

## GOOD FAITH CHOICE OF A LAW TO GOVERN A CONTRACT

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This article argues that an agreement on the proper law of a contract is not a free-standing promissory term but merely has the effect of a presumption that the express choice is the proper law. If this is kept firmly in view, there are more similarities than differences between the nature of the proper law of a possibly unformed contract, the floating proper law, and the changing proper law. In all cases, reliance may be placed on an express choice of law unless it would be substantially unjust to the non-relying party or would occasion him substantial hardship.

### I. INTRODUCTION

This article seeks to explore and elucidate the nature and scope of good faith as a limit on party choice of a law to govern their contract.<sup>1</sup> The elucidation predicates a jurisdiction-selecting methodology which in theory is content-indifferent. Seeking solutions to conflicts between laws on the basis, not of the interests and policies directly implicated, but of connections to legal systems or law districts as well as the broad nature of justice implicated, the methodology seems to imply that good faith, if relevant at all, is a matter of evasion of law or abuse of the international legal order in that sense. A review of competing doctrines of fraud on the law will therefore be necessary, although this article advocates a more substantive conception of good faith reliance on choice of law.

### II. DOCTRINE OF FRAUD ON THE LAW

An early idea which took root in civilian law and common law developments of the jurisdiction-selecting methodology was that of fraud on the law. In France, the doctrine of fraud on the law became firmly established as a principle of the conflict of laws in the aftermath of an early decision of the Cour de Cassation.<sup>2</sup> Universal recognition however has not occurred despite the long passage of time since

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<sup>1</sup> The question whether parties can choose a law to govern their tort or other legal but non-contractual personal relationship is not dealt with. For a discussion of this question, see *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 (CA). See also Yeo Tiong Min, “The Effective Reach of Choice of Law Agreements” (2008) 20 Sing Ac LJ 723 [Yeo, “Effective Reach”].

<sup>2</sup> Cass civ, 18 March 1878, *Princesse de Bauffremont c Prince de Bauffremont* (1878) 5 JDI 505.

then. In the United States, as elsewhere in the common law world, a comprehensive doctrine has never developed.<sup>3</sup>

The idea of course has persisted. Yet despite a degree of longevity, most modern attempts to delineate its scope continue to run into serious conceptual difficulties. Bogdan, for instance, assumed that what was objectionable is the creation by a party or parties of an artificial connection by deliberate and conscious manipulation.<sup>4</sup> Another assumption was made that there is a natural applicable law, but a party can exploit the private international law rules and contrive or engineer a connection to another applicable law for the purposes of avoiding or evading the 'natural' applicable law. The purposes of private international law are overcome or circumvented as a result. Under scrutiny, this notion breaks down. Weighty objections can be raised to the notion of the natural applicable law. Since the rules of private international law vary from country to country, and they do so partly because they predicate an *ex post* problem to be resolved, there is seldom a consensus on which connecting factor is correct for any legal problem and hence which law is the natural applicable law. It is only possible to speak of appropriate connecting factors; a few or more may be appropriate without any being the most appropriate. It follows that a thesis of fraud on the law of a universal character is impossible. The thesis must inevitably be given a single and definitive municipal reference, leading to the circular conclusion that what the forum considers appropriate must be deemed to be the correct connecting factor. But if that is so, when is a connection artificial when another court would or could accept it as appropriate? Even if, given the *ex post* nature of the rules of private international law, reference should be restricted to the connections recognised by the rules of private international law of the natural forum of the litigation of the dispute between the parties, so that only the connections approved by the natural forum are deemed to be natural, the quest for a reference datum is no nearer. The problem is that there is no consensus among countries which subscribe to the notion of natural forum on what it is.<sup>5</sup> The unhappy question then becomes one of which court decides what and where the natural forum is.

Another equally formidable problem is that the suggestion of an artificially created connection seems to predicate that the propositus has some knowledge of the unfavourable rules which would otherwise apply if the artificial connection was not established. This implies a need to inquire into mental states and hence, a concern with circumstantial evidence of past or repeated experience from which conscious manipulation may perhaps be inferred. The difficulty now is that aside from property dispositions and other institutional transactions where states of mind are or must be declared, there are serious doubts as to whether the evidential barriers to a perfect ascertainment of conscious manipulation can easily be overcome. Even where the requisite knowledge is present, courts have to accept that parties can legitimately plan their affairs on the basis of which set of *ex ante* rules will govern their transaction.

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<sup>3</sup> "Fraud on the Law – The Doctrine of Evasion", Note, (1942) 42 Colum L Rev 1015.

<sup>4</sup> Michael Bogdan, "Private International Law as Component of the Law of the Forum: General Course on Private International Law" in *Recueil des Cours* 2010, vol 348 (Leiden/Boston: Martinus Nijhoff Publishers, 2011) at c XI.

<sup>5</sup> See *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460 (HL). Cf *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 (HCA); *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (HCA); *Puttick v Tenon Ltd* (2008) 238 CLR 265 (HCA).

They should and will be slow to castigate such planning for the sake of transactional certainty as being fraudulent,<sup>6</sup> and this obscures the line between legitimate and illegitimate conscious manipulation.

Taking a different tack, some regard omission of the material or substantive state interests which are implicated in an alleged fraud on the law as inimical to a workable doctrine of evasion of law. The idea premised is that evasion reflects a sense in which the effects of the artificially created applicable law ought not to be tolerated in view of and for the sake of the state interests implicated. This has led to recommendations that evasion of law concerns should be dealt with substantively by a doctrine of public policy.<sup>7</sup> Disagreeing, Bogdan argues with some merit that “[w]hile public policy is in principle used to avoid negative consequences of the substantive contents of the applicable foreign law, the abuse of law has more to do with the manner in which the applicable law was designated”.<sup>8</sup> In any case, the domestic case law proves embarrassing for evasion theorists of this substantive persuasion. The common law has never developed a clear material doctrine of abuse of law that could be extrapolated to international cases. Common law courts have dealt indirectly with the problem of abuse of law, utilising a variety of sometimes ‘mythical’ rules, such as the doctrine of sham, substance over form, and fraud on creditors.<sup>9</sup> On other occasions, a more direct approach has been possible by way of statutory intervention and purposive construction. However, in general, common law systems have avoided subjecting an exercise of rights to an explicit doctrine of abuse of rights. A person with a right to do an act owes no one else a duty to exercise it in a considerate manner in good faith or for proper purposes or motives, unless he is a fiduciary. All this implies that it will be difficult for common law systems to extrapolate a local doctrine of evasion of law for international cases.

### III. ROLE OF GOOD FAITH

All the same, whether or not the common law admits a general doctrine of evasion of law of the kind just discussed, it apparently requires that the party choice of a law to govern a contract must be undertaken in good faith. The requirement of good faith surfaced in the well-known decision of the Privy Council in *Vita Food Products Inc v Unus Shipping Co Ltd (in liq)*.<sup>10</sup> In the course of carriage of the plaintiff’s goods from Newfoundland to New York, the defendant shipowner’s vessel ran aground at Nova Scotia, admittedly as a result of the master’s negligence in navigation. Under the bill of lading, which was expressed as governed by English law, the exemption of liability in respect of such negligence would be valid. It would also have been valid under the Hague Rules if those rules, as enacted in Newfoundland, had been incorporated by way of a clause paramount in the bill of lading. Attempting to avoid the exemption of liability, the plaintiff laid its action in tort, suing the defendant as being a common

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<sup>6</sup> See Bogdan, *supra* note 4 at 209, which concluded that “the whole issue of abuse of private international law is complicated and not suitable for easy and general solutions”.

