RECONSIDERING THE LAW GOVERNING THE FORMATION OF INTERNATIONAL CONTRACTS IN AUSTRALIA

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This article revisits the question of what law governs the formation of international contracts from the perspective of the law in Australia. Ever since the High Court of Australia's obiter decision in Oceanic Sun Line Special Shipping Co Inc v Fay *in 1988, courts have maintained that Australian law,* qua lex fori*, should apply to formation questions. The article challenges the suitability of this choice-of-law rule and evaluates the possible ways of reframing this aspect of the law in Australia. The article's main contention is that the* lex fori *should be replaced by a set of choice-of-law rules under which formation questions in international contracts are resolved based on: (i) the law expressly chosen by the parties to govern such matters; or (ii) in the absence of such express choice, the law of the territory which has the most real and substantial connection with the negotiations preceding the purported agreement.*

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I Introduction

A court hearing a private dispute with international elements may occasionally have to decide the law according to which the parties' competing claims should be adjudicated. In common law jurisdictions, the 'proper law of the contract' governs the rights and obligations of the parties in litigation arising from international contracts.[1] Three distinct choice-of-law rules help to determine the proper law. Under the first rule, the parties' dispute is to be resolved by reference to the law expressly chosen by them in the agreement.[2] In the absence of an express choice, the second rule states that the proper law of the contract is to be implied, with the implication being arrived at 'upon the construction of the contract and by the permissible means of construction'.[3] Where there is no choice, either express or implied, the third choice-of-law rule becomes relevant; it states that the proper law is to be the law of the forum that has the most real and substantial connection to the contract.[4]

Whatever the proper law of a contract, it does not necessarily follow that it will govern *all* disputes arising from the parties' agreement. Thus, it is entirely possible for different laws to apply to different aspects of an international contract. As Cheshire pointed out as long ago as 1948:

> [B]aldly to assert that international contracts are subject to a certain law is an over-simplification of the problem. The true inquiry is not — what law governs the contract? It is — what law governs the particular question raised in the instant proceedings? The legal system which determines, for instance, whether agreement has been reached or whether the contract is void for want of consideration, is not necessarily that which is relevant to a question of interpretation.[5]

[1] *Mount Albert Borough Council v Australasian Temperance and General Mutual Life Assurance Society Ltd* [1938] AC 224, 240 (Lord Wright for the Court).

[2] *Vita Food Products Inc v Unus Shipping Co Ltd (in liq)* [1939] AC 277, 289–90 (Lord Wright for the Court).

[3] *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418, 441 (Toohey, Gaudron and Gummow JJ) ('*Akai*').

[4] *Bonython v Commonwealth* [1951] AC 201, 219, 221 (Lord Simonds for the Court). As far as the application of the choice-of-law rules in Australia is concerned, the ruling in *Akai* (n 3) appears to have combined the express and implied rules: see at 440–2 (Toohey, Gaudron and Gummow JJ).

[5] Geoffrey Chevalier Cheshire, *International Contracts: Being the Fifteenth Lecture on the David Murray Foundation in the University of Glasgow Delivered on March 4th, 1948* (Jackson, Son & Company, 1948) 18 ('*International Contracts*'). See also Clive M Schmitthoff, *A Textbook of the English Conflict of Laws (Private International Law)* (Sir Isaac Pitman & Sons, 2nd ed, 1948) 106.

This article is broadly concerned with the law by reference to which common law courts address disputes surrounding the formation of international contracts. The question of which law governs these disputes has long been considered by commentators as '[o]ne of the more notoriously intractable problems of the modern conflict of laws',[6] 'a classic conflict of laws conundrum'[7] and a 'vexatious problem'[8] that has 'confounded the common law'.[9] It is scarcely an overstatement, therefore, to regard it as being one of the thorniest and most complicated issues in private international law at common law. For present purposes, 'formation' of international contracts encompasses two separate situations. One situation involves cases where the dispute relates to whether the parties' negotiations had indeed resulted in *consensus ad idem* (the '*consensus ad idem* question'). The other concerns cases in which, although an agreement has been reached, the contentious issue is whether the contract was vitiated by fraud, mistake, duress or misrepresentation (the 'reality of consent question'). Both of these issues are referred to as 'formation questions' in this article.

More specifically, the article seeks to revisit the choice-of-law rules governing formation questions from the perspective of the law in Australia. Following Brennan J's and Gaudron J's obiter remarks in the High Court of Australia's ruling in *Oceanic Sun Line Special Shipping Co Inc v Fay* ('*Oceanic Sun*') in 1988,[10] courts have maintained that this aspect of international contractual disputes is to be resolved by reference to Australian law, *qua lex fori*.[11] The article sets out to challenge the suitability of the *lex fori* in this context and proposes that it be replaced by an alternative set of choice-of-law rules. Under the proposed regime, *consensus ad idem* and reality of consent questions in international contracts would be resolved based on: (i) the law expressly chosen by the parties to apply to such matters; or (ii) in the absence of such an express choice, the law of the territory which has the most real and substantial connection with the negotiations preceding the purported agreement.

[6] Adrian Briggs, 'The Formation of International Contracts' [1990] *Lloyd's Maritime and Commercial Law Quarterly* 192, 192.

[7] Adeline Chong, 'Choice of Law for Formation of Contracts: *Solomon Lew v Kaikhushru Shiavax Nargolwala*' [2021] (2) *Singapore Journal of Legal Studies* 383, 385.

[8] Kelvin FK Low, 'Choice of Law in Formation of Contracts' (2004) 20(3) *Journal of Contract Law* 167, 191.

[9] Ibid 167.

[10] (1988) 165 CLR 197 ('*Oceanic Sun*'). See at 225 (Brennan J), 260–1 (Gaudron J).

[11] See, eg, *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* (2017) 247 FCR 1, 14 [45]–[46] (Greenwood J), 28 [133]–[134] (Beach J, Dowsett J agreeing at 3 [1]) ('*Trina Solar (Full Court)*'); *Central Petroleum Ltd v Geoscience Resource Recovery LLC* [2018] 2 Qd R 371, 386 [47]–[49] (Bowskill J); *Dialogue Consulting Pty Ltd v Instagram Inc* (2020) 291 FCR 155, 223 [483] (Beach J).

The main body of the article contains three parts. By way of background to the discussion on the law in Australia, Part II presents a historical account of the origins of the modern-day approaches adopted by common law courts to establishing the law governing formation questions. In Part III, the focus shifts onto the law in Australia. In particular, it examines how courts there have settled on using Australian law (being the *lex fori*) in addressing formation questions, before proceeding to evaluate the appropriateness of this choice-of-law rule. Finally, Part IV advances an alternative approach which, it is argued, provides a more attractive and defensible way of determining the law governing the formation of international contracts in Australia.

II The Law Governing Formation Questions at Common Law: A Historical Background

A *Early to Mid-20th Century:* Lex Loci Contractus

In the early 20th century, the question of which law governed the formation of international contracts at common law scarcely received attention in judicial pronouncements or academic commentary.[12] For example, none of the first five editions of *Dicey's Conflict of Laws* ('*Dicey*'), published between 1896 and 1932, raised or proffered a view on the choice-of-law rule applicable to formation questions.[13] Similarly, the first three editions of Cheshire's *Private International Law*, published between 1935 and 1947, did not grapple with this aspect of contract choice-of-law rules.[14] Nevertheless, and to the extent that any discussion of the matter can be found in other common law sources, the preferred approach in the early 20th century was to rely on the law of the place where the disputed contract was made (the '*lex loci contractus*').

For instance, in England, in the first two editions of *International Private Law or the Conflict of Laws*, published in 1918 and 1927, Hibbert observed that the law of the place where the contract was made should prima facie address

[12] The only notable exception is said to be the New South Wales case, *White Cliffs Opal Mines Ltd v Miller* [1904] 4 SR (NSW) 150, 153–4 (AH Simpson CJ in Eq) ('*White Cliffs*'), which is discussed below in Part III(A) of this article.

