluded (the *locus contractus*),<sup>19</sup> or the place of performance.<sup>20</sup> But as Edelman J recognised in the recent *Australian Competition and Consumer Commission v Valve Corp [No 3]* (*‘Valve’*) litigation, different factors may point in different directions.<sup>21</sup> His Honour made a welcomed critique when he observed that, ‘[w]hilst the language of “closest and most real connection” trips off the tongue, the underlying concept is far from clear’.<sup>22</sup> These comments highlight the importance of choice of law clauses in cross-border contracts: when a transaction is truly international, different factors will pull in different directions, creating uncertainty and so legal risk. As always, such risk can be reduced through prudent drafting.

If the contracting parties do direct their minds to an appropriate choice of law provision, the court may still not give effect to the parties’ intended proper law of the contract. This will be the case where a forum statute has ‘mandatory’

---

<sup>14</sup> *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588, quoted in *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724 (31 July 2009) [27] (Brereton J) (*‘Ace Insurance v Moose’*).

<sup>15</sup> *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50, 65 (*‘Amin Rasheed’*).

<sup>16</sup> *Akai* (1996) 188 CLR 418, 441 (Toohey, Gaudron and Gummow JJ).

<sup>17</sup> On the problems with the tripartite hierarchy for determining the law applicable to a contract (express choice, inferred choice and objective choice), see Brooke Adele Marshall, ‘Reconsidering the Proper Law of the Contract’ (2012) 13 *Melbourne Journal of International Law* 505, 506.

<sup>18</sup> *Bonython v Commonwealth* (1950) 81 CLR 486, 498 (Lord Simonds). See also *Marshall v Fleming* [2017] NSWSC 1107 (24 August 2017) [96].

<sup>19</sup> See, eg, *Fleming v Marshall* (2011) 279 ALR 737, 751 [64] (Macfarlan JA).

<sup>20</sup> See, eg, *Mendelson-Zeller Co Inc v T & C Providores Pty Ltd* [1981] 1 NSWLR 366.

<sup>21</sup> *Australian Competition and Consumer Commission v Valve Corp [No 3]* (2016) 337 ALR 647, 662 [69] (*‘Valve’*). See also *Carillion Construction Ltd v AIG Australia Ltd* [2016] NSWSC 495 (22 April 2016) [94].

<sup>22</sup> *Valve* (2016) 337 ALR 647, 661 [65].

effect.<sup>23</sup> Even in the absence of an express statutory provision to the effect that local law (*lex fori*) applies irrespective of the parties' choice of law, courts may refuse to enforce foreign law for reasons of public policy.<sup>24</sup> As the plurality held in *Akai*, courts may refuse to give effect to contractual provisions which, while not directly contrary to any express or implied statutory prohibition, nevertheless contravene 'the policy of the law' as discerned from the scope and purpose of a particular statute, or from a judicial decision.<sup>25</sup> The 'policy of the law' may thus trump a choice of law clause in favour of foreign law in a cross-border contract. The scope of this public policy homing device, and the role of forum statutes in choice of law problems, are vexed issues of private international law.<sup>26</sup> They will continue to vex Australian private international law once the International Civil Law Act is in force.

Australia's approach to choice of law for contracts may be bludgeoned into two rough propositions. First, parties are generally free to choose the system of law that will govern their contract. As Peter Nygh once put it, '[i]n relation to international contracts, the freedom of the parties is magnified'.<sup>27</sup> Second, courts will refuse to apply the law chosen by parties to a contract where to do so would be incompatible with forum policy. There is, of course, much more nuance to this area of law,<sup>28</sup> and some of that nuance is explored in the pages that follow. But these two propositions provide a sufficient helicopter view. They also roughly correspond to the substance of the *Hague Principles*. The devil is in the details, which are explored in Part IV below.

### III THE HAGUE PRINCIPLES

#### A Overview

The *Hague Principles* are a device by which the Hague Conference aims to harmonise principles of private international law. As Marta Pertegás and Brooke Marshall observe, the *Hague Principles* advance the cause for harmonisation in two ways.<sup>29</sup> First, they provide a model law — or a guide to best practice — for use by lawmakers. The Australian experience demonstrates the success of that function: it seems that, in respect of the *Hague Principles*, the Attorney-General's Department secured the support of the Joint Standing Committee on Treaties with relative ease.<sup>30</sup> Secondly, the *Hague Principles* seek to 'level the field' between litigation and arbitration by paying greater deference to party autonomy by allowing the selection of non-state law and by purporting to limit

---

<sup>23</sup> See, eg, *Carriage of Goods by Sea Act 1991* (Cth) s 11.

<sup>24</sup> See *Sykes v Cleary* (1992) 176 CLR 7. Cf the discussion of 'reasonable steps' in *Re Canavan* (2017) 91 ALJR 1209, 1221–3 [61]–[69].

<sup>25</sup> *Akai* (1996) 188 CLR 418, 447 (Toohey, Gaudron and Gummow JJ).

<sup>26</sup> See Mary Keyes, 'Statutes, Choice of Law, and the Role of Forum Choice' (2008) 4 *Journal of Private International Law* 1.

<sup>27</sup> Peter Nygh, *Autonomy in International Contracts* (Clarendon Press, 1999) 2, quoted in Douglas, above n 4, 189.

<sup>28</sup> See Maria Hook, *The Choice of Law Contract* (Hart Publishing, 2016).

<sup>29</sup> Pertegás and Marshall, above n 7, 979.

<sup>30</sup> See Private International Law and Commercial Policy Section, Attorney-General's Department, *National Interest Analysis: Australia's Accession to the Convention on Choice of Court Agreements* [2016] ATNIA 7, [21]–[22]. Cf *Report 166*, above n 2, 19 [3.5].

the ability of states to apply their own law rather than the chosen law by appeal to forum policy.<sup>31</sup> In respect of that second endeavour, the *Hague Convention* is a critical partner to the *Hague Principles*, and the litigation counterpart to the *New York Convention*,<sup>32</sup> which may see a reinvention of litigation as the preferred mode of dispute resolution in cross-border contracts.

The *Hague Principles* are underpinned by the leitmotiv of party autonomy:<sup>33</sup> the normative claim the contracting parties ought to be free to enter into contracts, and select the law applicable to those contracts, largely as they wish. The provision for selection of non-state law is illustrative of that theme,<sup>34</sup> as is art 2(4), which provides that '[n]o connection is required between the law chosen and the parties or their transaction'.<sup>35</sup> The old-fashioned idea that there must be some tangible connection between the subject matter of contract and the proper law of the contract will be unequivocally excised from Australian law with the International Civil Law Act.<sup>36</sup> However, Australian courts are likely to decline to exercise their jurisdiction in cases subject to foreign *lex causae*, either under the *Hague Convention* obligations imposed by an International Civil Law Act,<sup>37</sup> or under the common law principles concerning foreign choice of court agreements;<sup>38</sup> or, in the event that the parties do not include a choice of court provision in their contract, by the common law doctrine of *forum non conveniens*.<sup>39</sup>

Unconfined, the principle of party autonomy would be unpalatable.<sup>40</sup> It is thus sensible that the *Hague Principles* do not advance an absolute freedom of contract, although they do espouse more 'limited exceptions'<sup>41</sup> to party autonomy than may be recognised under many systems of private international law. The scope of those exceptions will be the most important, the most difficult and perhaps the most litigated aspect of the *Hague Principles* within an International Civil Law Act. Although the principle of party autonomy is already held in high esteem in many systems of private international law,<sup>42</sup> including that

<sup>31</sup> Pertegás and Marshall, above n 7, 979.

<sup>32</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

<sup>33</sup> Hague Conference on Private International Law, 'Commentary on the *Principles on Choice of Law in International Commercial Contracts*' in '*Principles on Choice of Law in International Commercial Contracts*' (The Hague Conference on Private International Law Permanent Bureau, 2015) 21, 77 [11.23] <<https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf>> archived at <<https://perma.cc/3KR4-DAAB>> ('*Hague Principles Commentary*').