<sup>7</sup> *Ibid* at 201.

<sup>8</sup> *Ibid*.

<sup>9</sup> See *eg* Matthew Conaglen, “Sham Trusts” (2008) 67(1) Cambridge LJ 176, which argued that there is a doctrine of sham and explored it in the context of trusts.

<sup>10</sup> [1939] AC 277 (PC) [*Vita Food Products Inc*].

carrier (and bailee) with unrestricted liability. The defendant naturally relied on the exemption of liability in the bill of lading as a defence to the tort claim. The Privy Council held that they were justified in doing so. First, the exemption clause was valid under the chosen governing law, English law, since the chosen law was bona fide and legal and gave no cause for avoidance as being contrary to public policy (the “*Vita Food Products Inc* rule” hereafter). The mere fact that English law was unconnected to the parties and their transaction was not evidence of lack of good faith in their choice of English law.<sup>11</sup> English law was a well-established commercial law commonly relied on by non-English parties who agreed to arbitrate in England and apply English law to transactions which were “carried on completely outside England”.<sup>12</sup> Second, the court held that the contract including the exemption clause would not be illegal and void by Newfoundland law where it was concluded. The shipowner had committed no illegality in omitting the clause paramount, the insertion of which was merely directory and not imperative. Third, in any case, even if the contract including the exemption clause had been illegal where it was concluded for failure to insert the clause paramount, that was inconsequential for a court of Nova Scotia. The illegality was not such an illegality to which that court might give effect on grounds of comity of nations. Disregarding the foreign illegality, the court’s task was to apply and give effect to the proper law of the contract, by virtue of which the exemption clause was valid.<sup>13</sup>

Many years on, the status or nature of the *Vita Food Products Inc* rule has remained elusive.<sup>14</sup> No prior authority was cited for the rule which the Privy Council described as being of the nature of a qualification (of principle),<sup>15</sup> and in subsequent discussions of the rule, at least three divergent lines have been discernible. None of them can withstand scrutiny, as will be shown.

One conception assumes that the choice of law is a promissory term of the contract by construing the elements of good faith and legality (supposed to be composite elements) to cover acts of wrongdoing affecting the substance of the containing contract, such as the deliberate exertion of duress, the perpetuation of fraud in relation to the terms of the contract, or the accidental contracting of an illegal agreement.<sup>16</sup> This however seems to be unwarranted. Although in *Vita Food Products Inc* the

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<sup>11</sup> See also *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725 at 747 (Victoria SC).

<sup>12</sup> *Vita Food Products Inc*, *supra* note 10 at 290.

<sup>13</sup> There appears to be a mistake in *OT Africa Line Ltd v Magic Sportswear Corp* [2005] 2 Lloyd’s LR 170 at para 21 (CA), where the court stated that the “exemption was void by the law of Newfoundland, whose legislature had enacted the Hague Rules”.

<sup>14</sup> See Peter Nygh, *Autonomy in International Contracts* (Oxford: Clarendon Press, 1999) at 67; Peter Kincaid, “Rationalising Contract Choice of Law Rules” (1993) 8 Otago L Rev 93; Peter North, *Private International Law Problems in Common Law Jurisdictions* (Dordrecht: Martinus Nijhoff Publishers, 1993) at 112 [North, *Problems*]. Cf *Re Nield*, noted at [1990] Jersey Law Reports N-12b.

<sup>15</sup> Walter Cook, *The Logical and Legal Bases of the Conflict of Laws* (Cambridge: Harvard University Press, 1949) at 422, 423, citing American precedents on usury contracts.

<sup>16</sup> Cf *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at para 55 (CA) [*CIMB Bank*], where the court stated that “the mere allegation of fraud is not in itself sufficient to impugn the choice of law clause in the contract”. With respect, the citation of *Industrial & Commercial Bank Ltd v Banco Ambrosiano Veneto SPA* [2000] SGHC 188 and *Ash v Corporation of Lloyd’s* (1992) 9 OR (3d) 755 at 758 (CA) indicates that the court conflated choice of jurisdiction and choice of law. See also Jonathan Harris, “Does Choice of Law Make Any Sense?” (2004) 57 *Curr Legal Probs* 305 at 327; Martin Davies, Andrew Bell & Paul Brereton, *Nygh’s Conflict of Laws in Australia*, 9th ed (Australia: LexisNexis Butterworths, 2014) at 450.

omission of the clause paramount was accidental (the illegality if it had existed would have been an accidental illegality), the Privy Council's reasoning on the illegality point was distinct from its consideration of the limits of freedom of choice of law. Expatriating on the limits of freedom of choice of law, the Privy Council distinctly conceived the rule as being a rebuttal of the *prima facie* inference that the intention of the parties signified by their express choice was the proper law of their contract.<sup>17</sup> On the other hand, the omission of the clause paramount was viewed in terms of substantive contractual illegality and not any supposed choice of law illegality.<sup>18</sup> This observation is also true of the discussion of substantive public policy in the Privy Council judgment. Highlighting certain remarks of Lord Halsbury in *Re Missouri Steamship Co*,<sup>19</sup> Lord Wright in the Privy Council commented that Lord Halsbury would be "referring to [substantive] matters of foreign law of such a character that it would be [contrary to] comity of nations".<sup>20</sup>

Following post-*Vita Food Products Inc* developments in relation to choice of forum agreements and on hindsight, the rule could possibly be regarded as more narrowly embracing substantive vitiating factors that directly impeach the choice of law clause.<sup>21</sup> This recommendation could be supported by importing a kind of separability thesis (recognised elsewhere with respect to choice of forum clauses), whereby choice of law clauses would be construed as contractual terms standing apart from the containing contract in the same way as choice of forum clauses.<sup>22</sup> Admittedly, the *Vita Food Products Inc* case does not explicitly negative a separability thesis. There was nothing in that case that would be inconsistent with the thesis of separability both in the facts and the reasoning.

However, the separability thesis must be rejected. The express choice of law, to the Privy Council, was merely the *prima facie* 'objectively ascertained' *proof* of the proper law, the law which the parties intended to apply. As Lord Wright stated in that case,

[B]y English law (and the law of Nova Scotia is the same) the proper law of the contract "is the law which the parties intended to apply." That intention is objectively ascertained, and, if not expressed, will be presumed from the terms of the contract and the relevant surrounding circumstances.<sup>23</sup>

Lord Wright emphasised that in all cases, whether there is an express choice or otherwise, the intention to select a law is objectively ascertained. He went on to clarify that while an express intention had been stated to be conclusive (of the objectively ascertained intention), that was not an absolute proposition, but rather enunciated a *prima facie* presumption.

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<sup>17</sup> As to whether there was rebuttal in that case, no reference was made to the omission of the clause paramount.

<sup>18</sup> The accidental omission likewise was dealt with substantively, as part of the contractual illegality and not part of any supposed lack of good faith in choice of law.

<sup>19</sup> (1888) 42 Ch D 321 at 336.

<sup>20</sup> *Vita Food Products Inc*, *supra* note 10 at 297.

<sup>21</sup> North, *Problems*, *supra* note 14, considered that there was no doubt about this. The only question was as to which law should determine whether the vitiation was legally recognised.

<sup>22</sup> For the separability of jurisdiction clauses from the containing contract, see *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's LR 254 (HL).

<sup>23</sup> *Vita Food Products Inc*, *supra* note 10 at 289, 290.