[13] The first discussion of this issue came in JHC Morris, *Dicey's Conflict of Laws* (Stevens & Sons, 6th ed, 1949) 616–17 ('*Dicey (6th ed)*'). Equivalent sections in earlier editions did not discuss the choice-of-law rules governing formation questions: see, eg, AV Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, ed A Berriedale Keith (Stevens & Sons, 5th ed, 1932) ch XXV.

[14] The first mention of this question is found in GC Cheshire, *Private International Law* (Clarendon Press, 4th ed, 1952) 215–18 ('*Private International Law (4th ed)*'). Earlier editions did not mention this issue when discussing the choice-of-law rules applicable to contracts: see, eg, GC Cheshire, *Private International Law* (Clarendon Press, 3rd ed, 1947) ch IX.

any doubt as to whether a cross-border contract had been created.[15] Around the same time, a similar approach appeared to have support in a number of important private international law sources published in the United States ('US').[16] Illustrative in this context is the discussion in Beale's seminal book, *A Treatise on the Conflict of Laws*, in 1935. On the issue of 'mutual assent' in contracts, it states that

> it is the law of the place of making which governs in determining whether there was such an expression of assent as would give rise to a contract, the phrase 'place of making' meaning here as elsewhere the place where the transaction took place which is claimed to have resulted in a contract, whether in fact and law a contract actually resulted or not.[17]

The preference for this approach to identifying the law governing the formation of cross-border contracts is also shared by the drafters of the American Law Institute's first *Restatement of the Law of Conflict of Laws* ('*Restatement*'), published in May 1934.[18] This was not especially surprising, as Beale and many whose views on the subject had been influenced by his were instrumental in drafting the *Restatement*.[19] The commentary within the section entitled 'Law Governing Validity of Contract' states that '[t]he law of the place of contracting determines the validity and effect of a promise with respect to',[20] inter alia, 'the mutual assent or consideration, if any, required to make a promise binding',[21]

[15] See W Nembhard Hibbert, *International Private Law or the Conflict of Laws* (University of London Press, 1918) 130–1; W Nembhard Hibbert, *International Private Law or the Conflict of Laws* (University of London Press, 2nd ed, 1927) 158–9.

[16] It should be noted that reliance on the *lex loci contractus* as the basis for resolving the formation question was not without its critics: see, eg, Ernest G Lorenzen, *Selected Articles on the Conflict of Laws* (Yale University Press, 1947) 299–300.

[17] Joseph H Beale, *A Treatise on the Conflict of Laws* (Baker, Voorhis & Co, 1935) vol 2, 1174 § 333.1 ('*A Treatise on the Conflict of Laws*').

[18] See American Law Institute, *Restatement of the Law of Conflict of Laws* (American Law Institute Publishers, 1934) 408–11 § 332 ('*Restatement*').

[19] See Ernest G Lorenzen and Raymond J Heilman, 'The Restatement of the Conflict of Laws' (1935) 83(5) *University of Pennsylvania Law Review and American Law Register* 555, 555 n 1. Indeed, it has been observed that Beale's *A Treatise on the Conflict of Laws* (n 17) 'was the model for the [*Restatement* (n 18)] in both structure and content. Thus, the [*Restatement* (n 18)] is inextricably tied to [Beale]': Symeon C Symeonides, 'Restatement (First and Second) of Conflict of Laws' in Jürgen Basedow et al (eds), *Encyclopedia of Private International Law* (Edward Elgar Publishing, 2017) vol 2, 1545, 1546.

[20] *Restatement* (n 18) 408 § 332.

[21] Ibid 409 § 332(c).

and 'fraud, illegality, or any other circumstances which make a promise void or voidable'.[22]

B *Mid-20th Century: The Proper Law of the Putative Agreement*

By the mid-20th century, the choice-of-law rules applicable to questions concerning *consensus ad idem* and reality of consent began to receive greater attention from private international law scholars. In this context, the views proffered by Wolff in his book, *Private International Law*, published in 1945, were particularly influential in enlivening the debate and shaping the future direction of the law in this area.[23] Rather than embracing *lex loci contractus*, Wolff proposed an alternative choice-of-law rule for ascertaining the formation of international contracts: 'The law that decides whether a contract was validly concluded is that law which regulates its effects if in fact it was validly concluded.'[24] In other words, according to Wolff, the proper law of the putative agreement should determine formation questions in international contracts. To avoid a situation wherein the proper law of the putative agreement regards the offeree's silence, in the face of an offer, to amount to an acceptance, Wolff qualified his approach, stating that '[t]he silence of a person can be deemed to be an act of legal significance only if that is so under the law of that person's residence or place of business'.[25]

In its immediate aftermath, Wolff's suggested method for addressing the question of formation of cross-border contracts — which later came to be known as the 'putative proper law' approach — divided opinion amongst the leading scholars in the field. As evidenced in a lecture delivered at the University of Glasgow in 1948, Cheshire was somewhat unpersuaded by the idea:

> Dr Martin Wolff asserts that the fact of agreement should be tested by reference to what would be the proper law if the contract were valid. This view is at first sight attractive, since it appears to avoid the necessity of fixing the *locus contractus*, which … may be a task of some complexity. Yet it seems a little artificial to speak of a hypothetical proper law before it is known whether the parties have even reached agreement. Moreover, it may be difficult to determine what the proper law is until it has been settled where the contract was made, for this place

[22] Ibid 409 § 332(e).

[23] See Martin Wolff, *Private International Law* (Oxford University Press, 1945) 445–7 § 421.

[24] Ibid 445 § 421.

[25] Ibid 446 § 421.

> constitutes one of the important elements, perhaps the most important, upon which the question turns.[26]

After examining the putative proper law and *lex loci contractus* as possible choice-of-law rules for the purpose of determining issues to do with the formation of international contracts, Cheshire proceeded to observe that '[a] reasonable solution … is to apply the *lex loci contractus* and to leave it to the *lex fori* to identify the *locus contractus*'.[27] Indeed, he predicted that, despite the problems that could arise from relying on the *lex loci contractus* as a choice-of-law rule in this context, 'the English and Scottish courts will determine the fact of agreement by the *lex loci contractus*, and will establish the *locus contractus* by applying the relevant test recognized by their domestic laws'.[28]

At the same time, the editors of the sixth edition of *Dicey*, published in 1949, seemed much more receptive to Wolff's suggested choice-of-law rule. It was in this edition where, for the first time, a rule was included that stated how the law by reference to which disputes concerning the formation of international contracts should be resolved. To all outward appearances, the editors embraced Wolff's proposal: 'Rule 138 — The formation of a contract is governed by that law which would be the proper law of the contract if the contract was validly concluded.'[29] However, the editors were at pains to point out that that rule was 'put forward tentatively and with some hesitation', owing to the lack of support in the relevant case law at the time for what it proposed.[30] The editors of *Dicey* acknowledged that sources such as the American Law Institute's *Restatement* had favoured the application of the *lex loci contractus* to determining formation questions in cross-border contracts.[31] But, ultimately, they were critical of the *lex loci contractus* as the relevant choice-of-law rule in this context. In their view,

> [a]part from the fact that the place of contracting may be purely fortuitous, there is a danger that by submitting to the *lex loci contractus* the question whether a contract has been concluded at all one may involve oneself in a vicious circle.[32]

The editors of *Dicey* went on to observe that reliance on the proper law of the putative contract as a basis for resolving formation questions

[26] Cheshire, *International Contracts* (n 5) 53–4 (citations omitted).

[27] Ibid 55.

[28] Ibid 56–7.

[29] Morris, *Dicey (6th ed)* (n 13) 616.

[30] Ibid 616–17.

[31] Ibid 617.

[32] Ibid.