<sup>34</sup> *Hague Principles* art 3.

<sup>35</sup> *Hague Principles* art 2(4).

<sup>36</sup> See *Re Helbert Wagg & Co* [1956] 2 WLR 183, 191; *Kay's Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124, 143.

<sup>37</sup> *Hague Convention* art 6.

<sup>38</sup> See *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 ('*Oceanic Sun*').

<sup>39</sup> *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. See also Richard Garnett, 'Stay of Proceedings in Australia: A "Clearly Inappropriate" Test?' (1999) 23 *Melbourne University Law Review* 30.

<sup>40</sup> Dickinson, above n 8, 410.

<sup>41</sup> *Hague Principles* Preamble para 1.

<sup>42</sup> Jonathan Levin, 'The *Hague Principles on Choice of Law in International Commercial Contracts*: Enhancing Party Autonomy in a Globalized Market' (2016) 13 *New York University Journal of Law & Business* 271, 276–7.

of Australia,<sup>43</sup> the further harmonisation of choice of law principles ought to be welcomed: it will enhance certainty in the law.

## B Scope

The *Hague Principles* apply to international contracts of a commercial nature in respect of which the parties have chosen a system of law.<sup>44</sup> This scope of operation parallels that of the *Hague Convention*, which generally applies in international cases to exclusive choice of court agreements concluded in civil or commercial matters.<sup>45</sup> The enactment of these two instruments in a single International Civil Law Act may result in some cross-pollination in the course of judicial construction of the provisions as to scope. This section outlines the kinds of cases which will be captured by the *Hague Principles*.

First, a contract must be ‘international’ in order to fall within the *Principles*’ scope. This requirement limits the application of the *Principles* to circumstances to which private international law would apply; that is, to cases with a foreign element.<sup>46</sup> Article 1(2) defines ‘international contracts’ as excluding purely domestic contracts,<sup>47</sup> capturing circumstances in which either party, the relationship between the parties, or other relevant elements, have some connection with more than one state.<sup>48</sup>

Secondly, the principles are limited to ‘commercial’ contracts. Although the title and the Preamble each refer to ‘commercial contracts’, the term is not explicitly defined. Instead, art 1(1) refers to contracts in which each party is ‘acting in the exercise of its trade or profession’.<sup>49</sup> The rationale for this approach is that ‘commercial’ may connote different things in different states.<sup>50</sup> The scope of this limitation will depend on not only the circumstances surrounding the contract in question, but also the commercial status and objectives of the relevant parties. Importantly, consumer and employment contracts are explicitly excluded.<sup>51</sup>

---

<sup>43</sup> *Huddart Parker Ltd v The Ship ‘Mill Hill’* (1950) 81 CLR 502, 509 (Dixon J).

<sup>44</sup> Brooke Marshall, ‘The *Hague Choice of Law Principles*, *CISG* and *PICC*: A Hard Look at a Choice of Soft Law’ (2016) 66 *American Journal of Comparative Law* 175, 183–4. See also Symeonides, above n 7, 879–82.

<sup>45</sup> See Marshall and Keyes, above n 4; Mills, above n 4; Douglas, above n 4.

<sup>46</sup> *Hague Principles* art 1(2).

<sup>47</sup> The commentary to art 1 outlines the steps necessary to ascertain internationality for the purposes of the *Principles*, noting that the two relevant factors to consider are first, the place of the establishment of the parties, and second, where the parties have a common state of establishment, ‘other relevant elements’ such as (1) the state in which the contract was concluded or (2) performance is to take place, (3) parties’ nationality and (4) the place of incorporation. If there is no relevant element that would establish internationality in accordance with this test, the contract is likely to fall beyond the scope of the *Principles*’ operation. See *Hague Principles Commentary*, above n 33, 32 [1.16]–[1.18].

<sup>48</sup> *Hague Principles Commentary*, above n 33, 31 [1.14].

<sup>49</sup> *Hague Principles* art 1(1). ‘Trade or profession’ casts a broad net and expressly includes commercial activity in both trade (ie, international contracts of the sale of goods, manufacture, and other trade-based contracts), as well as in the course of providing professional services pursuant to an international contract as defined above. International contracts for the provision of legal, financial, insurance or other business services fall within the scope of the *Principles*: *Hague Principles Commentary*, above n 33, 29 [1.6], 30 [1.8].

<sup>50</sup> *Hague Principles Commentary*, above n 33, 29 [1.6].

<sup>51</sup> *Hague Principles* art 1(1).

Article 1(3) provides a laundry list of specific exclusions, including in respect of the contractual capacity of individuals, jurisdiction and arbitration clauses, companies and trusts, insolvency, proprietary effects of contracts, as well as the issue of whether an agent is able to bind a principle to a third party.<sup>52</sup>

Once part of Australian law, the International Civil Law Act would not exhaustively replace Australian choice of law principles in respect of contracts. To the contrary: a great many contracts (for example, consumer contracts) would fall outside the scope of the Act. Further, the Act would depend on the continued existence of forum law for the purposes of ‘gap-filling’ in the case of selection of non-state law.<sup>53</sup> But the *Hague Principles* would patch over a significant part of Australian private international law in a manner comparable to the *Hague Convention*’s impact on choice of court agreements, or the impact of the *Foreign Judgments Act 1991* (Cth) on the general law of recognition and enforcement of foreign judgments. The following Part details how the *Hague Principles* would make an impact on Australian choice of law principles.

#### IV POINTS OF IMPACT

##### A Dépeçage

Parties to a contract captured by the *Hague Principles* may select either the applicable law for the whole contract, or the law applicable to only part of it.<sup>54</sup> They may also explicitly select different laws for different parts of the contract.<sup>55</sup> This gives rise to the prospect of *dépeçage*: where a court applies more than one system of law to the same dispute in a case with a foreign element.<sup>56</sup> In respect of contracts, Brooke Marshall describes ‘voluntary *dépeçage*’ as ‘a legal tool which enables parties to choose several laws to govern discrete parts of their contract or phases of their contractual relationship’.<sup>57</sup> The *Hague Principles*’ explicit recognition of voluntary *dépeçage* illustrates that the principle of freedom of contract is at the core of this instrument.

Arguably, an enactment of voluntary *dépeçage* would change Australian law. In *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society*, Evatt J held that

the whole theory which lies at the root of private international law, however difficult that theory might be in application, is that the law of one country, and one country alone, can be the proper or governing law of the contract.<sup>58</sup>

<sup>52</sup> Ibid arts 1(3)(a)–(f).

<sup>53</sup> On ‘gap-filling’, see *Hague Principles Commentary*, above n 33, 42 [3.15]. See also Geneviève Saumier, ‘The *Hague Principles* and the Choice of Non-State “Rules of Law” to Govern an International Commercial Contract’ (2014) 40 *Brooklyn Journal of International Law* 1, 17.

<sup>54</sup> *Hague Principles* art 2(2)(a).

<sup>55</sup> Ibid art 2(2)(b).

<sup>56</sup> ‘The process of separating the elements comprising a legal relationship so as to subject them to the laws of several different legal systems is known as *dépeçage*’: Pertegás and Marshall, above n 7, 994.

<sup>57</sup> Marshall, ‘A Hard Look at a Choice of Soft Law’, above n 44, 20.

<sup>58</sup> *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 604.



Although this is an old case, the proposition may still have currency.<sup>59</sup> But there may be legitimate commercial reasons for parties to a cross-border contract to pick and choose the principles of applicable law from multiple systems of law. In the absence of a strong reason to denounce voluntary *dépeçage*, this aspect of the *Hague Principles* ought to be welcomed.