In this analysis, the presumption is, as a matter of principle, subject to the qualification that the choice must be bona fide and legal and not contrary to public policy. There would accordingly be no basis for regarding an express choice of law as a free-standing promissory term of the contract. It partakes rather of the nature of a rebuttable recital or statement which leads to or explains the operative terms of the contract. From a consequentialist point of view, this conception is also more defensible. If an express choice of law was a free-standing promissory term, the consequence of any invalidity of such term would be failure to make a contract. The entire contract would not come into being, since if the parties had intended and promised to be bound by contract under a law which could not give it effect, the contract must be rejected. However, no one has ever doubted that the rejection of an express choice is not that the parties have failed to make a contract. It merely means that there is an absence of choice, leading the courts to apply the choice presumed from the circumstances.<sup>24</sup>

There is further proof that the choice of law term is non-promissory in nature. Nothing in the authorities which have applied the rule thus far contradicts the non-promissory nature of a choice of law term.<sup>25</sup> In *Ace Insurance Ltd v Moose Enterprise Pty Ltd*,<sup>26</sup> the Australian parties to a liability insurance contract covering risks of the insured's liability in the US, among other territories, had agreed to litigate any dispute arising thereunder in Australia, and to Australian law as governing law. The insured was sued in California in class actions seeking the recovery of the price and monitoring medical costs. It commenced proceedings against the insurer for a declaration that the insurer would be liable under the insurance contract to indemnify the insured. It was seeking thereby to obtain the benefit of certain advantages under Californian law, such as an alleged refutation of the insurer's claim that the coverage was limited to personal injury claims. The insurer responded by applying to the court in New South Wales for an anti-suit injunction, contending *inter alia* that the insured should be restrained from seeking in effect to have Californian law applied by the Californian court. It submitted that the choice of law agreement amounted to an implied negative promise to the insurer that the insured would not seek to have another law than Australian law applied to their contract. Ultimately the insurer would succeed in obtaining the injunction on the ground that the forum in New South Wales was the exclusive forum, but that did not stop Brereton J from decisively rejecting the choice of law submission. He held that a choice of law term was not a promissory term, although not ruling out that contracting parties could frame a provision which was promissory if they used very clear language to that effect.<sup>27</sup> In the present view, a choice of law term not tied to a choice of jurisdiction can never have a promissory character. Even when it is tied to a choice of jurisdiction clause, it should only produce that effect if in truth and as a matter of fact, it is proved that

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<sup>24</sup> So unlike the choice of jurisdiction agreement, the choice of law agreement is not a separable contract, the breach of which is reparable by a damages award. Cf *Union Discount Co Ltd v Zoller* [2001] EWCA Civ 1755; *National Westminster Bank Plc v Rabobank Nederland (No 3)* [2008] 1 Lloyd's LR 16 (QB).

<sup>25</sup> Cf *CIMB Bank*, *supra* note 16.

<sup>26</sup> [2009] NSWSCR 724.

<sup>27</sup> In substance, Brereton J inverted the analysis of Adrian Briggs in *Agreements On Jurisdiction and Choice of Law* (Oxford: Oxford University Press, 2008) at paras 11.45-11.58 [Briggs, *Agreements*] on which the insurers relied. Briggs argued that as a starting point, a choice of law term was promissory although exceptionally it might not be.

if proceedings had been brought in the exclusive forum, the court there would have disregarded the party choice altogether and *in limine*.

Further indirect support that the choice of law term is not a free-standing promissory term may be found in the reasoning of the Australian High Court in *Akai Pty Ltd v People's Insurance Co Ltd*<sup>28</sup> and of the English Commercial Court in somewhat parallel proceedings in respect of the same parties and dispute. The parties to a credit insurance policy (intended to protect Akai against financial loss suffered in the event of default of its major debtors) had agreed to exclusive English jurisdiction and governance by English law. Akai, the insured party, sued to recover its claim in New South Wales contrary to the English jurisdiction agreement, relying on s 8(2) of the *Insurance Contracts Act 1984 (Cth)*. A majority of the High Court held that s 8(2) had the effect that the applicable law clause must be ignored in favour of the objective proper law, which was determined to be the law of New South Wales. If the proceedings continued in New South Wales, the court was bound to apply the mandatory provisions of s 54 of the same Act since the objective proper law was the law of New South Wales. However, if the proceedings in New South Wales were stayed in favour of proceedings in the alternative English forum, s 54 would be disregarded. The English court, ignoring s 54, would consider English law to be the proper law of the contract. It was held that for the sake of giving effect to the mandatory provisions of s 54, the policy of Australian law and the Constitution were against granting a stay. In the second place, and in any case, it was held that the same provisions resulted in nullification of the English jurisdiction agreement. The jurisdiction agreement was void because it would have the effect of circumventing the provisions of s 54. There was accordingly no contractual obligation to refer disputes to the English court. So then in both aspects of their reasoning, the majority of the High Court conspicuously did not concern themselves with whether the choice of English law as a free-standing promissory term was bona fide and legal in the face of s 8(2). The court's direct recourse to the objective proper law as directed by s 8(2) could only predicate that the choice of law clause did not operate as a true agreement capable of being vitiated, but merely served as rebuttable *prima facie* evidence of the proper law.

Akai had in fact also brought concurrent proceedings in England, which had been adjourned pending the decision of the High Court of Australia. Following the High Court's affirmation of the lower court's refusal to stay the proceedings in New South Wales, People's Insurance Co Ltd counterclaimed in the English proceedings, adding an application for an antisuit injunction to stop the proceedings in New South Wales. In *Akai Pty Ltd v People's Insurance Co Ltd*,<sup>29</sup> Thomas J considered whether the decision of the High Court of Australia ought to make a difference in the English proceedings. Although he first observed that the parties had freely bargained for English law, when he turned to discuss the effect of public policy, he shifted his focus exclusively to the English jurisdiction agreement.<sup>30</sup> He asked whether it would be contrary to English public policy to give effect to an otherwise valid English jurisdiction agreement, valid by virtue of a choice of English law which had freely been negotiated. Like the Australian High Court in its approach to the choice of law

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<sup>28</sup> (1996) 188 CLR 418 (HCA) [*Akai*].

<sup>29</sup> [1998] 1 Lloyd's LR 90 (QB).

<sup>30</sup> *Ibid* at 100.

clause, he did not frame a distinct issue as to the legality of the choice of English law clause in the face of s 8(2) of the *Insurance Contracts Act 1984 (Cth)*. Nor did he think it relevant to ask whether there was any policy as a result of s 8(2) or s 54 for avoiding the clause. Ignoring s 8(2) and s 54, he focused the discussion of public policy on the English jurisdiction agreement, which was assumed to be valid even if it would be nullified by virtue of the Australian law. So then in the English judgment also, the express choice of law was not regarded as being anything more than a statement of non-promissory intention lacking in direct contractual force.

#### IV. PROBLEMS WITH EVASION EXPLANATION

Under a second line of appraisal, the *Vita Food Products Inc* rule has been conceived as being an anti-evasion-of-law measure. This conception is also doubtful. First, the rule underscored by an evasion rationale is under-inclusive. It assumes that only an express choice can be abusive. The truth is that parties can also arrange their transaction so as to create objective connections that conceal their fraudulent endeavour to break a country's law.<sup>31</sup> If evasion of law was the key to the *Vita Food Products Inc* rule, the rule should have pertinently directed, but does not do so, application of the law evaded instead of the objective applicable law. In an older case, *Foster v Driscoll*,<sup>32</sup> there was also no suggestion that a doctrine of fraud was applicable leading to the application of the law evaded, even though in every attempt to perpetrate an illegality against the laws of a friendly country, parties will inevitably arrange their connections so as to avoid their contract being governed by the law to be evaded.