> has the advantage that it submits the formation of the contract to the same system which governs its essential validity and its interpretation. It is hardly open to the objection of illogicality.[33]

For much the same reasons as those identified by Wolff,[34] they acknowledged that whether certain conduct — such as silence on the part of the offeree — would result in the formation of an agreement should be established based on the law of the offeree's residence or place of business:

> If, eg, a person in England receives an offer to contract from Denmark containing a clause by which the contract is to be governed by Danish law, it should not be said that the Englishman's silence amounts to an acceptance, merely on the ground that, in circumstances of this kind, Danish law would have regarded the offeree's silence as equivalent to an acceptance.[35]

Using the proper law of the putative agreement as the basis for resolving questions concerning both the existence of *consensus ad idem* and the reality of consent gained further ground when it was also endorsed by Cheshire in the fourth edition of *Private International Law*, published in 1952.[36] It is not clear whether the adoption by *Dicey*'s editors of Wolff's proposed method for resolving formation questions played a part in changing Cheshire's views on this matter. In any event, and in much the same way as *Dicey*'s editors, Cheshire questioned the logic in relying on the *lex loci contractus*, remarking that 'if the question is whether the agreement was made it is a *petitio principii* to purport to apply the law of the country where it was made'.[37] Despite finally embracing Wolff's proposed choice-of-law rule, Cheshire was rather pessimistic about its prospects, predicting that 'when the occasion arises the English court will prefer the *lex loci contractus*'.[38] Indeed, in the fifth and sixth editions of his work, published in 1957 and 1961 respectively, Cheshire continued to express the view that although the law governing the putative agreement should determine the question of formation, '[t]here [was] little doubt … that the English judges prefer the theory of the *lex loci contractus*'.[39]

[33] Ibid.

[34] See Wolff (n 23) 446 § 421.

[35] Morris, *Dicey (6th ed)* (n 13) 618. See also at 617.

[36] See Cheshire, *Private International Law (4th ed)* (n 14) 216.

[37] Ibid.

[38] Ibid 217.

[39] GC Cheshire, *Private International Law* (Clarendon Press, 5th ed, 1957) 225; GC Cheshire, *Private International Law* (Clarendon Press, 6th ed, 1961) 234.

However, the opposite of what Cheshire had predicted materialised in *Albeko Schuhmaschinen AG v The Kamborian Shoe Machine Co Ltd* ('*Albeko Schuhmaschinen*') in 1961, when the English court ruled (in obiter) that the proper law of the putative agreement should apply to disputes involving the formation of cross-border contracts.[40] In this case, an English company, K, posted a letter from England to a Swiss company, A, containing an offer based on which A would become K's agent in Switzerland with a commission on sales of K's products in that country. In due course, a number of K's products were sold in Switzerland, prompting A to seek commission on the sales. A contended that an agreement had been formed between the parties as it had accepted K's offer by posting a letter. However, Salmon J dismissed this contention, finding that no contract had been made between the parties as A had not sent the letter of acceptance. Nevertheless, his Lordship proceeded to make pronouncements regarding the law which would have established whether the parties had indeed entered an agreement, on the assumption that A had actually sent the letter of acceptance, albeit that it never made its way to K.[41]

Under English law, the offeree's mere *posting* of the acceptance letter would have been sufficient for an agreement to be made,[42] even if the letter had ended up being delayed in the post or lost altogether.[43] However, under Swiss law, the offeror's *receipt* of the acceptance was critical to the agreement being made.[44] Salmon J stated that, on the facts, Swiss law would have determined whether there was a meeting of minds between the parties. His Lordship pointed out that Switzerland would have been the place of performance of the contract and that the offer had been communicated there. Consequently, Swiss law would have been the proper law of the contract, had the contract been concluded between the parties. Accordingly, Salmon J found that, on these facts, no contract would have come into being even if the offeree had posted an acceptance that never reached the offeror.[45]

[40] *Albeko Schuhmaschinen AG v The Kamborian Shoe Machine Co Ltd* (1961) 111 LJ 519, 519 (Salmon J) ('*Albeko Schuhmaschinen*').

[41] Ibid.

[42] Under English law, when reasonable, and provided that the letter is properly addressed and stamped, all that the offeree must do to enter into an agreement with the offeror is post the acceptance letter: see *Adams v Lindsell* (1818) 1 B & Ald 681; 106 ER 250, 251.

[43] See *The Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) 4 Ex D 216, 224 (Thesiger LJ), 224, 228, 232 (Baggallay LJ).

[44] *Albeko Schuhmaschinen* (n 40) 519 (Salmon J).

[45] Ibid.

C *The Putative Proper Law Approach Doubted?*

Although only persuasive, Salmon J's obiter remarks in *Albeko Schuhmaschinen* were nonetheless regarded as an endorsement of the putative proper law approach as the relevant choice-of-law rule for determining formation questions.[46] Hence, by the mid-1960s, it began to look as though the approach would take root in England and, indeed, across the rest of the common law world. However, it was not long before doubt was cast on the suitability of this choice-of-law rule. Especially significant in this regard were Diplock LJ's obiter remarks in *Mackender v Feldia AG* ('*Mackender*').[47]

The dispute in this case arose in the context of an insurance contract entered in England between the plaintiffs, who were English insurers, and the defendants, three diamond merchants incorporated in Switzerland, Belgium and Italy.[48] Under the contract, the plaintiff had undertaken to insure the defendants against loss or damage to their stock. After losing a quantity of diamonds in Naples, the defendants sought reimbursement under the policy. However, the plaintiffs rejected their claim. Subsequently, the defendants initiated proceedings in Belgium, demanding indemnity under the insurance policy. For their part, the plaintiffs commenced service-out proceedings in England to obtain a declaration that the policy was void due to the defendants' illegal smuggling of diamonds into Italy, and/or that the policy was voidable because of the defendants' failure to disclose material facts.

At first instance, Roskill J granted the plaintiffs' ex parte application to serve the writ on the defendants outside of England.[49] The defendants appealed to the Court of Appeal. They pointed to a clause within the insurance policy which stated that disputes arising from the contract were to be subjected to the exclusive jurisdiction of the courts in Belgium and governed exclusively by Belgian law.[50] In response, the plaintiffs contended that the illegal conduct and non-disclosure on the part of the defendants had the effect of vitiating the plaintiffs' consent to the agreement, including the Belgian jurisdiction and choice-of-law clauses.[51] Thus, the plaintiffs argued that a 'putative objective

[46] See, eg, GC Cheshire, *Private International Law* (Butterworths, 7th ed, 1965) 203–4; JHC Morris, *Dicey and Morris on the Conflict of Laws* (Stevens & Sons, 8th ed, 1967) 741–3 r 129.

[47] [1967] 2 QB 590 ('*Mackender*').

[48] Ibid 596–7 (Lord Denning MR).

[49] Ibid. This decision was affirmed by McNair J: see at 597 (Lord Denning MR), 600 (Diplock LJ).

[50] Ibid 596–7.

[51] Ibid 597–8.

proper law', rather than Belgian law (as had been chosen in the agreement), should determine whether the contract was to be avoided.[52]

The Court of Appeal allowed the defendants' appeal.[53] Their Lordships found that while the alleged illegal smuggling of diamonds into Italy would make the contract unenforceable, it would not put in doubt its formation.[54] Thus, the Belgian jurisdiction and choice-of-law clauses remained unaffected, with Belgian law governing the rights and obligations of the parties under the insurance policy. Moreover, their Lordships dismissed the plaintiffs' submission that the defendants' non-disclosure had rendered the agreement void and thus undermined the reality of the plaintiffs' consent to the terms of the agreement. In their Lordships' judgment, the non-disclosure merely made the contract voidable, meaning that it would cease to exist from the moment of avoidance, rather than from the beginning.[55] Therefore, whether the insurers could repudiate the contract owing to non-disclosure had to be decided based on Belgian law, which was the proper law of the contract of insurance.[56] On the facts, their Lordships set aside the service-out order on the basis that Belgium was the appropriate venue for hearing the claim.[57]

Despite finding that the agreement between the parties had not been rendered void in *Mackender*, Diplock LJ nonetheless proceeded to state (in obiter) that he would have referred to English law in determining the efficacy of the parties' agreement, had this been a case involving a plea of non est factum:

> Where acts done in England, in this case the oral negotiations between the assured's broker and the underwriters, the initialling of the slip and the signing of the policy, are alleged not to have resulted in an agreement at all (ie, where there is a plea of non est factum) and the question is whether there was any real consensus ad idem, it may well be that this question has to be determined by English law and not by the law which would have been agreed by them as the proper law of the contract if they had reached an agreement.[58]

The dictum clearly casts doubt on the appropriateness of the proper law of the putative contract as a basis for determining the formation of international agreements. Indeed, just before making these remarks, Diplock LJ had said that

[52] Ibid 602 (Diplock LJ).