### B Selection of Non-State Law

The very term ‘choice of law clause’ indicates that *law* is the subject chosen by such a clause, but under art 3, that ‘law’ need not be created by any kind of government institution. The law chosen may be ‘rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise’. The broad language is consistent with the approach of some arbitration rules.<sup>60</sup> The language might capture non-state law, such as the law promulgated by an intergovernmental organisation, like the *UNIDROIT Principles of International Commercial Contracts*;<sup>61</sup> or the law of a religion, like sharia; or even *lex mercatoria*.<sup>62</sup> Whether such principles are ‘generally accepted’ as neutral and balanced in the appropriate geographical region is a difficult question, and one which may invite some kind of empirical emphasise.<sup>63</sup> The commentary does not resolve the issue.<sup>64</sup>

Australian law has followed the English position that principles of non-State law may be incorporated as terms of a contract while Australian law remains the governing law.<sup>65</sup> In *Engel v Adelaide Hebrew Congregation Inc*, Doyle CJ accepted a contractual clause that disputes would be referred to a Jewish ecclesiastical court which would apply Jewish law.<sup>66</sup> His Honour held that ‘parties to a contract governed generally by Australian law, or of which Australian law is the proper law, can agree to incorporate provisions of another system of law as provisions of the contract’, provided there is certainty about that law.<sup>67</sup> In obiter, his Honour was ‘inclined to agree’ that Jewish law was not the proper law of the contract, although he accepted that principles of Jewish law

<sup>59</sup> See *Olex Focas Pty Ltd v Skodaexport Co Ltd* [1998] 3 VR 380, 395 (Batt J).

<sup>60</sup> United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration* (United Nations, 2008) art 28(1); Pertegás and Marshall, above n 7, 996; Ralf Michaels, ‘Non-State Law in the *Hague Principles on Choice of Law in International Commercial Contracts*’ in Kai Purnhagen and Peter Rott (eds), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Springer, 2014) 43, 44.

<sup>61</sup> International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts* (2016). See *Hague Principles Commentary*, above n 33, 41 [3.6].

<sup>62</sup> See Markus Petsche, ‘The Application of Transnational Law (*Lex Mercatoria*) by Domestic Courts’ (2014) 10 *Journal of Private International Law* 489. Cf Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 3<sup>rd</sup> ed, 2013) 237.

<sup>63</sup> See Peter Mankowski, ‘Article 3 of the *Hague Principles*: The Final Breakthrough for the Choice of Non-State Law?’ (2017) 22 *Uniform Law Review* 369, 373. Saumier notes that art 3 presents problems of proof and interpretation: Saumier, above n 53, 23.

<sup>64</sup> See *Hague Principles Commentary*, above n 33, 41 [3.12].

<sup>65</sup> See *Halpern v Halpern [Nos 1 and 2]* [2008] QB 195; *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ 19 (28 January 2004) [51] (Potter LJ).

<sup>66</sup> *Engel v Adelaide Hebrew Congregation Inc* [2007] 98 SAS 402 (‘*Engel*’).

<sup>67</sup> *Ibid* 409 [36].

might be incorporated as terms.<sup>68</sup> Recently, Brereton J followed the approach in *Engel* in *Re South Head & District Synagogue (Sydney)*, agreeing that Jewish law could be incorporated into a contract as terms of the contract.<sup>69</sup>

As the commentary to the *Hague Principles* recognises, incorporation by reference is distinguishable from allowing parties to choose ‘rules of law’ as the law applicable to their contract.<sup>70</sup> The enactment of the *Hague Principles* would be a departure from Australian choice of law orthodoxy.<sup>71</sup> Whether this change ought to be welcomed is a matter of debate. Michaels has argued that art 3 ‘is emblematic of a dangerous tendency of making law to educate parties as to what would be good for them’.<sup>72</sup> The libertarian counterargument is to appeal to party autonomy. In light of the exclusions for consumer and employment contracts, why not allow sophisticated commercial parties to select the applicable law?<sup>73</sup> Party autonomy has long been at the heart of the common law approach to selection of the proper law. As Lord Wright stated in *Vita Food*:

where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed *is bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy.<sup>74</sup>

Those words continue to hold true. Where the parties have made a bona fide selection of non-state law, and where that non-state law is generally accepted as a neutral set of rules, it should not be contrary to Australian policy to give effect to that choice.

### C *The Expression of the Choice of Law*

The first sentence of art 4 provides that a choice of law must be made expressly or clearly. This is consistent with the discussion of express and inferred choice of law by the plurality in *Akai*. Their Honours held that, in each case, the real issue is what the parties intended.<sup>75</sup> Their approach to the tripartite classification of express, inferred and objective proper law was to merge the first two categories: either the parties intended a system of law to govern their contract, or they did not. Their approach is not inconsistent with the first sentence of art 4, which does not cover the field. The commentary explains:<sup>76</sup>

<sup>68</sup> *Ibid* 408 [26], 409 [35]–[37] (Doyle CJ).

<sup>69</sup> *Re South Head & District Synagogue (Sydney) (admin apptd)* [2017] NSWSC 823 (22 June 2017) [29].

<sup>70</sup> *Hague Principles Commentary*, above n 33, 26 [1.18].

<sup>71</sup> In the absence of a relevant statutory provision, it is suggested that it is unlikely that ‘the law of the forum provides otherwise’ for the purposes of art 3: that is, Australian law would not positively *preclude* the selection on non-state law as the proper law of a contract in accordance with the *Hague Principles*.

<sup>72</sup> Michaels, above n 60, 45.

<sup>73</sup> Arguably, small businesses could also be justifiably excluded from the scope of the *Hague Principles*: like consumers, they would often lack the bargaining power to agree to a choice of law in any meaningful sense. See James J Spigelman, ‘The *Hague Choice of Court Convention* and International Commercial Litigation’ (2009) 83 *Australian Law Journal* 386, 391.

<sup>74</sup> *Vita Food* [1939] AC 277, 290 (Lord Wright).

<sup>75</sup> *Akai* (1996) 188 CLR 418, 440 (Toohey, Gaudron and Gummow JJ).

<sup>76</sup> *Hague Principles Commentary*, above n 33, 47 [4.17].

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

Once the *Hague Principles* are enacted, it is likely that the current common law principles concerning ascertainment of the parties' choice of law will continue to be relied upon by Australian courts. A court will determine what the parties actually intended in respect of choice of law.<sup>77</sup> If the court cannot do that, it will determine the objective proper law with reference to the current general law.

The second sentence of art 4 provides that a jurisdiction or arbitration agreement is not 'itself equivalent' to a choice of law. At a surface level, this is consistent with the principle emphasised by the High Court in *John Pfeiffer Pty Ltd v Rogerson* ('*Pfeiffer*'), that the issue of whether a court has jurisdiction is distinct from the issue of the applicable law.<sup>78</sup> It may be questioned, however, whether the second sentence of art 4 contains a further layer of meaning, and advances the proposition that a jurisdiction or arbitration agreement may not, *by itself*, indicate an inferred choice of law. According to the commentary:

a choice of court agreement between the parties to confer jurisdiction on a court may be *one of the factors* to be taken into account in determining whether the parties intended the contract to be governed by the law of that forum.<sup>79</sup>

Under current principles, an exclusive foreign jurisdiction clause may be sufficient for the court to infer a choice of the law of the chosen court. That was the approach of Hudson J in *Lewis Construction Co Pty Ltd v M Tichauer Société Anonyme*, where his Honour described the following clause as the 'determining factor' which indicated an implied selection of the law of France as the proper law of the contract: '[i]n case of litigation the Commercial Court of Lyons is the only competent Court; even in the case of recourse on the guarantee or in case of multiple defendants'.<sup>80</sup> On the other hand, the process of determining the proper law of the contract is a matter of giving effect to the intention of the parties;<sup>81</sup> where reference is made to a choice of court agreement in the course of ascertaining that intention, the court is engaging in contractual construction.<sup>82</sup> Like any other term of a contract, a choice of court clause should be construed in context, in light of the contract as a whole; and so even on current principles, reference should not be made *solely* to a choice of court clause when determining the choice of law through a process of construction. Perhaps the enactment of the *Hague Principles* would bring that orthodoxy to the fronts of the minds of the drafters of cross-border contracts, encouraging them to give dedicated attention to choice of law clauses as distinct from choice of court clauses.