Second, if the predicate of the rule is that freedom of choice is only legitimate and non-abusive in international cases (*ie* party choice is only to be allowed for international cases), it seems incongruous to confine the rule to an express choice of a law which is not the *lex fori*. At common law, a case is implicitly international if it involves a choice or conflict of laws.<sup>33</sup> A case not involving an express choice is also an international case if the courts would determine an objective applicable law which is not the *lex fori*. There is again no satisfying explanation why an express choice alone is, but an objective proper law is not, subject to the requirements of bona fides and legality.

A less critical puzzle is that it is ambiguous whether the doctrine, as a doctrine of evasion of law, is that of the forum, of the putative applicable law, or of the objective proper law. This ambiguity was latent in the expatiation of the *Vita Food Products Inc* rule. The Privy Council evidently applied the requirements of bona fides and legality as imposed by English law, which was the putative proper law, while parenthetically observing that the law of Nova Scotia was the same. As a court sitting in Nova Scotia, the Privy Council might be expected to apply the private international law of Nova Scotia, and the order of reference in the parenthesis should have been inverse if the doctrine being applied was that of the *lex fori*. Reversing the emphasis, the court could almost have said that it was for the putative applicable

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<sup>31</sup> The use of a soft (open-ended, multi-variable) connecting factor merely makes evasion more difficult.

<sup>32</sup> [1929] 1 KB 470. See also *Regazzoni v K C Sethia* [1958] AC 301 (HL).

<sup>33</sup> *Cf* Kincaid, *supra* note 14 at 103.

law to articulate a doctrine of evasion, suggesting a unilateral rule of conflict that applies the anti-evasion policies of the putative proper law.

The point however is that the court did not do so. If the rule was purely an anti-evasion measure, a preference for the putative proper law's doctrine of evasion would be more cogent. It would be consistent with the argument that a notion of evasion of the *lex fori* would be otiose, since a doctrine of evasion of forum mandatory law already serves the same anti-evasion purpose.<sup>34</sup> The fact that, so far as evasion of the *lex fori* is concerned, a doctrine of evasion is redundant was evident in sub nom *Freehold Land Investments Ltd v Queensland Estates Pty Ltd*.<sup>35</sup> In the first instance court, the rule was relied on.<sup>36</sup> On the appeal to the High Court of Australia, it became evident that no reference to that rule was necessary since the question was simply whether there was an overriding forum mandatory statute.<sup>37</sup> Another argument could be mounted, namely that if the rule was purely an anti-evasion measure, one would expect at the least the court to take the putative proper law's doctrine into consideration, even if the doctrine of evasion must be that of the forum. As Bogdan has argued, the forum should tolerate evasion if this would be acceptable to the objective proper law or the law that would be designated by the forum in the absence of choice by the parties.<sup>38</sup> There was however no suggestion in the judgment of the Privy Council that such considerations would be relevant.

#### V. A SCHIZOPHRENIC RULE

The *Vita Food Products Inc* rule becomes even more complicated under a third line of appraisal, which conceives it as being partly an anti-evasion measure and partly a public policy reservation.<sup>39</sup> This conception implies redundancy of the second limb of the rule and enhancement of the first limb. The first limb is enhanced since the *lex fori*'s controls of good faith and legality are relevant, not the putative proper law's controls. The second limb is redundant since the forum court simply applies the forum's pre-existent rules of public policy, which is already the case under the doctrine of public policy reservations.<sup>40</sup>

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<sup>34</sup> See James Fawcett, "Evasion of Law and Mandatory Rules in Private International Law" (1990) 49(1) Cambridge LJ 44 at 48, 49. Cf Mary Keyes, "Statutes, Choice of Law, and the Role of Forum Choice" (2008) 4(1) J P Int'l L 1.

<sup>35</sup> (1970) 123 CLR 418 (HCA).

<sup>36</sup> *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] QR 378 (Queensland SC).

<sup>37</sup> In *Akai*, *supra* note 28, the HCA clarified that a statute has an overriding nature if it embodies specific policies which are remedial reforms or directed against oppressive and unjust practices and could easily be evaded by the simple expedient of choosing another law.

<sup>38</sup> Bogdan, *supra* note 4 at 202.

<sup>39</sup> Cf Bogdan, *ibid*, who argued that a doctrine of evasion of law serves very different functions from a public policy reservation.

<sup>40</sup> Supporting this is Yeo Tiong Min, *Halsbury's Laws of Singapore: Conflict of Laws*, vol 6(2) (Singapore: LexisNexis, 2013) at 295; Yeo Tiong Min, *Private International Law: Law Reform in Miscellaneous Matters* (28 March 2003) at 39, arguing that it is hard to see how a choice of the applicable law, by itself, can contradict public policy. See also Yeo, "Effective Reach", *supra* note 1 at para 4. Cf *PS Chellaram & Co Ltd v China Ocean Shipping Co* [1989] 1 Lloyd's LR 413 (NSW SC), endorsed in *Pacific Electric Wire & Cable Co Ltd v Neptune Orient Lines Ltd* [1993] 2 SLR(R) 102 at para 39 (HC).

The point being made has ceased to be purely academic. In *Peh Teck Quee v Bayerische Landesbank Girozentrale*,<sup>41</sup> the Singapore Court of Appeal, taking this approach, took it for granted that the public policy limb was intended to deny application of the chosen applicable law whenever application of that chosen law would be offensive to the forum's public policy. Thus conceived, the *Vita Food Products Inc* rule would comprise a non-substantive anti-evasion part (the first limb) and a substantive public policy part (the second limb). This conception of the public policy limb strictly speaking is not a faithful rendition of the rule. As has been shown, the rule was formulated as a qualification to the objective proper law, quite separate and distinct from substantive considerations such as contractual illegality or exclusionary public policy rules. Another significant change has occurred in the nature of the second limitation on choice of law. When the public policy of the forum is invoked to strike down the choice because application of the choice would offend public policy, the case is dismissed. This is different from what the Privy Council envisaged, which was to discard the chosen law and apply instead the objective proper law.

Be that as it may, besides reconceptualising the second limb, the Singapore Court of Appeal in *Peh Teck Quee* reformulated *obiter* the first limb, saying that "[t]he only rider to [the virtual conclusiveness of the express choice] is the principle that if the only purpose for choosing Singapore law was to evade the operation of Malaysian law, the court would be likely to hold that the choice of law was not bona fide on the basis of the evidence before it".<sup>42</sup> By focusing on the sole purpose, the *obiter* reformulation helpfully clarifies that the first limb calls for an objective appraisal of good faith.<sup>43</sup> The reformulation also clarifies that if in that case the sole purpose of evading the workings of Malaysian law had been proved, there would have been sufficient reason to negative the choice of Singapore law and to apply the objective proper law. This means that good faith is lacking even if the laws to be evaded are not part of the objective proper law. However, the laws to be evaded will only be applied if they form part of the objective proper law.

## VI. ANOTHER WAY FORWARD

The only conclusion that could be reached from the preceding incursions and explanations is that the contents of the *Vita Food Products Inc* rule as an anti-evasion measure cannot be stated with complete confidence. Significant differences have emerged as to how the rule as an anti-evasion measure should be characterised, and it does not appear that a choice among them will be fruitful, or that extra effort at defining the elements of the rule as an anti-evasion measure will be rewarding.

Untrammelled by authorities, a reinterpretation of the rule that requires freedom of choice of law to be exercised, as opposed to made, in good faith would be more defensible than a purely anti-evasion rule. Indeed, unless authority has ossified the conception of the rule – and it is submitted that it has not – the *Vita Food Products Inc* rule should be recast as a rule about good faith reliance on the party choice of law. Such a rule importantly would have an end, and not a start, as its focus. It would

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<sup>41</sup> [1999] 3 SLR(R) 842 (CA) [*Peh Teck Quee*].