[53] Ibid 599 (Lord Denning MR), 604–5 (Diplock LJ), 605–6 (Russell LJ).

[54] Ibid 598–9 (Lord Denning MR), 602 (Diplock LJ), 605–6 (Russell LJ).

[55] Ibid 598 (Lord Denning MR), 602–4 (Diplock LJ).

[56] Ibid 598 (Lord Denning MR), 604–5 (Diplock LJ), 605–6 (Russell LJ).

[57] Ibid 599 (Lord Denning MR), 604–5 (Diplock LJ), 605–6 (Russell LJ).

[58] Ibid 602–3.

he found the putative proper law to be a 'confusing' concept.[59] At the same time, the passage is somewhat ambiguous. To begin with, it is difficult to identify the precise basis on which Diplock LJ would have applied English law on the facts to address the issue of the survival (or otherwise) of the parties' agreement following vitiating conduct. Put differently, it is not obvious whether English law would have been applied as the *lex fori* or as the *lex loci contractus*.[60] Furthermore, it is not immediately apparent whether Diplock LJ questioned the viability of the putative proper law approach in general or only where the reality of the parties' consent was in dispute. It is perhaps because of these ambiguities in Diplock LJ's dictum that *Mackender* was at one point described as a 'difficult decision'.[61]

In its aftermath, Diplock LJ's obiter remarks in *Mackender* did not have any real influence on the way in which courts in England dealt with formation questions in international contracts. Thus, the putative proper law approach has remained the preferred choice-of-law rule at common law in England.[62] More generally, there have been no real judicial developments in this area in England since the ruling in *Mackender*. To a large extent, the stasis has been due to the incorporation into English law, by virtue of the *Contracts (Applicable Law) Act 1990* (UK), of the *Convention on the Law Applicable to Contractual Obligations* ('*Rome Convention*').[63] The *Rome Convention*, which itself was later superseded by the *Rome I Regulation*,[64] has all but supplanted common law choice-of-law rules. Consequently, the scope for litigation concerning formation questions at common law has been limited. Moreover, the prospect of further developments in this area seems remote, not least because despite the United Kingdom's withdrawal from the European Union ('EU'), the EU choice-of-law regimes have

[59] Ibid 602.

[60] PE Nygh, *Conflict of Laws in Australia* (Butterworths, 2nd ed, 1971) 354 ('*Conflict of Laws (2nd ed)*').

[61] Lawrence Collins, *Dicey and Morris on the Conflict of Laws* (Stevens & Sons, 11th ed, 1987) 1199.

[62] See, eg, obiter rulings in *Compania Naviera Micro SA v Shipley International Inc* [1982] 2 Lloyd's Rep 351, 353 (Ackner LJ) ('*The Parouth*'); *Union Transport plc v Continental Lines SA* [1992] 1 WLR 15, 23 (Lord Goff, Lord Jauncey agreeing at 23, Lord Lowry agreeing at 23) ('*Union Transport*').

[63] *Convention on the Law Applicable to Contractual Obligations*, opened for signature 19 June 1980, [1980] OJ L 266/1 (entered into force 1 April 1991) art 1 ('*Rome Convention*'); *Contracts (Applicable Law) Act 1990* (UK) ss 1–2.

[64] *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)* [2008] OJ L 177/6, art 24 ('*Rome I Regulation*'). The *Rome I Regulation* (n 64) applies to contracts entered into after 17 December 2009: art 28.

been retained in English law.[65] However, as Part III proceeds to show, even though Diplock LJ's dictum in *Mackender* has proved to have had almost no influence on the development of common law choice-of-law rules in England concerning formation questions, it has nonetheless formed the basis for the contemporary Australian approach in this area.

III The Law Governing Formation Questions in Australia

A *Background*

Not long after its articulation in the mid-20th century in England, the putative proper law approach began to receive attention in Australia. Overall, the Australian commentators' early impressions of this approach appeared to be positive. For instance, writing in 1972, and much like the editors of *Dicey* and Cheshire, Sykes considered that it would be pointless to 'refer to the law of the place of contract because the determination of where a contract is made may involve the very issue to be decided in the case'.[66] Referring to Salmon J's obiter remarks in *Albeko Schuhmaschinen*, Sykes observed that the proper law of the putative agreement 'seem[ed] the most suitable' choice-of-law rule for addressing formation questions.[67]

Sykes also pointed to the New South Wales ('NSW') case of *White Cliffs Opal Mines Ltd v Miller* ('*White Cliffs*')[68] as the only Australian decision in support of the application of the putative proper law.[69] This is one of the first references in Australian or English sources to the ruling as an authority concerned with the law applicable to the formation of international contracts.[70] The facts of the case were as follows.[71] The plaintiffs were the English owners of a mine located in NSW. The defendants were representatives of the NSW government. In a letter dated 30 April 1902, the defendants offered to purchase the mine from the plaintiffs. The letter stated that the defendants' offer would remain open until 30 June 1902. The plaintiffs' directors in London sent a telegram at 15:55 GMT on 30 June 1902 (corresponding to 01:55 AEST on 1 July 1902) accepting

[65] See *European Union (Withdrawal) Act 2018* (UK) s 3; *The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019* (UK) SI 2019/834, reg 10, as amended by *The Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020* (UK) SI 2020/1574, reg 6.

[66] Edward I Sykes, *A Textbook on the Australian Conflict of Laws* (Law Book, 1972) 309.

[67] Ibid 310.

[68] *White Cliffs* (n 12).

[69] Sykes (n 66) 310.

[70] See also JLR Davis, *Casebook on the Conflict of Laws in Australia* (Butterworths, 1971) 201–2.

[71] *White Cliffs* (n 12) 152–3 (AH Simpson CJ in Eq).

the defendants' offer. Subsequently, the plaintiffs brought proceedings in NSW seeking the specific performance of the alleged agreement on the basis that they had accepted the offer on 30 June, within the time prescribed in the offer. For their part, the defendants argued that the plaintiffs were late in accepting the offer and that no contract had come into being.

Against this backdrop, the main issue for the Court's consideration was whether the plaintiffs' acceptance was dispatched on time. In his judgment, AH Simpson CJ in Eq cited the relevant principles concerned with identifying the proper law of the contract in the absence of a choice by the parties, be it express or implied.[72] The Chief Justice observed that it was in NSW that the parties' negotiations and correspondence had taken place. What is more, the subject matter of the alleged transaction was immovable property located in NSW. Thus, AH Simpson CJ in Eq found that the date specified in the offer had to be interpreted according to NSW law, meaning that no agreement had been reached between the parties.[73]

It is argued that it cannot be claimed with certainty that *White Cliffs* was indeed a dispute where, *substantively*, there was a difference between the laws in England and NSW on whether the parties had entered an agreement. After all, both legal systems imposed the same criteria for the creation of agreements. It is perhaps more likely that *White Cliffs* was actually a case regarding the construction of the phrase 'open until 30 June 1902' which had been stipulated in the defendants' offer. Put differently, the real question that had to be answered was whether the offer was open until 23:59 AEST on 30 June 1902 or until 23:59 GMT on 30 June 1902. This reading of the case is in line with the view of one eminent conflict of laws scholar in Australia who, in 1971, suggested that *White Cliffs* appears to exemplify a situation in which 'the exact meaning of a time limit inserted in the contract' had to be ascertained.[74] In any event, *White Cliffs* has continued to be regarded within the academic commentary in Australia as one of the earliest examples of a common law court applying the putative proper law approach as a basis for determining whether the parties' negotiations have resulted in an agreement.[75]

[72] See ibid 153–4.