---

<sup>77</sup> On the role of tacit choice of law under art 4 of the *Hague Principles*, see Lauro Gama Jr, 'Tacit Choice of Law in the *Hague Principles*' (2017) 22 *Uniform Law Review* 336.

<sup>78</sup> *Pfeiffer* (2000) 203 CLR 503. On the difference between a choice of law clause and a choice of court clause, see *Dunbee Ltd v Gilman & Co (Australia) Pty Ltd* [1968] 1 NSW 577.

<sup>79</sup> *Hague Principles Commentary*, above n 33, 45 [4.11] (emphasis added).

<sup>80</sup> *Lewis Construction Co Pty Ltd v M Tichauer Société Anonyme* [1966] VR 341, 346.

<sup>81</sup> *Akai* (1996) 188 CLR 418, 440 (Toohey, Gaudron and Gummow JJ).

<sup>82</sup> *Valve* (2016) 337 ALR 647, 661 [63] (Edelman J).

### D The Law Applicable to Consensus ad Idem

Like the contract itself, a contractual choice of law does not exist in a legal vacuum.<sup>83</sup> The recognition of a choice of law is made according to principles of law: that is, it depends on a system of law for its existence. This creates the possibility of a chicken-and-egg scenario: what system of law should a court apply to determine whether the parties have agreed to a choice of law? If the court applies the system of law putatively chosen by the choice of law clause, is that not begging the question?<sup>84</sup> Nevertheless, art 6(1)(a) pragmatically accepts the system ‘purportedly agreed to’ as the law applicable to the question of whether the parties have agreed to a choice of law.<sup>85</sup> In doing so, it departs from the current Australian approach.

In *Oceanic Sun Line Special Shipping Co Inc v Fay* (*‘Oceanic Sun’*), the High Court considered whether conditions on a ticket were incorporated into a contract. Importantly, those ‘conditions’ included an exclusive choice of court clause in favour of Greek courts. In obiter, in separate sets of reasons, Brennan J and Gaudron J considered that the law of the court hearing the matter, the *lex fori*, should determine the issue of whether the conditions formed part of the contract, and so whether the choice of court clause was agreed to.<sup>86</sup> Brennan J explained:

The question whether a contract has been made depends on whether there has been a consensus ad idem and the terms of the contract, if made, are the subject of that consensus. ... In deciding whether a contract has been made, the court has regard to all the circumstances of the case including any foreign system of law which the parties have incorporated into their communications, but it refers to the municipal law to determine whether, in those circumstances, the parties reached a consensus ad idem and what the consensus was... There is no system other than the municipal law to which reference can be made for the purposes of answering the preliminary questions whether a contract has been made and its terms.<sup>87</sup>

His Honour’s approach has been applied in more recent cases, including in *Hargood v OHTL Public Company Ltd*.<sup>88</sup> After the plaintiff was injured while staying at a hotel in Thailand, she sued the owner of the hotel in tort. The defendant sought to have the proceeding stayed, relying on a form which the plaintiff signed which she checked into the hotel. The form contained a choice of law clause in favour of Thai law, and an exclusive choice of court clause in favour of Thai courts. A preliminary issue was whether the contract was concluded at the time the plaintiff made her online booking, or later, when she

---

<sup>83</sup> *Amin Rasheed* [1984] AC 50, 65 (Lord Diplock).

<sup>84</sup> See Adrian Briggs, ‘The Formation of International Contracts’ [1990] *Lloyd’s Maritime and Commercial Law Quarterly* 192, cited with approval in *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* (2015) 331 ALR 108, 120 [74]–[75], 122–3 [85]–[86] (*‘Jasmin Solar’*); Andrew S Bell, ‘Jurisdiction and Arbitration Agreements in Transnational Contracts’ (Pt 2) (1996) 10 *Journal of Contract Law* 97, 100; Kevin F K Low, ‘Choice of Law in Formation of Contracts’ (2004) 20 *Journal of Contract Law* 167.

<sup>85</sup> See the consideration of this ‘pragmatic’ approach in *Jasmin Solar* (2015) 331 ALR 108, 123 [86]–[87].

<sup>86</sup> *Oceanic Sun* (1988) 165 CLR 197, 225 (Brennan J), 261 (Gaudron J).

<sup>87</sup> *Ibid* 225 (Brennan J).

<sup>88</sup> *Hargood v OHTL Public Co Ltd* [2015] NSWSC 446 (24 April 2015) (*‘Hargood’*). See also *Venter v Ilona MY Ltd* [2012] NSWSC 1029 (24 August 2012) [25]–[26].

signed the form. Davies J followed the approach of Brennan J in *Oceanic Sun* and held that the *lex fori* would determine the issue, and so the jurisdiction clause was not a part of the contract.<sup>89</sup> More recently, the *lex fori* approach to matters of *consensus ad idem* was applied by Edelman J in *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* (*'Jasmin Solar'*),<sup>90</sup> and then again on appeal by the Full Court of the Federal Court in *Trina Solar (US) Inc v Jasmin Solar Pty Ltd*.<sup>91</sup>

The *Hague Principles'* application of the putative chosen law is consistent with the approach taken in Europe under the *Rome I Regulation*, which provides that '[t]he existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid'.<sup>92</sup> In respect of this issue, the introduction of the International Civil Law Act would make Australian private international law somewhat less parochial, and would bring Australia closer to the international community.

### E Severability of a Choice of Law

Article 7 provides that a 'choice of law cannot be contested solely on the ground that the contract to which it applies is not valid'. The common law recognises the same principle in relation to jurisdiction<sup>93</sup> and arbitration agreements,<sup>94</sup> which will only be amenable to rescission if the jurisdiction or arbitration agreement itself, rather than the broader contract, was vitiated.<sup>95</sup> Australian courts will recognise that an exclusive jurisdiction clause is severable, and may stand alone as an agreement in its own right.<sup>96</sup> But choice of law clauses are different. In *Ace Insurance Ltd v Moose Enterprise Pty Ltd*, Brereton J held that a choice of law clause does not give rise to an implied negative obligation to not invoke the chosen law.<sup>97</sup> In so holding, his Honour recognised that a choice of law clause is not promissory in nature, considering and distinguishing the argument of Adrian Briggs.<sup>98</sup> If that is right, then a choice of law clause is not

---

<sup>89</sup> *Hargood* [2015] NSWSC 446 (24 April 2015) [23]–[30].

<sup>90</sup> *Jasmin Solar* (2015) 331 ALR 108, 123–5 [89]–[95], 126 [106].

<sup>91</sup> *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* (2017) 247 FCR 1, 8–14 [26]–[46] (Greenwood J), 28 [133]–[134], 29 [137], [139], 31 [151], [152] (Beach J). See also *Central Petroleum Ltd v Geoscience Resource Recovery LLC* [2017] QSC 223, [44]–[49].

<sup>92</sup> *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations* [2008] OJ L 177/6, art 10(1) (emphasis added) (*'Rome I Regulation'*). Further, *Hague Principles* art 6(2) parallels *Rome I Regulation* art 10(2) in allowing application of the law of a party's 'establishment' (cf 'habitual residence' in *Rome I Regulation*) if it would not be reasonable to determine the issue by the putative proper law of the contract.

<sup>93</sup> *Fili Shipping Co Ltd v Premium Nafta Products Ltd* [2007] Bus LR 1719.

<sup>94</sup> *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, 101 (Allsop J) (*'Comandate'*); *Hancock Prospecting Pty Ltd v Rinehart* (2017) 350 ALR 658, 739–44 (Allsop CJ, Besanko and O'Callaghan JJ).

<sup>95</sup> See Lord Lawrence Collins et al (eds), *Dicey, Morris and Collins on The Conflict of Laws* (Sweet & Maxwell, 15<sup>th</sup> ed, 2012) 610–11 [12–112].

<sup>96</sup> *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* (1997) 41 NSWLR 559, 566–7.

<sup>97</sup> *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724 (31 July 2009) [51] (Brereton J).