<sup>42</sup> *Ibid* at para 17 [emphasis added].

<sup>43</sup> This has the advantage of avoiding the difficulties of proof of subjective intent to evade.

not be concerned with motives or intent to evade the law, nor with the purposes of evading a law, nor with the nature of the law being evaded, whether critical or reformative, if evasion can be proved, nor with the naturalness or artificiality of connections to a law, with reference to the making of the contract. It would be immaterial whether the reference datum or law is the objective proper law or any law within the parties' contemplation. The key to the rule would be the post-contract effect of relying on the express choice. Thus recast, the rule's limits on freedom of choice will be grounded in adjustments that befit the policies and objectives of private international law, applied with full sensitivity to the substantive context. The exercise by the protagonist of a rule of private international law is not in good faith and legal if it results in injustice or creates undue hardship to the non-relying party. Put another way, the rules of private international law are accorded to parties to help them transact without unfair detriment in a multiplicity of legal orders, and the rule reinterpreted shifts the focus from national interests to party justice, as should be the case. The reinterpretation ensures that the heart of the matter is the curtailing of a more private kind of abuse, namely the inflicting of injustice or hardship that can threaten and derail the international order. It would also be more compatible with the horizontality of the rules of private international law than an anti-evasion rule. Under a horizontal system of norms, parties acquire rights to the extent that state laws accord them *ex post facto*, and the insistence on good faith reliance on a chosen law is perfectly consistent with this *ex post* nature of the rules of private international law.

An important point to be noticed is that non-good faith reliance on an express choice of law will never be rigidly structured. There will be no standard factual occurrence amounting to non-good faith reliance. Whether a party's reliance on the chosen law is in good faith will turn on the precise web of circumstances, including both the events leading to the choice and those unfolding post-contract.

There remains the question of the effect of non-good faith reliance. The suggested reinterpretation would produce a more nuanced and proportionate outcome. Since the court is only concerned with reliance which is lacking in good faith, the effect of non-good faith reliance should be specific to the obligations which are affected. The rest of the applicable law should remain efficacious as a presumption. This is an improvement on the present interpretation of the rule, which is that denial of the choice leads to a total rejection of the chosen law and its replacement by the objective proper law. The reinterpretation would avoid throwing overboard the rest of the chosen applicable law on which reliance will be in good faith. So far as the affected part is concerned, it would allow the court the flexibility to substitute such law as would remove or repel injustice to the defendant. The court would not be constrained to apply the objective proper law whether or not this would perpetuate the injustice or dispel it. For some, the reinterpretation would lead to unpredictable results. But the objection in truth is exaggerated because in an *ex post* system of solving conflict of laws, a degree of unpredictability in hard cases is inevitable.

## VII. BINDING CHOICES, FLOATING CHOICES AND CHANGING CHOICES

A bolder thesis will next be advanced, namely that a doctrine of good faith reliance on the chosen law would also be apposite in solving problems that arise out of the

captioned situations. In the present view, sharing a common foundation, all three situations implicate the extent to which reliance can be placed on a party-initiated choice of law, which is inconclusive by reason of an unforeseen or unforeseeable alteration in the assumptions underlying the choice, or simply by virtue of uncertainty as to whether the parties have made a choice of law for their contract. This could happen if there is a mistaken assumption shared by both parties to the contract that the contract has been concluded under the chosen law. Inconclusiveness of choice of law could also arise if the parties use standard forms containing different choice of law terms, and doubts arise about whether they have made a contract under the one or the other supposed applicable law. A more common instance is where the parties could have referenced different laws when making their contract, as where the contract is not concluded by virtue of the objective proper law, or the law of the place of business of one of the parties, or the law of the forum, but validly concluded under the chosen law.<sup>44</sup> In these circumstances, the objection to regarding the chosen law as conclusive is typically expressed in terms of denying the choice because it would be circular to give effect to it. Giving effect to the chosen law would be tantamount to lifting up the contract by its own bootstraps, as it were. Stated in this manner, the problem of the circular formation of a contract is of variable impact. Its seriousness depends on whether the law which pronounces the contract to be not formed is the *lex fori*, or the objective proper law, or the law of the place of business of a party. In turn, this turns on whether the dispute between the parties is to be litigated in a forum whose court emphasises the objective proper law or the law of the place of the business.

Present solutions to the problem of failure to make a conclusive choice of law recognised in the case law impress either by their derivational logic or pragmatic abandonment of it. It is not necessary to pursue an extensive review of the literature in all its rich details to find a complete lack of consensus on what the definitive solution should be.

Briggs, who was perhaps the foremost exponent of the derivational logic intrinsic to the problem of possible failure to conclude a contract under the applicable law, also made the strongest case for it.<sup>45</sup> He argued that the proper law of a contract is a connecting factor, and therefore its determination must be undertaken in accordance with the *lex fori* which exclusively undertakes the selection of the connecting factor for the sake of localising a legal problem. Necessarily as a further logical derivative, that determination must be undertaken in accordance with the substantive law of contract formation of the forum. Ordinarily, by way of contrast, when the forum decides which connections are relevant and determines their appropriateness, there is nothing directly substantive in this exercise. In advocating application of the substantive *lex fori* (ie forum law of contract) to the determination of the disputed proper law, however, Briggs was not troubled by the departure from the usual parameters

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<sup>44</sup> Writers have tended however to frame a more abstract objection, saying that where it is disputed that a contract is concluded, it would be circular to determine the allegation by the putative proper law. This formulation of the problem underestimates the fact that a party alleging non-formation must be relying on some other law than the putative proper law. See A J E Jaffey, *Topics in Choice of Law* (London: The British Institute of International and Comparative Law, 1996) at c 4, which explained in another way that parties have chosen a law on the supposition that the contract is concluded; therefore the putative proper law cannot be used to verify if the supposition is true.

<sup>45</sup> Adrian Briggs, "The Formation of International Contracts" (1990) LMCLQ 192 [Briggs, "Formation"].

of selection of connecting factors. He accepted that this was inevitable where the parties are not agreed that they have made a contract. If they have not made a contract, they cannot have chosen a proper law, and without applying the substantive *lex fori*, the existence of the proper law cannot be vouchsafed. Once, however, the proper law has been determined to exist by the *lex fori*, it can and should be applied to resolve conclusively the question whether the parties have made a valid contract.

Logical solutions such as the above were troubling to many who claimed that they raise the hurdles to contract formation too high. Often criticised as creating incentives to forum shopping, these solutions were charged with damaging the international order. This might have been a partial reason that the English courts have preferred to solve formation problems by reference to the putative proper law.<sup>46</sup> The solution seems pragmatic though dubious in logic.