[73] Ibid 154.

[74] Nygh, *Conflict of Laws (2nd ed)* (n 60) 357.

[75] See, eg, PE Nygh, *Conflict of Laws in Australia* (Butterworths, 4th ed, 1984) 232; Edward I Sykes and Michael C Pryles, *Australian Private International Law* (Law Book, 2nd ed, 1987) 557. For a more recent example, see Martin Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2020) 498 [19.63].

B Lex Fori *as the Law Governing Formation Questions in Australia*

For all the initial receptiveness of private international law scholars in Australia to the idea of applying the proper law of the putative agreement to formation questions, Australian courts have shown no interest in embracing this approach. Instead, they have preferred to rely on Australian law, *qua lex fori*, in addressing this aspect of international contractual disputes. In this context, the High Court of Australia's judgment in *Oceanic Sun* is especially significant. *Oceanic Sun* is perhaps best known as the case in which the High Court of Australia declined the invitation to adopt the English *forum non conveniens* doctrine,[76] as outlined in *Spiliada Maritime Corporation v Cansulex Ltd*,[77] and instead laid the foundation[78] for the articulation of the 'clearly inappropriate forum' test in *Voth v Manildra Flour Mills Pty Ltd*[79] as the modern-day basis for the doctrine's application in Australia. But *Oceanic Sun* is also an important authority as it stated (in obiter) that questions surrounding the formation of cross-border contracts should be resolved based on Australian law, as the *lex fori*.[80]

In *Oceanic Sun*, the plaintiff, F, a Queensland resident, engaged the services of a travel agent in Sydney to arrange a cruise in the Mediterranean aboard a Greek vessel operated by the Greek defendants, OSL. F paid for the cruise and was issued with an 'exchange order' (which was not the ticket); the ticket was to be issued in Athens upon tendering of the exchange order. The travel agent followed these instructions and received the ticket in Athens on F's behalf. Among other terms, the ticket contained a clause stating that the courts of Athens, Greece, shall have exclusive jurisdiction over any claim against OSL. While on board the vessel, F sustained serious injuries. He commenced negligence proceedings in NSW against OSL. In response, OSL sought a stay of those proceedings.[81]

On the facts, there was no doubt that F and OSL had entered an agreement.[82] What was in contention, though, was whether, by virtue of the exclusive jurisdiction clause printed on the ticket, F was obliged to bring the claim in Greece.[83]

[76] See *Oceanic Sun* (n 10) 240 (Brennan J), 254–5 (Deane J), 265–6 (Gaudron J). Cf at 212–13 (Wilson and Toohey JJ).

[77] [1987] 1 AC 460, 464–5 (Lord Templeman), 476–8 (Lord Goff, Lord Keith agreeing at 464, Lord Griffiths agreeing at 465, Lord Mackay agreeing at 466).

[78] See *Oceanic Sun* (n 10) 247–8 (Deane J, Gaudron J agreeing at 266).

[79] (1990) 171 CLR 538, 564–6 (Mason CJ, Deane, Dawson and Gaudron JJ, Brennan J agreeing at 572).

[80] See *Oceanic Sun* (n 10) 225 (Brennan J), 260–1 (Gaudron J).

[81] Ibid 221–2 (Brennan J).

[82] Ibid 205 (Wilson and Toohey JJ).

[83] Ibid 223–4 (Brennan J).

In these circumstances, it was necessary to rule on where the contract was made: if, as F argued,[84] the agreement had been made in NSW, then the jurisdiction clause would not have been a part of it; however, if, as OSL contended,[85] the agreement was made in Athens, then the jurisdiction clause would be deemed to have been incorporated within it. Ultimately, the High Court ruled unanimously that the contract was concluded in NSW and that it did not include the Greek jurisdiction clause.[86] In reaching this finding, their Honours relied on the relevant principles under NSW (rather than Greek) law. Justices Wilson and Toohey and Deane J appeared to take this step as a matter of course.[87] However, Brennan J and Gaudron J's judgments said more about why they based their reasoning on NSW law, as the *lex fori*.[88] Significantly for the purpose of the present discussion, Brennan J observed that 'the system of law by reference to which' the court must determine whether F and OSL entered an agreement in NSW that contained a Greek jurisdiction clause 'cannot be identified by assuming that the contract contained the clause'.[89] In other words, his Honour was not prepared to answer these questions based on Greek law, which almost certainly would have been implied as the proper law of the putative agreement between F and OSL. Drawing on Diplock LJ's obiter remarks in *Mackender*, Brennan J stated that

> [i]n 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.[90]

Applying principles of NSW law to the facts, Brennan J concluded that the contract had been made in Sydney when the exchange order (rather than the ticket) had been issued, and that the Greek jurisdiction clause came in 'too late' for it to be incorporated.[91] In the same vein, Gaudron J, who also drew support from

[84] See ibid 199–200 (AM Gleeson QC) (during argument).

[85] See ibid 198–9 (KR Handley QC) (during argument).

[86] Ibid 205–8 (Wilson and Toohey JJ, Deane J agreeing at 256), 225–9 (Brennan J, Gaudron J agreeing at 261).

[87] See ibid 205–6 (Wilson and Toohey JJ, Deane J agreeing at 256).

[88] See ibid 225 (Brennan J), 260–1 (Gaudron J).

[89] Ibid 225.

[90] Ibid (emphasis added) (citations omitted), citing *Mackender* (n 47) 602–3 (Diplock LJ).

[91] *Oceanic Sun* (n 10) 228.

Mackender, stated that 'all questions which are necessarily antecedent to a determination of the proper law of a contract must fall for answer in accordance with the lex fori'.[92]

Although the existence of *consensus ad idem* between the parties and the reality of consent were not under consideration in *Oceanic Sun*, Brennan J and Gaudron J's pronouncements in the case have come to be seen as stating (albeit in obiter terms) that disputes concerning these matters should be decided by reference to the *lex fori*.[93] Consequently, in the intervening years, courts in Australia have simply reiterated that Australian law applies to incorporation questions.[94] The case of *Trina Solar (US) Inc v Jasmin Solar Pty Ltd*[95] helpfully illustrates the current state of legal development in Australia concerning this aspect of contract choice-of-law rules.

In this case, the dispute arose from a contract in which the respondent, J, an Australian company, sought to purchase a large quantity of solar panels from the appellant, T, a Californian company.[96] Following negotiations, J chose to purchase the solar panels through JRC, an intermediary US entity with which J was affiliated.[97] JRC was named as the purchaser in the eventual agreement, with J being named as its guarantor.[98] The agreement contained a New York arbitration clause and a New York choice-of-law clause.[99]

In due course, T supplied the solar panels and demanded payment.[100] After its request for payment was not honoured, T commenced arbitration proceedings in New York against J and JRC.[101] In response, J sought to be removed from the arbitration, pointing out that it was not a party to the agreement.[102] The

92 Ibid 261, citing *Mackender* (n 47) 603.

93 See, eg, *Trina Solar (Full Court)* (n 11) 14 [45]–[46] (Greenwood J), 28 [134] (Beach J). See also Davies et al (n 75) 499 [19.65].

94 See, eg, *Venter v Ilona MY Ltd* [2012] NSWSC 1029, [25]–[27] (Rein J) ('*Venter*'); *Hargood v OHTL Public Company Ltd* [2015] NSWSC 446, [23] (Davies J) ('*Hargood*'). The adherence to Brennan J's and Gaudron J's remarks in *Oceanic Sun* (n 10) is not unusual. After all, intermediate appellate courts should follow 'seriously considered dicta' of Australia's apex court: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151 [134] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Hill v Zuda Pty Ltd* (2022) 275 CLR 24, 34–5 [25] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ).