<sup>98</sup> *Ibid* [42]–[46] (Brereton J); Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) 446–53 [11.45]–[11.58].

severable in the way that a choice of court clause might be — by itself, it would not be of the nature of a contract. So under common law principles, choice of law clauses *may be* contested on the basis that the surrounding contract was not ‘valid’, in the sense that the contract was vitiated, because it makes little sense to focus on the ‘validity’ of a clause that is not promissory in nature.<sup>99</sup> Article 7 is thus an addition to Australian law, and one which may invite litigation over the circumstances in which a choice of law clause may be impugned.<sup>100</sup>

#### F Exclusion of Renvoi

For private international law enthusiasts, art 8 is perhaps a lamentable aspect of the *Hague Principles* because it removes an opportunity to talk about renvoi. Renvoi is a notorious doctrine of private international law that involves a court applying the choice of law rules of a foreign system of law because a forum choice of law rule provides that the foreign system is the applicable law.<sup>101</sup> The doctrine was famously reinvigorated in *Neilson v Overseas Projects Corporation of Victoria Ltd* (‘*Neilson*’), where the High Court recognised the prospect of renvoi for international torts.<sup>102</sup> Whether renvoi ought to apply in other contexts is contentious. Despite powerful voices to the contrary,<sup>103</sup> there has been some Australian authority to suggest that renvoi could apply to international contracts. In *O’Driscoll v J Ray McDermott, SA*, McLure JA contemplated that the authority of *Neilson* might be invoked in respect of a cross-border contract.<sup>104</sup> Those remarks were obiter: on the facts, the choice of law rules of the applicable law were the same as those of the forum. There was no true conflict of laws between the choice of law approaches of Singapore and Australia.<sup>105</sup>

Conversely, in *Proactive Building Solutions v Mackenzie Keck*, McDougall J declined to comment that the authority of *Neilson* should be limited to the choice of law rules for tort.<sup>106</sup> In doing so, his Honour cited the commercial reasons underpinning choice of law rules, focusing on the proposition that in drafting contracts, parties are unlikely to contemplate that in their choice of law, renvoi might apply and lead to the application of a wholly different system of law again.

<sup>99</sup> ‘Validity’ is a slippery term. See *Jasmin Solar* (2015) 331 ALR 108, 122. See also Douglas, above n 4, 201–3.

<sup>100</sup> Litigation of ‘validity’ under the *Hague Convention*, and in respect of arbitration agreements, may inform courts’ approach to validity under art 7 of the *Hague Principles*. See also Mary Keyes, ‘Jurisdiction under the *Hague Choice of Courts Convention*: Its Likely Impact on Australian Practice’ (2009) 5 *Journal of Private International Law* 181.

<sup>101</sup> See also Reid Mortensen, ‘Troublesome and Obscure: The Renewal of Renvoi in Australia’ (2006) 2 *Journal of Private International Law* 1; Reid Mortensen, ‘Homing Devices in Choice of Tort Law: Australian, British, and Canadian Approaches’ (2006) 55 *International and Comparative Law Quarterly* 839, 870–3; Anthony Gray, ‘The Rise of Renvoi in Australia: Creating the Theoretical Framework’ (2007) 30 *University of New South Wales Law Journal* 103.

<sup>102</sup> *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 (‘*Neilson*’).

<sup>103</sup> See *Amin Rasheed* [1984] AC 50, 61–2 (Lord Diplock). See also Erwin Spiro, ‘The Proper Law of the Contract and Renvoi: Further Comments on the *Amin Rasheed Shipping Case*’ (1984) 33 *International and Comparative Law Quarterly* 199, 199–202.

<sup>104</sup> *O’Driscoll v J Ray McDermott, SA* [2006] WASCA 25 (22 February 2006) [12] (McLure JA).

<sup>105</sup> *Ibid* [18] (McLure JA).

<sup>106</sup> *Proactive Building Solutions v Mackenzie Keck* [2013] NSWSC 1500 (1 October 2013) [28].

Indeed, in *Neilson*, Gummow and Hayne JJ noted that accepting a single theory of renvoi to be applied in every case would fail to account for the clear differences between issues in tort on one hand, and other issues such as contract which emphasise party autonomy, on the other.<sup>107</sup> The *Hague Principles* were crafted with such sentiments in mind: renvoi is excluded, but may apply if the parties expressly provide that it should.

### G *Scope of the Chosen Law*

Article 9 is an important provision which details, in a non-exhaustive manner, the subject matter that shall be governed by the system of law chosen by the parties. The provision is broad: it provides that the chosen law ‘shall govern all aspects of the contract between the parties’ before enumerating specific examples.<sup>108</sup> The inclusion of certain matters within the ‘scope of the chosen law’ is predictable, and consistent with common law principles; for example, the rights and obligations arising from the contract,<sup>109</sup> and performance,<sup>110</sup> are each subject to the law chosen by the parties. But there are a few respects in which art 9 extends the application of the proper law to issues that might otherwise be subject to the *lex fori*.

The points of impact depend on the Australian approach to characterisation of matters of procedure. The common law rule is that a litigant must take the forum as he or she finds it, and so matters of procedure are subject to the law of the forum.<sup>111</sup> Historically, Australian courts took a relatively parochial approach to the characterisation of procedure, which favoured application of the *lex fori*.<sup>112</sup> In *Pfeiffer*, the High Court retreated from that parochialism by accepting that principles which regulate the mode or conduct of proceedings are ‘procedural’ in character, while other principles are substantive.<sup>113</sup>

Even so, under the test affirmed in *Pfeiffer*, a number of issues which would be captured by the chosen law under art 9 would be subject to the *lex fori* at common law. Consider the law applicable to the assessment of damages under art 9(1)(c). Traditionally, ‘the forms of remedies and modes of proceeding are regulated solely by the law of the place where the action is instituted’.<sup>114</sup> *Pfeiffer* may have changed that, but in *Renault v Zhang*, the High Court reserved ‘for further consideration’ the question of whether assessment of damages should be treated as substantive, at least for international torts.<sup>115</sup> Arguably, assessment of

---

<sup>107</sup> *Neilson* (2005) 223 CLR 331, 366 [99].

<sup>108</sup> *Hague Principles* art 9(1).

<sup>109</sup> *Ibid* art 9(1)(b).

<sup>110</sup> *Ibid* art 9(1)(c).

<sup>111</sup> *McKain v R W Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1, 17 (Mason CJ), 40 (Brennan, Dawson, Toohey and McHugh JJ), 46–7 (Deane J), 56 (Gaudron J); *Pfeiffer* (2000) 203 CLR 503, 542–4 [97]–[100] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). Cf Richard Garnett, who challenges the assumption that *lex fori* always governs issues of procedure: Richard Garnett, *Substance and Procedure in Private International Law* (Oxford University Press, 2012).

<sup>112</sup> See, eg, *Stevens v Head* (1993) 176 CLR 433.

<sup>113</sup> *Pfeiffer* (2000) 203 CLR 503, 543–4 [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

<sup>114</sup> *General Steam Navigation Co v Guillou* (1843) 152 ER 1061, 1069.

<sup>115</sup> *Renault v Zhang* (2002) 210 CLR 491, 520 [76] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

damages might still be subject to the *lex fori*, even where the proper law of the contract is a foreign system of law. Perhaps the better view is that, at common law, remedies are available ‘in the form and manner that the forum provides’,<sup>116</sup> but that the approach to assessment, as a matter of substance within the meaning of *Pfeiffer*, may be legitimately subject to the proper law of the contract.<sup>117</sup> At the very least, the mention of ‘assessment of damages’ in art 9(1)(c) would enhance certainty in this area.

Another point of note is art 9(1)(f), which provides that burden of proof and legal presumptions are subject to the chosen law. At common law, whether such things ought to be characterised as procedural will vary between cases;<sup>118</sup> the test in *Pfeiffer* would favour substantive characterisation in those cases where the burden or presumption is to do the most work. Once the International Civil Law Act is enacted, art 9(1)(f) would add clarity by removing any doubt. The Act would effectively compel a substantive characterisation for the matters listed in art 9. The change would be blunt, but to the extent that it adds to certainty in the law, it would be welcomed.