Eschewing logical solutions, a third recommendation was made in different ways by writers such as Kelvin Low and Basedow. Both argued that the possible failure to create a binding contract under the applicable law must be tested by reference to the unadorned, untreated, basal materials which are part of the contract negotiations. The former relied on the basic element of common intention to make a contract by reference to a single system of law, provoking the objection that these elements can only be known by reference to an applicable law.<sup>47</sup> Since a contract exists or does not exist only within the parameters of a legal order, and furthermore since it is unquestionable that differences exist between legal orders as to how these elements are proved or explicated, the binding effect of an agreement as to the proper law is only in honour until confirmed by, and question-begging without, reference to the applicable law. The latter argued in a more sophisticated fashion that there is a prototype agreement whenever intended contracting parties negotiate a contract and that it is fallacious to suppose that the prototype has to be derived from an applicable law. Every agreement has a core and a corona,<sup>48</sup> and differences in the corona ought not to distract from the certainty of the core, if that exists. Basedow himself powerfully urged that an agreement on choice of law is a self-fulfilling dispositional agreement. Although he accepted that individuals are not intrinsically empowered to give their agreement binding legal force, he maintained that they are free to make a self-fulfilling dispositional agreement.<sup>49</sup>

The inconclusiveness of the debate which has been touched on has persisted despite the extensive literature, and no apology is needed to put forward another analysis of the problem. This is that the problem is simpler than it looks if one returns to the predicates of the *Vita Food Products Inc* case, namely that the express choice takes effect not as a contract but as an evidentiary presumption. As an agreement as to the choice of law is not promissory, there is no concern with whether its binding nature is itself suspect when the contract is allegedly not formed. The only question to be

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<sup>46</sup> See *The Heidberg* [1994] 2 Lloyd's LR 287 (QB); *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] 2 Lloyd's LR 475 (CA).

<sup>47</sup> Kelvin Low, "Choice of Law in Formation of Contracts" (2004) 20 *Journal of Contract Law* 167. It follows that that a commonly intended system of law will no less determine whether the parties have made a contract as to what the terms of the contract are and whether it is valid.

<sup>48</sup> Jürgen Basedow, "The Law of Open Societies – Private Ordering and Public Regulation of International Relations: General Course on Private International Law" in *Recueil des Cours* 2012, vol 360 (Leiden/Boston: Martinus Nijhoff Publishers, 2013) at 187, 188.

<sup>49</sup> *Ibid* at 199.

answered is whether the presumption is rebutted so that the chosen law is conclusively the applicable law. Logically then, the question of possible failure to conclude a binding contract under the applicable law is equivalent to the question earlier considered of whether the bona fides of the chosen law is in question. To elaborate, the problem of formation of contract falls into one of several diagnostic categories; namely, where the parties have acted upon the erroneous common assumption that the chosen law is conclusive but in truth the contract is not validly concluded under the chosen law, or where the chosen law is inconclusive because other laws that the forum court might apply in the absence of choice of law by the parties deny that a contract has been validly concluded. Be that as it may, the exact source of inconclusiveness of the party choice of law is immaterial, although the resultant factual injustice may be more or less serious. Therefore, just as reliance on a chosen law of the contract requires the relying party to do so in good faith, so also an attempt to rely on the argument that the contract is not concluded under some law. Such reliance will not be in good faith if it operates unjustly on the counterparty or creates undue hardship on him.

#### VIII. THE FLOATING PROPER LAW

It is submitted that the phenomenon of the floating choice of law lends itself to a similar kind of good faith analysis.<sup>50</sup> The case for this seems at first blush more difficult to sustain. There seems to be a logical obstacle of a different kind to the validity of a floating proper law, namely that no contract can exist in a legal vacuum (which is different from a case of inconclusiveness of choice of law). Parties to a contract cannot logically make an agreement with a floating proper law, since if it is not known at the time of contracting which law is governing, they cannot have made a binding contract.<sup>51</sup> This logical consequence, it could be supposed, will be inescapable even if the contract would have existed under either each possible governing law.

This apparently unrelenting legal logic was first announced in *Amin Rasheed Shipping Corp v Kuwait Insurance Co*, where Lord Diplock declared that contracts were incapable of existing in a legal vacuum.<sup>52</sup> It surfaced more prominently in *Armar Shipping Co Ltd v Caisse Algerienne D'Assurance et de Reassurance (The Armar)*.<sup>53</sup> Following the loss of their cargo, the cargo owners entered into a general average bond with the shipowner's insurers. A dispute having arisen under the bond, the shipowner's insurers applied for an Order 11 writ to serve out of the jurisdiction on the cargo owners, claiming contribution under the bond. The precise Order 11

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<sup>50</sup> In agreement with David Pierce, "Post-Formation Choice of Law in Contract" (1987) 50 Mod L Rev 176, though for different reasons.

<sup>51</sup> See *CGU International Insurance plc v Szabo* [2002] 1 All ER (Comm) 83 at para 36 (HC) for the proposition that the concept that a contract may be concluded without having any governing law is not one to which effect can be given. The alternative proposition that the proper law must exist at the time of the contract has been cited. See also *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 (HL). This proposition, but not the other, is consistent with the view that the choice of law term is non-promissory.

<sup>52</sup> [1984] AC 50 at 65 (HL).

<sup>53</sup> [1980] 2 Lloyd's LR 450 (CA).

nexus relied on was that the bond was impliedly governed by English law, the *lex fori*. It was in that context and for the purposes of service out of the jurisdiction that the English Court of Appeal considered the insurers' submission that the bond contained an implied choice of English law. The insurers contended that the implication arose by reference to the general average clause in the contract of carriage between the shipowner and the cargo owners, which had provided that the law of contribution should be the law of the place of adjustment at the option of the shipowner. Since the contract of carriage was clearly a contract related to the bond in question, the insurers argued that the subsequent actual selection of London by the shipowner as the place of adjustment under the contract of carriage implied that English law became the governing law of the bond. The Court of Appeal rejected the submission. It was not possible, the court observed, to imply a law uncertain at the outset, when the bond was executed. At that time when the bond was executed, no specific place had been selected for adjustment, and it was not known for a certainty that London would be selected for those purposes. To imply a law at the place of an adjustment which might take place at some uncertain time in the future would be to countenance that the parties to the bond had intended to make a contract in a legal vacuum.

A few years on, Bingham J in *Dubai Electricity Co v Islamic Republic of Iran Shipping Lines (The Iran Vojdan)* apparently elevated the foregoing constructional aid into a logical principle that the proper law must "be built into the fabric of the contract from the start and cannot float in an indeterminate way until finally determined at the option of one party".<sup>54</sup>

It is however important to appreciate that despite the facial insistence on legal logic, the English courts have actually shied away from following it to the conclusion of denying the existence of a contract made in the absence of a law. In *The Armar* after all, the court was not required to apply the proposition that a contract does not exist in a legal vacuum. It was not doubted that the bond had been validly concluded, and the court only had to decide, and did decide, that it did not have or could not have had the implied proper law suggested by the shipowner. So far from suggesting that if the contract had been made under such implied proper law it would have been non-existent, the court intimated that the bond was a contract validly made under the objective proper law, which was probably the law of Algeria. There was also a floating clause in the contract of carriage, as has been noted, and likewise there was no suggestion that the Court of Appeal regarded the contract of carriage as being null and void by virtue of the clause. Indeed, no one even remotely supposed that that contract was anything other than a valid contract since the argument was that both contract of carriage and the general average bond shared expressly and by implication the same governing law.

In *The Iran Vojdan*, notwithstanding the court's facial commitment to the legal logic, the logical consequence of a non-existent contract, if any, was in effect avoided by characterising the dispute as involving a delayed party choice. The floating proper law clause in that case was only superficially a floating law. The parties truly had not intended to make a contract in the absence of a law. Their contract existed under the objective proper law, and the only question therefore was whether they intended to make an express choice to be affirmed at a later time and whether their delayed choice

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<sup>54</sup> [1984] 2 Lloyd's LR 380 at 385 (QB).

had legal effect. It was held that by reference to the objective German law, which was presumed similar to the *lex fori*, the actual delayed choice was too uncertain. But on principle, it was recognised that delaying the choice of an express applicable law will be possible if that is permissible under the objective proper law.