95 *Trina Solar (Full Court)* (n 11).

96 Ibid 5 [11] (Greenwood J).

97 Ibid 5 [11]–[12].

98 Ibid 5 [12].

99 Ibid 5–6 [14]–[15].

100 Ibid 6 [16].

101 Ibid.

102 Ibid 6 [17].

arbitrator rejected J's contention and made an award under which J and JRC were jointly and severally liable to pay T the contracted sum.[103] Subsequently, J applied to the Federal Court of Australia for leave to serve proceedings on T out of the forum.[104] The key issue for the Court's consideration was whether J's application should be rejected because of the existence of the New York arbitration clause in the agreement.[105] Put differently, the Court had to decide whether J and T had entered into an arbitration agreement. J relied on Australian law, as the *lex fori*, in arguing that it was not a party to any arbitration agreement.[106] Conversely, T argued that whether the parties had entered an arbitration agreement had to be established based on New York law, as the law governing the putative arbitration agreement.[107] T claimed that, under New York law, J was a party to the arbitration agreement.[108]

At first instance, Edelman J rejected T's argument, ruling that Australian law should apply to the question of whether J was a party to the arbitration agreement.[109] In reaching this conclusion, his Honour relied on Brennan J and Gaudron J's remarks in *Oceanic Sun*[110] and a number of subsequent cases which had followed their Honours' approach.[111] Applying principles of Australian law to the facts, Edelman J ultimately found that J was not a party to the alleged arbitration agreement and was, therefore, not bound by it.[112] This decision was upheld on T's appeal to a Full Court of the Federal Court of Australia.[113] In the attempt to persuade the Full Court that the proper law of the putative contract should determine formation questions, T relied on a number of English authorities, as well as accounts in academic commentary in Australia and England.[114] Ultimately, though, T failed to persuade the Full Court to depart from the obiter statements in Brennan J and Gaudron J's judgments in *Oceanic Sun*,

[103] Ibid.

[104] *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* (2015) 331 ALR 108, 110 [1] (Edelman J) ('*Trina Solar (FCA)*').

[105] Ibid 110–11 [5].

[106] Ibid 111 [6].

[107] Ibid.

[108] Ibid 110–11 [5]–[6].

[109] Ibid 126 [106].

[110] See ibid 124 [91]–[93], citing *Oceanic Sun* (n 10) 225 (Brennan J), 260–1 (Gaudron J).

[111] See *Trina Solar (FCA)* (n 104) 124–5 [95] (Edelman J), citing *Venter* (n 94) [25]–[26] (Rein J), *Hargood* (n 94) [23] (Davies J).

[112] *Trina Solar (FCA)* (n 104) 131 [141].

[113] *Trina Solar (Full Court)* (n 11) 23 [96] (Greenwood J), 39 [189] (Beach J, Dowsett J agreeing at 3 [1]).

[114] See ibid 13–14 [43]–[44] (Greenwood J).

with their Honours maintaining that Australian law, *qua lex fori*, should continue to provide the basis for resolving questions regarding the formation of international contracts.[115]

C Lex Fori*: An Evaluation*

Although the *lex fori* has clearly found favour with Australian courts as the relevant choice-of-law rule for addressing questions regarding the creation of agreements and the reality of consent in international litigation, it has received widespread criticism. For example, in 1991, shortly after the decision in *Oceanic Sun*, the authors of the third edition of *Australian Private International Law* observed that '[t]he view that the formation and terms of a contract are governed by the *lex fori* is … incorrect' and that this aspect of the High Court's ruling 'should be treated as per incurium'.[116] Discussing the decision in *Oceanic Sun*, another commentator expressed the view that reliance on the *lex fori* did not 'represent a sound solution to the question of formation of international contracts'.[117] Separately, one of the authors of *Australian Private International Law* considered that '[t]here are dangers in applying the law of the forum to determine the formation of a contract'.[118] At least two reasons combine to cast doubt on the suitability of the *lex fori* in this context.

First, it is recalled that, in outlining their reasoning, Brennan J and Gaudron J drew support from Diplock LJ's judgment in *Mackender*,[119] presumably because their Honours deemed the English case to be authority (albeit in obiter terms) for the proposition that the *lex fori* should apply to formation questions. However, this reading of Diplock LJ's observations is rather unconvincing. It is true that Diplock LJ harboured doubts about the utility of the putative proper law approach as a choice-of-law rule — as evidenced by his Lordship's remark that he found the notion to be 'confusing'.[120] But it is far from clear that he actually favoured the application of the *lex fori* in its stead. Lord Justice Diplock stated that had *Mackender* been a case concerning a plea of non est

[115] See ibid 14 [46] (Greenwood J), 28 [133]–[134] (Beach J, Dowsett J agreeing at 3 [1]).

[116] Edward I Sykes and Michael C Pryles, *Australian Private International Law* (Law Book, 3rd ed, 1991) 612.

[117] Michael Garner, 'Formation of International Contracts: Finding the Right Choice of Law Rule' (1989) 63(11) *Australian Law Journal* 751, 751.

[118] Michael Pryles, 'Judicial Darkness on the Oceanic Sun' (1988) 62(10) *Australian Law Journal* 774, 788.

[119] See *Mackender* (n 47) 602–3 (Diplock LJ), cited in *Oceanic Sun* (n 10) 225 (Brennan J), 261 (Gaudron J).

[120] *Mackender* (n 47) 602.

factum, he would have referred to English law in order to establish whether there was real consent between the parties.[121] For convenience, the relevant passage in the judgment is recited here:

> Where acts done in England, in this case the oral negotiations between the assured's broker and the underwriters, the initialling of the slip and the signing of the policy, are alleged not to have resulted in an agreement at all (ie, where there is a plea of non est factum) and the question is whether there was any real consensus ad idem, it may well be that this question has to be determined by English law and not by the law which would have been agreed by them as the proper law of the contract if they had reached an agreement.[122]

As this passage, and the rest of Diplock LJ's judgment not cited here, highlight, it cannot be said with certainty that, on these facts, his Lordship would have employed English law as the *lex fori*. Indeed, as the first half of the passage highlights, Diplock LJ may well have arrived at the choice of English law because England was where important actions surrounding the transaction — namely, oral negotiations and the initialling and signing of the agreement — had taken place. Accordingly, it is argued that the idea that the *lex fori* should govern formation and reality of consent questions is premised on a questionable reading of the ruling in *Mackender*.

Second, an approach which subjects the determination of formation questions in cross-border contractual disputes to the *lex fori* is liable to be regarded as unduly myopic. Indeed, this was one of the main reasons why Brennan J and Gaudron J's pronouncements in *Oceanic Sun* attracted so much criticism following the ruling. As one commentator remarked,

> if our jurisprudence is to embrace a robust principle of 'internationalism', the spirit of which permeates any full-blooded system of private international law, it should set itself against the adoption of a rigid lex fori rule. … Moreover, there is no manifest justification for Australian courts to defer invariably to the domestic law of the forum to resolve questions of formation of contract.[123]

More recently, similar concerns prompted the Court of Appeal of Singapore, in *Lew v Nargolwala* ('*Lew*'),[124] to reject Thorley IJ's first instance decision to afford a role to the *lex fori* in Singapore's choice-of-law regime for the resolution

[121] Ibid 602–3.

[122] Ibid.

[123] Garner (n 117) 758.