### H Assignment

Article 10 concerns a difficult but commercially important issue: the law applicable to the contractual assignment of a creditor’s rights against a debtor arising from a contract between the debtor and creditor.<sup>119</sup> The article concerns *contractual* assignment, which may be better understood as a novation, where a third party (the assignee) take the place of the creditor pursuant to a contract.<sup>120</sup> As the proprietary effects of contracts is beyond the scope of the *Hague Principles*,<sup>121</sup> that issue will remain subject to common law choice of law rules in respect of property, which tend to apply the *lex situs*.<sup>122</sup>

Article 10 contemplates two contracts, each of which may have its own, potentially distinct proper law: (1) the contract between the debtor and creditor, and (2) the contract of assignment between the creditor and the assignee.<sup>123</sup> Difficult questions may arise where two such contracts intersect.<sup>124</sup> The *Hague Principles* carve up the problem as follows. First, under art 10(a), where the creditor and assignee have selected a proper law, the proper law of the contract of assignment governs the rights and obligations of the creditor and the assignee in respect of their contract. Secondly, under art 10(b), where the debtor and

<sup>116</sup> *Naiad Dynamics US Inc v Vidakovic* (2017) 266 IR 103, 106 [16] (Le Miere J).

<sup>117</sup> See *Livesley v Horst* [1925] 1 DLR 159, 161 (Duff J), cited in *Stevens v Head* (1993) 176 CLR 433, 458 (Brennan, Dawson, Toohey and McHugh JJ).

<sup>118</sup> See Martin Davies, Andrew S Bell and Paul L G Brereton, *Nygh’s Conflict of Laws in Australia* (LexisNexis Butterworths, 9<sup>th</sup> ed, 2014) 392–5 [16.27]–[16.35].

<sup>119</sup> The law applicable to assignment of obligations is also addressed in the *United Nations Convention on the Assignment of Receivables in International Trade*, GA Res 56/81, UN GAOR, 56<sup>th</sup> sess, Agenda Item 161, UN Doc A/RES/56/81 (31 January 2002, adopted 12 December 2001). See *Hague Principles Commentary*, above n 33, 70 [10.12].

<sup>120</sup> See *Robinson v Podosky* [1905] St R Qd 118, 122 (Chubb J). Cf Trevor C Hartley, ‘Choice of Law Regarding the Voluntary Assignment of Contractual Obligations under the *Rome I Regulation*’ (2011) 60 *International and Comparative Law Quarterly* 29, 32–3.

<sup>121</sup> *Hague Principles* art 1(3)(e).

<sup>122</sup> See also Davies, Bell and Brereton, above n 118, 745–7 [33.5]–[33.13], 766 [33.68].

<sup>123</sup> See, eg, *Re United Railways of the Havana and Regla Warehouses Ltd* [1958] 1 Ch 52.

<sup>124</sup> See *Hague Principles Commentary*, above n 33, 67–8 [10.3]–[10.5].



creditor have selected a proper law, that proper law governs (i) whether the assignment can be invoked against the debtor, (ii) the rights of the assignee against the debtor, and (iii) whether the obligations of the debtor have been discharged. This is a sensible approach to the problem, which gives effect to party autonomy via the common sense principle that a contractual obligation should be subject to the law applicable to the contract that created the obligation.<sup>125</sup>

## I *Public Policy*

Once an International Civil Law Act is in force, the most frequently-litigated aspect of the enacted *Hague Principles* is likely to be art 11, the provision which gives effect to the core principle that the autonomy of parties to choose the proper law of the contract is not absolute.<sup>126</sup> Article 11 is comprised of five paragraphs but it contains a core theme: a choice of foreign law will not be upheld where to do so would contravene certain forum policy.<sup>127</sup> The difficult question is what kinds of public policy will warrant the invocation of the escape device in the face of a contrary choice of foreign law, and what policies would not. On this issue, state practice and the views of commentators ‘vary wildly’, particularly in respect of the proper approach to so-called ‘mandatory’ forum statutes.<sup>128</sup>

### 1 *Mandatory Forum Law*

Article 11(1) makes it clear that mandatory law can justify a court applying its own law rather than the chosen law. This should be taken as a reference to principles of statutes which prohibit ‘contracting out’ of the operation of the statute, or provide that they apply irrespective of parties’ choices to the contrary. An example is s 11 of the *Carriage of Goods by Sea Act 1991* (Cth), which provides that an agreement has no effect so far as it purports to preclude or limit the application of the law of the place of shipment to certain kinds of contracts, and mandates the application of the law of the place of shipment to those kinds of contracts.<sup>129</sup>

Difficult questions arise where a statute prohibits contracting out in certain cases but does not explicitly determine the proper law in other cases. A difficult example is s 67 of the *Australian Consumer Law* (‘ACL’), which provides as follows:

If:

---

<sup>125</sup> Ibid 68 [10.7].

<sup>126</sup> Dickinson describes art 11 ‘as a vital complement and counterbalance to the principle of party autonomy’: Dickinson, above n 8, 410.

<sup>127</sup> *Hague Principles Commentary*, above n 33, 70 [11.2].

<sup>128</sup> Andrew Dickinson, ‘The Role of Public Policy and Mandatory Rules within the Proposed *Hague Principles of the Law Applicable to International Commercial Contracts* – Updating Note’ (Legal Studies Research Paper No 12/82, Sydney Law School, October 2012) 2 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2168057](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2168057)> archived at <<https://perma.cc/B4XZ-R6SC>>.

<sup>129</sup> *Carriage of Goods by Sea Act 1991* (Cth) s 11.

- (a) the proper law of a contract for the supply of goods or services to a consumer would be the law of any part of Australia but for a term of the contract that provides otherwise; or
- (b) a contract for the supply of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, the following provisions for all or any of the provisions of this Division:
  - (i) the provisions of the law of a country other than Australia;
  - (ii) the provisions of the law of a State or a Territory;

the provisions of this Division apply in relation to the supply under the contract despite that term.<sup>130</sup>

In the *Valve* litigation, Edelman J accepted that, in the absence of an exclusive choice of the courts of Washington State, USA, and in the absence of an express choice of the law of Washington State, the objective proper law of the contract would have been the law of Washington State, which had the ‘closest and most real connection’ to the transaction.<sup>131</sup> But s 67 does not deal with that scenario; it applies to certain contracts the objective proper law of which would be the law of a part of Australia.<sup>132</sup> Nonetheless, his Honour appealed to the text, context, history, purpose, and policy of s 67 in holding that the *ACL* should apply regardless.<sup>133</sup>

On appeal, the Full Court of the Federal Court recognised that, applying general principles of statutory construction, the substantive provisions of div 1 of pt 3–2 of the *ACL* are presumed to be limited in operation to the territorial scope of Australia.<sup>134</sup> But that presumption may be undone by clear words. Section 5(1)(c) of the *Competition and Consumer Act 2010* (Cth) provides that the *ACL* extends<sup>135</sup> to the engaging in conduct outside Australia by bodies corporate carrying on business within Australia.<sup>136</sup> It was held that Valve had carried on business within Australia by providing its Steam video game distribution service to consumers based in Australia.<sup>137</sup> In those circumstances, their Honours appealed to a purposive construction in holding that

[i]t would be inconsistent with the statutory scheme and the statutory purpose to read s 67 as *limiting* the scope of operation of the Division such that a supply of goods or services is not covered where the supply is pursuant to a contract the objective proper law of which is the law of another country.<sup>138</sup>

<sup>130</sup> *Competition and Consumer Act 2010* (Cth) sch 2 (‘*ACL*’) s 67.

<sup>131</sup> *Valve* (2016) 337 ALR 647, 665 [84].

<sup>132</sup> See *Valve Corporation v Australian Competition and Consumer Commission* [2017] FCAFC 224, [108], [113] (Dowsett, Mckerracher and Moshinsky JJ) (‘*Valve v ACCC*’).