Among academics, likewise the contractual logic, that a contract with a floating choice of law is non-existent, has been glossed over. Pierce regarded the problem as one of post-formation change of law.<sup>55</sup> For him, the question was whether a contract which exists can have a floating law which if activated will displace the pre-existent objective proper law. He supposed that contracting parties who supposed they had made a valid contract with a floating proper law would have contracted under the objective proper law in the first place. Beck also supposed without further explanation or demonstration that an objectionable floating term did not render the contract non-existent.<sup>56</sup> Only the term was invalid.

Briggs's analysis was very rigorous.<sup>57</sup> He recognised both strands of authority represented by *The Armar* and *The Iran Vojdan* respectively but without attempting to reconcile them or prefer one or the other, nevertheless provided arguments in support of the analysis adopted in *The Iran Vojdan*. Essentially, it was a question of discovering the proper law as a connecting factor. Applying the starting point of the *lex fori*, he posited that the *lex fori* must reject the floating law as an express choice, regarding it as a term of the contract whose validity was in issue. The objectively determined proper law would thus be applied to test its validity and any election made according to its terms. As a solution based on derivational logic, the resemblance between Briggs's solution to the problem of contract formation and his solution to the floating choice of law is uncanny. In both cases, the *lex fori* must perform the initial selection of the appropriate connecting factor. Beyond this, however, the analysis leads to different outcomes. To solve the problem of circular formation, Briggs would refer us to the *lex fori*.<sup>58</sup> To solve the problem of the floating choice, he would instead refer us to the objective proper law.

There are enough clues that for Briggs, this was because problems of formation and floating choice were logically different. He predicated that a problem of floating choice did not involve the court in any circular application of the chosen law; that is to say, it did not involve a question of the existence of a valid choice. There was merely uncertainty as to the applicable law; that is, as to whether a term of the contract was sufficiently certain so that it could be given binding effect as between the parties.

However, this formulation of the problem of floating choice as involving validity of a term of the contract is itself controversial. Even if the contract would exist under either floating law, a floating law term arguably entails that no law exists until either law has been chosen to the exclusion of the other, and that therefore no contract has been made even if it would exist if either law had actually been selected at the time of contract. It follows that those who assume that choice of law terms are promissory must acknowledge that problems of formation of contract and floating choice are in fact logically equivalent. Parties to a contract whose existence is disputed are not

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<sup>55</sup> Pierce, *supra* note 50.

<sup>56</sup> Andrew Beck, "Floating Choice of Law Clauses" (1987) LMCLQ 523.

<sup>57</sup> Adrian Briggs, "The Validity of 'Floating' Choice of Law and Jurisdiction Clauses" (1986) LMCLQ 508.

<sup>58</sup> Briggs, "Formation", *supra* note 45; Briggs, *Agreements*, *supra* note 27 at 384.

in dispute about the freedom of choice. They have indeed exercised their freedom, but the question is whether that freedom has been exercised in a binding agreement so as to be binding on both parties. Parties to a floating choice of law likewise purport to have exercised their freedom of choice, and the question is whether they have done so through a binding contract to make a contract. Nor can the logical obstacle posed by a floating choice of law be avoided by construing the intention of the parties as being to make provision for delay in making an express choice to replace the objective proper law which is governing if and unless a valid express choice is later made. Where the possibility exists that the objective proper law can be replaced retrospectively by exercising the option to make an express choice, the problem remains that the parties may have made a binding choice by agreeing to make a contract.

In these circumstances, the same recommendation should be made as for the problem of contract formation. The earlier discussion, it will be recalled, provoked a pragmatic conclusion in favour of applying a doctrine of good faith reliance on the chosen law. Likewise here. For the sake of argument, it might be supposed that if the question is whether the parties have made a contract to make a contract, there could be a stronger case for applying the substantive *lex fori* on the basis that a floating choice of law resembles a choice of forum term and, like that term, is a severable agreement.

But again such reasoning would be at odds with the accepted doctrinal choice of law premises. A breach of choice of forum clauses is reparable by a damages award, but no one has ever supposed that damages may be obtained for a breach of choice of law clause. Once the party choice of law is perceived as being presumptively the proper law, the only question should be whether it would be contrary to good faith for a party to invoke and rely on the floating choice in the circumstances which have unfolded.

#### IX. POST-FORMATION CHANGE OF PROPER LAW

There are in fact many kinds of post-formation change or variation of the proper law. Many are indistinguishable in substance from floating choices. Thus, where retrospective change is possible, there is only a semantical difference between the floating choice and the post-formation change of choice of law. While the pre-existing applicable law (including the objective proper law in the absence of express choice) may be certain, the fact that the applicable law may be changed with retrospective effect implies that there is no applicable law at the time of contract. As was seen before, the court in *The Armar* recognised this equivalence between floating proper laws and changing proper laws. This effect was stated, it is submitted, accurately by the writer of the headnote of the case reported in the All England Reports as follows: “Nor could the contract float in an absence of law until the proper law was determined, nor could it change from one country to another on the happening of subsequent events.”<sup>59</sup>

What seems also clear from cases decided after *The Armar* is that a retrospective change however is not conclusive that the change of applicable law clause is a floating

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<sup>59</sup> [1984] 1 All ER 498 at 498 (CA).

choice of law. In *Astro Venturoso Compania Naviera v Hellenic Shipyards SA (The Mariannina)*,<sup>60</sup> the English Court of Appeal had little difficulty in distinguishing its earlier *obiter dictum* in *The Armar* when confronted with an agreement which provided that if the parties arbitrated their disputes, the proper law would be English law; but that if the arbitration should be invalid, the Greek courts would be the exclusive courts for their disputes and the proper law would be Greek law. The court clarified that the earlier decision showed that it was not satisfactory or acceptable to seek to determine the proper law by reference to a subsequent unilateral event. In the instant case, however, there was no attempt to imply two possible proper laws, one from the reference to arbitration and the other from the reference to adjudication by the courts. The arbitral reference was in fact the primary reference, and the choice of adjudicatory forum and governing law was merely a fallback provision. There was commercial sense in having such a provision, albeit it was an uncommon one.

In a further notable manner, the court did not consider submitting the question at hand to the decision of the objective proper law. If the issue were really one of invalidity of a term of the contract, the court would, for the sake of consistency with *The Iran Vojudan*, have consulted the objective proper law for its position as to the validity or invalidity of the term. The court's reasoning, which ignored this, could only mean that there was no issue of invalidity, notwithstanding that the law to be applied in the event the disputes should be litigated had retrospective effect. The clause was essentially a provision for a variation fixed in advance which selected a primary and a secondary forum and fixed the respective laws each forum should apply.

On the other hand, many have presumed that a term permitting either or only one party to change a pre-existent applicable law prospectively is very different, being merely a variation of an existing contract.<sup>61</sup> Although Kahn-Freund was very sceptical about the difference, arguing that the prospective variation (without making a new contract) also raised a question of the initial validity of the contract,<sup>62</sup> there is considerable contrary academic support for regarding a post-contract prospective variation of proper law as attracting special considerations. Both arguments of policy and principle have been cited. While the contract whose proper law may be prospectively varied may involve an uncertain term, there is no issue of uncertainty of contract really. Giving effect to the contract simply means that if and when the right to change is invoked, obligations and rights which are as yet unexecuted will henceforth be construed in accordance with the new applicable law. Obligations and rights which have been executed or accrued, as the case may be, under the former applicable law will remain valid. It follows that a valid contract cannot be invalidated by a change of the proper law. Some would add that likewise third party rights, whether they have accrued or not, cannot suffer prejudice by a change of the proper law.<sup>63</sup> Not all reject prospective validation. For them, reasons of policy support

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<sup>60</sup> [1983] 1 Lloyd's LR 12 (CA).