[124] [2021] 2 SLR 1 ('*Lew (Court of Appeal)*').

of formation questions.[125] The main question for consideration in the case was whether N, the Singaporean proprietors of a luxury villa in Thailand,[126] had agreed to sell the villa to L, an Australian buyer.[127] Justice Thorley had stated that where the proper law of the putative agreement could not be identified through the application of the three traditional choice-of-law rules — namely, express choice, implied choice or, in the absence of any designation, the law of the forum that has the most real and substantial connection to the contract — 'the counsel of prudence would be to apply the *lex fori*'.[128] The Court of Appeal of Singapore, however, dismissed this pronouncement.[129] Lord Mance IJ, who delivered the Court of Appeal's judgment[130] sitting as an international judge, observed that

> one must question the appropriateness of a rule which would automatically assign the determination of the issue of whether a binding and enforceable contract had been made to the law of the forum. If the 'attainment of uniform solutions [i]s the chief purpose of private international law', the selection of the *lex fori* would fail to achieve that purpose.[131]

Accordingly, the Court went on to state that there was 'no room for the *lex fori* to apply' when resolving questions surrounding the formation of international contracts in Singapore.[132] For these reasons, it is argued that, although a well-established choice-of-law rule under Australian private international law, the *lex fori* leaves much to be desired as a means of determining the existence of *consensus ad idem* or reality of consent in international contracts. The next part of the discussion focuses on finding a choice-of-law rule which, it is argued, would represent an improvement on the existing law in Australia.

125 *Lew v Nargolwala* [2020] 3 SLR 61, 108–9 [162]–[164], 110 [169] (Thorley IJ) ('*Lew (First Instance)*').

126 Strictly speaking, the villa at the centre of the dispute was owned by a company incorporated in the British Virgin Islands: ibid 66 [5]. N controlled the company.

127 *Lew (First Instance)* (n 125) 66 [7] (Thorley IJ).

128 Ibid 109 [164].

129 *Lew (Court of Appeal)* (n 124) 41–2 [81]–[83] (Lord Mance IJ for the Court).

130 Chief Justice Menon and Phang JCA concurring.

131 *Lew (Court of Appeal)* (n 124) 37 [70] (Lord Mance IJ for the Court) (citations omitted), quoting Ernst Rabel, *The Conflict of Laws: A Comparative Study* (University of Michigan Press, 2nd ed, 1958) vol 1, 94.

132 *Lew (Court of Appeal)* (n 124) 41 [81] (Lord Mance IJ for the Court).

IV An Alternative Choice-of-Law Regime Applicable to Formation Questions in Australia

When thinking about an alternative to the *lex fori* as a basis for resolving formation questions in international contracts in Australia, the putative proper law approach presents itself as arguably the most attractive option. To begin with, this choice-of-law rule has been employed by courts in many common law jurisdictions. Although in *Mackender* Diplock LJ may have regarded the putative proper law approach with disfavour,[133] it has remained the preferred basis for determining formation questions at common law in England.[134] Likewise, courts in Canada address questions concerning the formation of international contracts based on this choice-of-law rule.[135] In Singapore, despite support for the *lex fori* in certain recent judicial pronouncements,[136] following the Court of Appeal's ruling in *Lew*, a 'modified putative proper law' approach determines whether the parties have entered an agreement.[137]

Another consideration which points to the attractiveness of the putative proper law approach is that it plays a key role in identifying the law applicable to formation questions in a major international choice-of-law regime — namely, the *Rome I Regulation*. This instrument contains the choice-of-law rules for courts in EU member states (with the exception of Denmark),[138] based on which the law applicable to contractual obligations is determined. Under art 10(1) of the *Rome I Regulation*, whether a contract has come into being is to be assessed according to the law which would have governed it had the agreement been validly formed. Nevertheless, the putative proper law approach codified within art 10(1) is somewhat curtailed by means of art 10(2). Under art 10(2), 'a party, in order to establish that he did not consent, may rely upon the law of

[133] See *Mackender* (n 47) 602.

[134] See, eg, Lord Collins and Jonathan Harris, *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 16th ed, 2022) 1856–60 [32–137]–[32–148], discussing *Albeko Schuhmaschinen* (n 40), *The Parouth* (n 62), *Union Transport* (n 62).

[135] See, eg, *Timberwest Forest Ltd v Gearbulk Pool Ltd* 2001 BCSC 882, [30]–[31] (Cullen J), affd *Timberwest Forest Ltd v Gearbulk Pool Ltd* [2003] 10 BCLR (4th) 327, 339 [59] (Levine JA, Rowles JA agreeing at 339, Huddart JA agreeing at 339). See also Stephen GA Pitel and Nicholas S Rafferty, *Conflict of Laws* (Irwin Law, 2nd ed, 2016) 294–6.

[136] See especially Chionh JC in *Pegaso Servicios Administrativos SA de CV v DP Offshore Engineering Pte Ltd* [2019] SGHC 47, [72]–[73] ('*Pegaso*').

[137] Chong (n 7) 385. See also *Lew (Court of Appeal)* (n 124) 33 [63], 37–41 [70]–[80] (Lord Mance IJ for the Court); Chong (n 7) 385–8. For an alternative reading of the Court of Appeal of Singapore's ruling, which regards the decision as having introduced a 'negotiation-based' choice-of-law rule for determining the formation of contracts, see Marcus Teo, 'A Negotiation-Based Choice of Law Rule for Contract Formation' [2021] *Lloyd's Maritime and Commercial Law Quarterly* 420.

[138] See *Rome I Regulation* (n 64) recital 46.

the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable' to address the question based on the putative proper law.

Finally, there is also evidence that, indeed, policymakers in Australia have favoured the putative proper law approach. In its report on choice of law published in 1992, just a few years after the ruling in *Oceanic Sun*, the Australian Law Reform Commission recommended that formation questions, among other questions,[139] be answered based on the proper law of the putative agreement:

> The formation of contract — offer and acceptance, consideration, the reality of consent are as much part of the substance of the law of contract as are questions of material validity and it is illogical to submit them to a different law, especially the law of forum, merely because they are dealt with before issues of material validity arise. The Commission recommends that they be governed by the proper law of the contract.[140]

Against this backdrop, the putative proper law approach may seem to be the most appealing replacement for the *lex fori* as the basis for determining formation questions in international contracts in Australia. However, it is argued that, although workable, its circular logic means that the putative proper law approach is not as desirable a choice-of-law rule as it may at first seem. Put simply, this means of resolving formation questions assumes the very thing it seeks to prove. To borrow from Cheshire,[141] if the question is whether the agreement was made, it is a *petitio principii* to purport to apply the law which would have governed the agreement had its existence not been in doubt. The conceptual inadequacy of the putative proper law approach is highlighted in the following passage in Edelman J's judgment, at first instance, in *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd*:

> The proper law contained in an agreement [on the facts, a choice of New York law which would have been the proper law of the putative arbitration agreement] is a bootstraps provision which usually governs all matters connected with that agreement because that is what the parties had agreed. But when the very question is whether a person has agreed at all, a party cannot pick itself up by the bootstraps provision when there has been no determination that it binds the other party. In the absence of a legislative solution, neither principle, nor

[139] See, eg, Law Reform Commission, *Choice of Law* (Report No 58, 1992) 97–8 [8.48], 101 [8.58].

[140] Ibid 101 [8.59].

[141] See Cheshire, *Private International Law (4th ed)* (n 14) 216.

> authority, supports the application of the proper law contained in such a contractual provision.[142]

In short, while the putative proper law approach may present itself as a convenient and realistic option to take the place of the *lex fori*, ultimately, the credibility of this choice-of-law rule is undermined by the circularity of its conceptual underpinnings. In these circumstances, it is argued that the *lex fori* should be replaced by an alternative set of choice-of-law rules which possesses the practical benefits of the putative proper law approach, without suffering from the same (or similar) logical shortcomings.

In response to the putative proper law approach's conceptual weaknesses, over the past half-century, different models have been proposed across the common law world for the purpose of revising the law applicable to formation questions in cross-border contracts. Many of these suggested approaches tend to incorporate one of (or, in some instances, both) the putative proper law and the *lex fori* models.[143] The flaws inherent in these approaches, therefore, are bound to undermine the persuasiveness of these proposed models for recasting the law in this area. Put differently, in order to be a more compelling means of revising the law, the alternative choice-of-law rule should identify the governing law without drawing on the putative proper law or the *lex fori*. For this purpose, a potentially fruitful course of action would be to resolve formation questions in international contracts in Australia based on: (i) the law expressly chosen by the parties to govern such matters; or (ii) in the absence of such express stipulation, the law of the territory which has the most real and substantial connection with the negotiations preceding the purported agreement.