<sup>133</sup> *Valve* (2016) 337 ALR 647, 666 [90].

<sup>134</sup> *Valve v ACCC* [2017] FCAFC 224 (22 December 2017) [105], citing *Jumbunna Coal Mine, NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309, 363 (O’Connor J); *Barcelo v Electrolytic Zinc Company of Australasia Ltd* (1932) 48 CLR 391, 423–5 (Dixon J); *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 600–1 (Dixon J).

<sup>135</sup> Other than pt V, div 3, which concerns country of origin representations.

<sup>136</sup> *Competition and Consumer Act 2010* (Cth) s 5(1)(g).

<sup>137</sup> *Valve v ACCC* [2017] FCAFC 224 (22 December 2017), [150].

<sup>138</sup> *Ibid* [114] (emphasis in original).

Valve Corporation sought special leave to appeal the Full Court's decision on s 67 of the *ACL* to the High Court. Special leave was refused in April 2018.<sup>139</sup> This is perhaps unfortunate; a High Court judgment on that subject matter would have been extremely important, not just for private international law, but for any global businesses providing internet-based services to consumers in Australia.<sup>140</sup> As for the *Hague Principles*, it is important to note that this litigation concerns consumer contracts, which would not be within the scope of an International Civil Law Act.<sup>141</sup>

Nevertheless, the *Valve* litigation may be critical to the future of the *Hague Principles* within Australian law; it provides the latest authority on when the 'policy' of an Australian statute may override an express choice of law.<sup>142</sup> In the judgment on liability, Edelman J appealed to the 'policy of the *Australian Consumer Law*' in justifying the extraterritorial application of the statute.<sup>143</sup> His Honour followed the High Court in *Akai*, where the policy of the *Insurance Contracts Act 1984* (Cth) was part of the rationale for refusing to give effect to an exclusive choice of English courts and an express choice of English law.<sup>144</sup> Recently, the High Court appealed to the 'policy' of the statute in *Equuscorp Pty Ltd v Haxton*.<sup>145</sup> And more recently still, on appeal from the decision of Edelman J, the Full Court tacitly appealed to policy when it referred to the 'statutory scheme' and 'statutory purpose' of the *ACL* in construing its scope of operation. Reading these authorities together, it seems that Australian courts are increasingly willing to depart from the old maxim of statutory interpretation that confines statutes to a territorial scope of operation.<sup>146</sup> The old common law approaches to statutory interpretation must be understood as subject to statutory amendment. For Commonwealth Acts, s 15AA of the *Acts Interpretation Act 1901* (Cth) is critical:

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

It is consistent with this purposive approach to statutory interpretation that Australian courts take a broad approach to the geographical scope of Australian statutes. In an environment where Australian lives and businesses increasingly cross borders on a regular basis, it would defeat the purposes of many pieces of Australian legislation if courts were to take a territorially-limited approach to

---

<sup>139</sup> *Valve Corporation v Australian Competition and Consumer Commission* [2018] HCASL 99 (19 April 2018).

<sup>140</sup> See also the recent decision of the Supreme Court of Canada that affirmed that Google carried on business in British Columbia by providing its internet search services within the jurisdiction, among other things: *Google Inc v Equustek Solutions Inc* [2017] 1 SCR 824.

<sup>141</sup> *Hague Principles* art 1(1).

<sup>142</sup> Note that, in respect of the meaning of 'overriding mandatory provisions' in art 11(1), the commentary provides as follows: 'It is not necessary that an overriding mandatory provision should take a particular form (ie, it need not be a provision of a constitutional instrument or statute), or that its overriding, mandatory character should be expressly stated': *Hague Principles Commentary*, above n 33, 74 [11.17].

<sup>143</sup> *Valve* (2016) 337 ALR 647, 671 [116].

<sup>144</sup> *Akai* (1996) 188 CLR 418, 433 (Toohey, Gaudron and Gummow JJ).

<sup>145</sup> *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 514 [25] (French CJ, Crennan and Kiefel JJ).

<sup>146</sup> Cf *Moore v Scenic Tours Pty Ltd [No 2]* [2017] NSWSC 733 (31 August 2017).

statutes' scope of operation. This view may be criticised by some as parochial statism,<sup>147</sup> but may also be defended as merely 'the forum's approach to the expression of the law that governs or regulates inherently international activity'.<sup>148</sup> If the purposive approach to statutory interpretation gives rise to forum shopping in favour of Australian courts, so be it.

For commercial litigators, the statutory prohibition on misleading or deceptive conduct in s 18 of the *ACL* is a very important provision of Australian legislation. When parties to a cross-border contract with strong connections to Australia seek to select foreign law as the proper law of their contract, an important question is whether s 18 ought to be applied. In a 2012 article, Garnett traced the treatment of jurisdiction clauses in Australian courts since the High Court's decision in *Akai*, and identified a trend towards Australian courts giving effect to exclusive foreign jurisdiction agreements by staying the local proceedings, even where relief was sought under s 18 of the *ACL*.<sup>149</sup> Although jurisdiction agreements are distinguishable from choice of law clauses, the 'policy' bases for refusing to give effect to each run in parallel, and are often dealt with together.<sup>150</sup> But, in light of *Valve*, it might be argued that the trend in favour of party autonomy ought to retreat in favour of the policy of the *ACL*. The territorial scope of s 18 *ACL* may prove to be an ongoing point of contention; it may be a focus of litigation over where parties to cross-border contracts with Australian connections should litigate.<sup>151</sup> It is unlikely that enactment of an International Civil Law Act would do anything to quell those interlocutory disputes.

## 2 *Mandatory Foreign Law and Foreign Public Policy*

Different legal systems take different approaches to the question of the proper limits on party autonomy to select the proper law of a cross-border contract. This fact gives rise to the issue of whose approach to party autonomy ought to be applied: the approach of the *lex fori*, or the approach of the system of law selected by the contract (ie, the proper law, the *lex causae*)?<sup>152</sup> Generally, the *Hague Principles* defer to the approach of the court seised; that is, the *lex fori* approach to mandatory law and public policy will apply. However, the mandatory laws and public policies of relevant systems of foreign law may have some role to play, too.<sup>153</sup>

Article 11(2) provides that the *lex fori* determines when a court may or must apply or take into account overriding mandatory provisions of another law, while art 11(4) provides that the *lex fori* determines when a court must or may apply the forum policy of the state whose law would apply in the absence of a choice

---

<sup>147</sup> See Maria Hook, 'The "Statutist Trap" and Subject-Matter Jurisdiction' (2017) 13 *Journal of Private International Law* 435.

<sup>148</sup> *Ship Sam Hawk v Reiter Petroleum Inc* (2016) 246 FCR 337, 361 [85] (Allsop CJ and Edelman J) ('*Sam Hawk*').

<sup>149</sup> Richard Garnett, 'Jurisdiction Clauses since *Akai*' (2013) 87 *Australian Law Journal* 134, 137–8. See *Comandate* (2006) 157 FCR 45. Cf *Yperion Technology SAS v Luminex Pty Ltd* [2012] FCA 554 (22 May 2012).

<sup>150</sup> See *Akai* (1996) 188 CLR 418.

<sup>151</sup> *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460, 464 (Lord Templeman).

<sup>152</sup> See Symeonides, above n 7, 882–5.

<sup>153</sup> See *Hague Principles* arts 11(2), (4)–(5).

of law. These provisions are consistent with the common law principle that violation of the public policy of a foreign country is generally an insufficient basis to avoid the application of that foreign proper law,<sup>154</sup> unless application of that law would also contravene forum policy.<sup>155</sup> They are also consistent with the broad principle that characterisation is a matter for the forum: it is for the local court to determine the character of relevant provisions of mandatory law, and to determine the proper law according to its own principles of choice of law.<sup>156</sup>

It is important to note that the mere fact that a foreign *lex causae* is different from Australian law does not mean that an Australian court will refuse to apply that foreign law.<sup>157</sup> An Australian court will give effect to a foreign statute, for example, in applying the *lex loci delicti* to an international tort.<sup>158</sup> An Australian court can give effect to Australian policy, as expressed in the choice of law rules of the *lex fori*, by giving effect to the policy of a foreign system of law, as expressed in a foreign statute or a foreign line of authority.<sup>159</sup> In that context, the paragraphs of art 11 concerning foreign policy and foreign mandatory law are consistent with Australian private international law.