<sup>61</sup> *Cf EI Du Pont de Nemours & Co v Agnew* [1987] 2 Lloyd's LR 585 at 592 (CA) [Agnew], where Bingham LJ supposed that it was "theoretically possible for a proper law to be retrospectively varied on exercise of a contractual option".

<sup>62</sup> O Kahn-Freund, *General Problems of Private International Law* (Leyden: Sijthoff, 1976) at 255-257.

<sup>63</sup> Law Reform Sub-Committee of the Singapore Academy of Law, *Report on Reform of the Law Concerning Choice of Law in Contract* (May 2004) at paras 87, 88.

retrospective validation where it will avoid uncertainty as to what law governs the contract.<sup>64</sup> In any case, the foregoing qualifications on variation cannot be a matter of *lex fori* prescription since there is a difference between varying a term of an existing contract and a choice of law term. In the latter case, it must be asked whether the already governing law should decide “whether variation is to be permitted, as a matter of substantive contract law”, or whether variation should be “classified as a choice of law issue, to be determined according to the private international law rules of the forum”.<sup>65</sup> North contended that if the latter is correct, a further question must be asked, namely whether the variation should be valid according to the pre-existing proper law or the new proper law chosen under the variation provisions.<sup>66</sup>

The immediately preceding questions would make sense if the change of proper law term was truly of a promissory nature. However, it is hard to find judicial support for this in *The Mariannina*, which some have regarded as an authority on change of the proper law. The court there did not so much as hint that any reference was required to the objective proper law; indeed *The Iran Vojdan* was omitted from the court’s discussion. Nor does the subsequent decision in *Libyan Arab Foreign Bank v Bankers Trust Co*<sup>67</sup> provide any support for treating a variation of the objective proper law as a term of the contract. Staughton J in that case held that after the managed account arrangements came into being, there was an implicit alteration of the proper law to a split proper law: English law and New York law governing the rights and obligations in respect of the London and New York accounts respectively. There was apparently no need to refer to the objective proper law, namely English law, which governed the deposit contract prior to the managed account arrangements coming into being.

A case that seems to have accepted that a term as to the post-contract variation of the proper law is contractual is the Singapore case of *Kredietbank NV v Sinotani Pacific Pte Ltd (Agricultural Bank of China, third party)*.<sup>68</sup> Sinotani, the beneficiary of an unconfirmed straight letter of credit payable at the issuing bank in China, drew a bill of exchange which it negotiated to Kredietbank subject to acceptance by the issuing bank. The requisite acceptance was later given, but before payment was due, a stop payment order was issued in China against the issuing bank, which accordingly refused to take up the documents and pay the draft on maturity. Having paid Kredietbank under the latter’s right of recourse, Sinotani claimed an indemnity against the issuing bank and damages in the alternative. The High Court held that the proper law of the credit was the law of China and that refusal of payment was justified, being in accordance with that law. The Court of Appeal agreed, dismissing Sinotani’s appeal against the lower court judgment.

In the present discussion, only the *obiter* judgment of the High Court is of interest. Dealing extensively with the submission that the letter of credit in that case should be regarded as being a restricted negotiation credit, the court considered if there was

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<sup>64</sup> Peter North, “Varying the Proper Law” in his book, *Essays in Private International Law* (Oxford: Clarendon Press, 1993) 51 at 65, 66.

<sup>65</sup> North, *Problems*, *supra* note 14 at 121. See also Aubrey Diamond, “Conflict of Laws in the EEC” (1979) 32 *Curr Legal Probs* 155 at 162–165.

<sup>66</sup> This does not sit well with the rejection of *renvoi* in applying the applicable law of a contract.

<sup>67</sup> [1989] 1 QB 728 [*Libyan Arab Bank*].

<sup>68</sup> [1999] 1 SLR(R) 274 (HC) [*Kredietbank*].

a problem that such a credit might be a floating contract without a law.<sup>69</sup> The court thought that *prima facie*, the credit would have an initial proper law, namely the law of the issuing bank. At first blush, there was a floating proper law issue since the credit would subsequently be governed by another law should the nominated bank agree to negotiate. There were however two answers against any objection that the credit was a floating contract. First, the court conceived that a documentary credit involved the formation of multiple contracts at different points of time. With the entry of new parties subsequently into the credit transaction by way of confirmation, or authorised acceptance, payment or negotiation without recourse under the credit, “fresh agreements” would be made involving merely a change of the initial proper law attached to the credit when it was first issued. Second, the court answered that as a fixed proper law might be subject to estoppel or subsequent agreements with the effect of changing that proper law, and as a contractual term might be changed by agreement, there was no reason that the proper law governing an agreement could not subsequently be changed by agreement.

Both answers premise that a floating choice and a changing choice alike are promissory terms. That is why to be valid, a change of proper law must involve the making of a new contract. With respect, however, the implicit notion that a letter of credit involves the making of new contracts whenever there is confirmation or negotiation is “artificial and unattractive”.<sup>70</sup> A letter of credit contract is better perceived as involving the formation of a singular albeit composite contract, with different relationships governed by split proper laws. This analysis was implicit in the English Court of Appeal judgment in *Marconi Communications International Ltd v PT Pan Indonesia Bank Ltd TBK*.<sup>71</sup>

Properly understood then, neither *The Mariannina* nor the *obiter* High Court judgment in *Kredietbank* contains any support for treating a prospective variation of a proper law agreement as a promissory term, and any differently from a floating proper law. A variation term, like a floating term, is non-promissory in nature. Its effect is presumptive and may be denied if the result would be injustice or harshness to a party to the contract. There is in other words no rigid proposition that variation is impermissible if it would validate an invalid contract or that retrospective change is impermissible. The only question is whether the retrospective validation will occasion injustice or harshness to the non-relying party.

A post-dispute variation is of course possible if permissible under the *lex fori*. It is distinguishable, being an agreement as to how the dispute shall be resolved and not a change of the proper law.<sup>72</sup> The sometimes similar effect achievable by the parties’ proffering no evidence of foreign applicable law is also to be distinguished.<sup>73</sup> It is likewise a matter of post-dispute variation rather than an *ex ante* contractual variation.

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<sup>69</sup> The advising bank never agreed to negotiate in the technical and legal sense and in fact never did so. It was thus academic. What mattered more was that the plaintiffs who assisted the defendants in this credit never itself negotiated the credit in the technical and legal sense, but in fact only discounted the letter of credit with full recourse, which did not amount to a negotiation. That was fatal to the defendants’ case.

<sup>70</sup> To borrow the words of Staughton J in *Libyan Arab Bank*, *supra* note 67 at 747.

<sup>71</sup> [2007] 2 Lloyd’s LR 72 (CA).

<sup>72</sup> Cf *Agnew*, *supra* note 61 at 592.

<sup>73</sup> Cf *North, Problems*, *supra* note 14 at 120.

## X. CONCLUSION

The proposition that an agreement on the proper law has effect as a contractual term is more an assumption than a rule. No case in fact has applied it. The result is that there are more similarities than differences between the nature of the proper law of a possibly unformed contract, the floating proper law, and the changing proper law. In all cases, if the express choice is merely presumptively the proper law, the only question is or should be whether it would be in good faith for one party to rely on the express choice of law in the circumstances which have unfolded. If the circumstances are such that this reliance would cause injustice or serious hardship to the non-relying party, the court will or should disregard the express choice to the extent that it will cause injustice or serious hardship and apply the law that will avoid the injustice or serious hardship.