The first rule in the proposed model is relatively straightforward. It should not be confused with the law that the parties may have expressly identified, during their negotiations, to apply to substantive disputes arising from the agreement after it has come into being. Rather, the expressly chosen law to determine formation questions would deal with a much narrower issue. Under the first

[142] *Trina Solar (FCA)* (n 104) 111 [7], cited with approval in *Trina Solar (Full Court)* (n 11) 28 [130] (Beach J). For similar judicial pronouncements highlighting the conceptual questionability of the putative proper law approach, see *Pegaso* (n 136) [72]–[73] (Chionh JC) and *Lew (First Instance)* (n 125) 107 [160] (Thorley IJ), both of which are Singaporean rulings. For statements within the academic commentary which have acknowledged the logical problems afflicting the putative proper law approach, see Jonathan Harris, 'Does Choice of Law Make Any Sense?' (2004) 57(1) *Current Legal Problems* 305, 317–18; Low (n 8) 169; Tan Yock Lin, 'Good Faith Choice of a Law To Govern a Contract' [2014] (December) *Singapore Journal of Legal Studies* 307, 318–19.

[143] See, eg, DF Libling, 'Formation of International Contracts' (1979) 42(2) *Modern Law Review* 169, 172–3; Briggs (n 6) 198; Yeo Tiong Min, 'Private International Law: Law Reform in Miscellaneous Matters' (Research Paper, 2003) 52–3 [204]; Chong (n 7) 389–92.

rule within the proposed choice-of-law regime, if the parties have expressly chosen to subject *disputes relating to the formation* of the purported agreement to the law of a specific jurisdiction, then that law should determine whether an agreement has indeed been formed. So, where the choice-of-law clause states that the law of, say, Ruritania shall apply to the 'formation and the reality of consent', Ruritanian law should govern these matters, provided that the party who seeks to rely on the clause can show that it, in fact, evidences the parties' understanding at the time of negotiations that those issues would be subjected to Ruritanian law. In practice, however, it is highly unusual for parties who are setting out to enter into a contract to discuss (or, for that matter, agree on) the law based on which their act of entering into that agreement is to be confirmed.[144] For this reason, it is bound to be rare for there to be many occasions where courts would rely on the first rule in the proposed model in order to decide formation questions. Instead, in the vast majority of cases, the law governing these questions would have to be established based on the second choice-of-law rule under the proposed model.

Under the second proposed rule, questions surrounding the formation of international contracts would be resolved according to the law of the jurisdiction which has the most real and substantial connection with the negotiations preceding the purported agreement. To all intents and purposes, this suggested rule takes into account the same type of considerations as those which are examined when ascertaining the proper law of the contract in the absence of an express or implied choice — namely, the law with which the contract has the closest and most real connection. Thus, factors such as 'the place of contracting, the place of performance, the place of residence or business of the parties respectively, and the nature of the subject matter of the contract' are all of relevance.[145] Also germane are considerations such as where the negotiations took place and what was discussed during them, where the land is located in cases concerning land,[146] and where the subject matter of the transaction is based.[147] The main difference, though, is that, with regard to the suggested rule here, the focus would be on the circumstances surrounding the negotiations preceding the alleged agreement. Consequently, for the purpose of the second proposed

144 See *Lew (Court of Appeal)* (n 124) 37 [70] (Lord Mance IJ for the Court).

145 *Re United Railways of the Havana and Regla Warehouses Ltd* [1960] Ch 52, 91 (Jenkins LJ for Jenkins and Romer LJJ) (citations omitted).

146 See, eg, *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565, 576 (Rich and Dixon JJ), 580–1 (Starke J); *Lew (Court of Appeal)* (n 124) 43–4 [87] (Lord Mance IJ for the Court).

147 See, eg, *THC Holding Pty Ltd v CMA Recycling Pty Ltd (admins apptd)* (2014) 101 ACSR 202, 213 [65]–[73] (Stevenson J).

rule, terms within the disputed agreement which govern the rights and obligations of the parties *after* the contested contract has been made should not be consulted. For instance, the parties' inclusion in the putative contract of a choice-of-law clause governing the interpretation of its terms should not play a role in identifying the law applicable to formation questions under the second proposed rule.[148] After all, such a clause is included in order to manage the resolution of disputes between the parties *post-formation*. If the formation of the agreement is the very issue in contention, it would be illogical to rely on terms whose existence depends on the existence of the contract in order to determine the law applying to formation matters. In this regard, the second proposed rule is similar to one of the approaches suggested as an alternative to the *lex fori* in the wake of the High Court of Australia's judgment in *Oceanic Sun*.[149]

The proposed model in this article is not without its own shortcomings. Perhaps the most obvious of these is that it is not always easy to identify the law of the territory which has the most real and substantial connection with the negotiations in the run-up to the disputed agreement. As Edelman J observed in *Australian Competition and Consumer Commission v Valve Corp [No 3]*, referring to the process of identifying the proper law of a contract in the absence of an express or implied choice, '[w]hilst the language of "closest and most real connection" trips off the tongue, the underlying concept is far from clear'.[150] According to his Honour, what makes this a difficult inquiry is that 'different factors will often point in different directions' and it is not quite clear 'why some matters are more important for a close connection than others'.[151] The same could be said for establishing the law governing formation questions under the second rule within the proposed model here. Despite the possible challenges that this choice-of-law rule might pose, it is argued that the suggested model in this article still represents a better option to pursue when compared with maintaining the *lex fori* as the applicable law in these cases or embracing the putative proper law approach. The proposed model does not suffer from the shortcomings which afflict the *lex fori* and the putative proper law while, at the same time, it contains some of their strengths. Therefore, it is argued that the proposed model provides a more attractive basis for resolving questions

148 To this extent, the proposed choice-of-law rules here are different to (in that they are narrower than) those outlined in *Lew (Court of Appeal)* (n 124) 37 [70] (Lord Mance IJ for the Court).

149 See Garner (n 117) 759–60. The wider difference, of course, is that the first choice-of-law rule under the regime proposed in this article — namely, the law expressly chosen by the parties to apply to formation questions — does not feature in Garner's suggested approach.

150 (2016) 337 ALR 647, 661 [65].

151 Ibid 662 [69].

concerning *consensus ad idem* and reality of consent in cross-border contractual disputes.

V Conclusion

For the best part of 100 years, the seemingly simple question of which law governs the formation of international contracts in common law jurisdictions has animated much debate, thus proving to be anything but straightforward. Under Australian law, which has been the chief focus of this article, courts have applied the *lex fori* as the basis for addressing whether the parties have reached *consensus ad idem* or whether their agreement has remained valid in view of allegations of fraud, mistake, duress or misrepresentation. As the discussion has sought to establish, the *lex fori* is an unsatisfactory choice-of-law rule in this context: it has a questionable doctrinal basis and is out of kilter with the broader norms of private international law. While, at first blush, the putative proper law approach may seem to be an appealing replacement for the *lex fori* — after all, it has a more secure doctrinal foothold and has been applied across much of the common law world and beyond — it is ultimately undermined by the fact that it assumes what it sets out to prove.

In these circumstances, the article proposed to replace the *lex fori* with an alternative set of choice-of-law rules which, it is suggested, possesses many of the attractive features of the putative proper law approach but lacks its weaknesses. In this context, it is argued that, to begin with, formation questions in international contracts should be resolved based on the law expressly chosen by the parties to govern such matters. In the absence of such express choice, however, the law of the territory which has the most real and substantial connection with the negotiations prior to the formation of the contested agreement should determine questions concerning *consensus ad idem* and reality of consent in international contractual disputes in Australia.