### 3 *Manifest Incompatibility with Fundamental Public Policy*

Article 11(3) is in strong terms, reflecting an intention on the part of the drafters that the public policy exception ought to be of an exceptional character.<sup>160</sup> The article provides:

A court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.

According to the commentary, the language discloses three preconditions to the application of the exception:

first, there must be a policy of the forum State of sufficient importance to justify its application to the case in question ('fundamental notions of public policy' or '*ordre public*'); secondly, the chosen law must be obviously inconsistent with that

---

<sup>154</sup> *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448, 456 (Phillips J).

<sup>155</sup> See *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 140 (Kirby P), 196 (McHugh JA); *A-G (UK) v Heinemann Publishers Australia Pty Ltd [No 2]* (1988) 165 CLR 30 ('*Spycatcher Case*').

<sup>156</sup> *Pfeiffer* (2000) 203 CLR 503, 527–8 [42]–[44] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Sam Hawk* (2016) 246 FCR 337, 385 [181]–[182] (Allsop CJ and Edelman J).

<sup>157</sup> See *Re Canavan* (2017) 349 ALR 534.

<sup>158</sup> See *Neilson* (2005) 223 CLR 331.

<sup>159</sup> Australian law rejects vested rights theory: *Koop v Bebb* (1951) 84 CLR 629, 643, 644 (Dixon, Williams, Fullagar and Kitto JJ); *Breavington v Godleman* (1988) 169 CLR 41, 160 (Toohey J); *Pfeiffer* (2000) 203 CLR 503, 526 [39] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Blunden v Commonwealth* (2003) 218 CLR 330, 340–1 [24] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also *Indyka v Indyka* [1969] 1 AC 33, 66 (Lord Reid).

<sup>160</sup> Andrew Dickinson, 'The Role of Public Policy and Mandatory Rules within the Proposed *Hague Principles*', above n 128, 2. On the drafting history of art 11, see Dickinson, above n 8, 404–7.

policy ('manifestly incompatible'); and thirdly, the manifest incompatibility must arise in the application of the chosen law to the dispute before the court.<sup>161</sup>

The difficult question for Australian courts is: what principles of forum policy are so important that they deserve the characterisation of 'fundamental notions'? Generally speaking, every principle of Australian law reflects Australian policy; but it cannot be the case that art 11(3) may be invoked in every case of a conflict of laws. As the High Court held in *Akai*, forum statutes may disclose public policy — so what cases will be captured by the exception for mandatory law in art 11(1), and what cases will be captured by art 11(3)?<sup>162</sup> Further, when will a foreign law be 'manifestly incompatible' with forum policy? What work does the word 'manifestly' do?<sup>163</sup> Common law exclusionary doctrines are likely to inform the answer to these questions, as will the case law concerning equivalent terms in the *Hague Convention*.<sup>164</sup>

Historically, common law courts would give effect to foreign law, in accordance with the choice of law rules of the *lex fori*, unless to do so 'would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal'.<sup>165</sup> At common law, Australian courts will refuse to give effect to foreign revenue laws;<sup>166</sup> foreign penal laws;<sup>167</sup> foreign governmental interests;<sup>168</sup> contracts which violate some principle of justice or morality;<sup>169</sup> and laws which violate international law.<sup>170</sup> It is unclear whether each of these kinds of exclusionary doctrines would be captured by art 11(3) of the *Hague Principles*, which seem best adapted to cases involving grave moral wrongs.<sup>171</sup> The ambiguity of the language in art 11(3) will provide courts with the room to deploy an escape device and select the *lex fori* where desirable. In the rare kinds of cases in which a common law exclusionary doctrine could be successfully invoked, it is likely that Australian

<sup>161</sup> *Hague Principles Commentary*, above n 33, 77 [11.23].

<sup>162</sup> The commentary on art 11 recognises that there is an overlap between the categories of mandatory law and public policy: *Hague Principles Commentary*, above n 33, 73 [11.11]. Laval notes that '[i]n Europe, the distinction between the public policy exception and the application of overriding mandatory rules is blurred because of the resemblance between both mechanisms': Sarah Laval, 'A Comparative Study of Party Autonomy and Its Limitations in International Contracts' (2016) 25 *Cardozo Journal of International and Comparative Law* 29, 39.

<sup>163</sup> Cf Richard Garnett, 'The *Hague Choice of Courts Convention*: Magnum Opus or Much Ado about Nothing?' (2009) 5 *Journal of Private International Law* 161, 166–7.

<sup>164</sup> See Dickinson, above n 8, 411–16.

<sup>165</sup> *Loucks v Standard Oil Co of New York*, 120 NE 198, 202 (Cardozo J) (1918), quoted in *Pfeiffer* (2000) 203 CLR 503, 541 [91] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

<sup>166</sup> *Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] AC 491; *Jamieson v Commissioner for Internal Revenue* [2007] NSWSC 324 (18 April 2007).

<sup>167</sup> *Huntington v Attrill* [1893] AC 150; *Sykes v Richardson* [2007] NSWSC 418 (1 May 2007). See also *Surgibit IP Holdings Pty Ltd v Ellis [No 2]* [2017] NSWSC 1379 (11 October 2017).

<sup>168</sup> *Spycatcher Case* (1988) 165 CLR 30; *Robb Evans of Robb Evans & Associates v European Bank Ltd* (2004) 61 NSWLR 75.

<sup>169</sup> *Kaufman v Gerson* [1904] 1 KB 591; *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249.

<sup>170</sup> *Kuwait Airways Corp v Iraqi Airways Co [Nos 4 and 5]* [2002] 2 AC 883 ('*Kuwait Airways*').

<sup>171</sup> Cf *Kuwait Airways* [2002] 2 AC 883.

courts could justifiably refuse to give effect to the relevant foreign law without contravening the requirements of art 11(3).

## V CONCLUSION

This article has explained how the introduction of the *Hague Principles* would impact Australian domestic law. The *Hague Principles*' enactment would remove some eccentricities in Australian private international law, bringing it closer to international practice. The *Hague Principles* have sought to address the fundamental tension between party autonomy and public policy in favour of the former, although the tension would remain under an International Civil Law Act. The scope of the public policy exceptions in art 11 is likely to be a focus of choice of law disputes under the Act.

The *Hague Principles*' character as a non-binding instrument is a novel move for the Hague Conference,<sup>172</sup> and one which will hopefully drive their uptake by states.<sup>173</sup> The soft law model avoids some of the pitfalls of binding instruments like the *Hague Convention*: states may be reluctant to join a certain convention as a party, notwithstanding their substantive agreement with the text, on the basis of some particular sticking point.<sup>174</sup> Where unification is not possible, the harmonisation of international commercial law is a desirable alternative. Australia's prospective enactment of the *Hague Principles* is thus to be commended: it serves the Hague Conference's goals of enhancing legal certainty for cross-border activities, and so encourages cross-border trade.<sup>175</sup>

---

<sup>172</sup> Michaels, above n 60, 43.

<sup>173</sup> Paraguay promulgated the *Hague Principles* in 2015. See Hague Conference on Private International Law, 'Paraguay Promulgates the Law based on the Draft *Hague Principles on Choice of Law in International Commercial Contracts*' (News Release, 20 January 2015) <<https://www.hcch.net/en/news-archive/details/?varevent=392>> archived at <<https://perma.cc/P9ZM-T74Y>>.

<sup>174</sup> Pertegás and Marshall, above n 7, 982–3.

<sup>175</sup> See Hague Conference on Private International Law, *About HCCH* (2018) <<https://www.hcch.net/en/about>> archived at <<https://perma.cc/A722-ENPE>>.