CHOICE OF LAW CLAUSES IN INTERNATIONAL CONTRACTS: OVERSEAS DEVELOPMENTS

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In June 1992 the New Zealand Law Commission recommended that the New Zealand Government should accede to the United National Convention on Contracts for the International Sale of Goods 1980, and that Parliament should enact the appropriate legislation.¹ The Commission has also been considering other aspects of international trade law and discussions have been held with the Australian Law Reform Commission on choice of law issues generally.² Earlier this year the Australian Law Reform Commission published Report No 58 on Choice of Law.³ Meanwhile in England the European Convention on the Law applicable to Contractual Obligations 1980 came into force on April 1, 1991.⁴ This Article considers these overseas developments, as reform here is necessary.

I. OVERVIEW OF THE EUROPEAN CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS 1980

The Convention on the Law Applicable to Contractual Obligations was signed in Rome on 19 June 1980 by seven of the then nine member states of the European Economic Community. The Convention developed in two stages. First a preliminary draft Convention on the law applicable to both contractual and non-contractual obligations was completed in 1972.⁵ This draft was the starting point for the Convention’s second stage. Negotiations took place between 1975 and 1980, the culmination of which was the present Convention. At the request of the British delegation, the provisions on non-contractual obligations were deleted to be dealt with by a subsequent Convention.

It was felt that the EEC was in need of such a Convention.⁶ Although all of the member states of the EEC today allow parties to a contract to choose the law that will govern their contract, different methods of determining the applicable law are used in the absence of such a determination by the parties themselves.⁷ Harmonising the conflict of law rules

4 Contracts (Applicable Law) Act 1990 (UK). Until this Statute was passed English and New Zealand law could be said to be identical. See generally Dicey & Morris The Conflict of Laws (1988) (11th ed) p 1168 et seq. Parties could choose the law to govern their international contract. An international contract may be defined as a contract which has “significant elements connected with more than one country”. See A J E Jaffey “Essential Validity of Contracts in the English Conflict of Laws” (1974) 23 ICLQ 1 at 2. See also G R Delaume “What is an International Contract? An American and a Gallic Dilemma” (1979) 28 ICLQ 258. In certain circumstances the court would infer a choice and in the absence of any choice the legal system with which the transaction had its closest and most real connection would apply. Whilst easy to state, this proper law doctrine was seen to be in need of reform; hence the English legislation and the Australian proposals.
7 Ibid. Lagarde notes for example that in Italy the contract is governed by the national law of the parties if it is common to both. Otherwise it is governed by the law of the state where the contract
within the EEC would, it was said, also prevent ‘forum shopping’, and increase legal certainty.  

1. Main features of the Convention

The Convention is world wide in effect. In other words it does not just provide choice of law rules for contracts with an EEC connection. It provides rules for any international contract where an EEC state is the forum.

The basic rules of the Convention follow the pattern of English law. Normally party autonomy is allowed, in other words, the parties may choose a law to govern their contract. This may be achieved by stating the chosen law in their contract. In traditional English terminology this is called the proper law. In the absence of choice the proper law will be the law of the country with which the contract is most closely connected. There is a presumption, however, that the closest connection is to be found where the party who is to effect the performance which is ‘characteristic of the contract’ has his habitual residence, or in the case of a company, its central administration. There are other presumptions and there are also detailed rules applying to certain consumer and employment contracts. These rules tend to be of a protective character. Finally the concept of mandatory rules is employed in the Convention and these latter can override the otherwise applicable law. Mandatory rules are rules which cannot be derogated from by contract.

An enormous amount has been written on the Convention and its history, both in English and other European languages. What follows is a discussion of the main provisions of the Convention with emphasis being placed on the differences the Convention will produce on the traditional common law approach to choice of law as it still exists in New Zealand.

2. The scope of the Convention

The Convention is divided into three parts. The first title concerns the scope of the Convention, which covers all contractual obligations except those mentioned in Article 1. The most notable exceptions relate to family law, arbitration agreements and agreements on the choice of the court. Certain insurance contracts are likewise excluded.

Article 1 states that ‘The rules of the Convention shall apply to contractual obligations in any situation involving a choice between the
laws of different countries”. Thus once a contract contains a choice of law clause, even in what is otherwise a purely domestic case, that choice of a foreign law brings the Convention into operation, because the issue has arisen as to whether the lex fori (the law of the forum) or the chosen law applies.\(^{16}\)

It may be noted that the Convention is world wide in effect, as it applies to all contracts having a foreign element whether or not they have any connection with the EEC. Thus New Zealanders choosing an EEC state as their forum would have the Convention law applied to them.

The fact that the Convention shall apply “in any situation involving a choice between the laws of different countries” has been criticised on the ground that it makes the application of the Convention depend on the forum chosen.\(^{17}\) Lagarde\(^ {18}\) gives, for example, a purely French contract which would be excluded from the scope of the Convention if the forum was a French court. However if the forum chosen was an English court the agreement would be decided by the Convention.

3. Party autonomy

The main rule of the Convention is embodied in Article 3 which provides that “a contract shall be governed by the law chosen by the parties”. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.\(^ {19}\) In the Report it is noted that whilst the choice will often be express, the court could find that the parties had made a “real choice” although they have not expressly stated so in the contract.\(^ {20}\) However the Report states quite categorically that this article does not permit a court to infer a choice of law that the parties might have made where they had no clear intention of making a choice. This situation is governed by another article.\(^ {21}\)

The extent of the freedom allowed to the parties is wide. No link is required by the Convention between the contract and the law selected. Nor is there any formal requirement that the choice be bona fide or legal.\(^ {22}\)

The parties may “select the law applicable to the whole or a part only of the contract”.\(^ {23}\) Thus Article 3(1) implicitly recognises that the parties may choose one law for one part of the contract and a different law for another part.

The Convention gives the parties considerable freedom with respect to when their choice of law can be made. The choice of law may be made at any time, even after the time that legal proceedings have begun.\(^ {24}\) Furthermore the parties may at any time agree to subject the contract to a law other than that which previously governed it.\(^ {25}\) A change in the law at a later date must not prejudice formal validity\(^ {26}\) or adversely affect the rights of third parties.\(^ {27}\)

\(^ {16}\) North above n 12, at 9.
\(^ {17}\) Lagarde above n 6, at 94.
\(^ {18}\) Ibid.
\(^ {19}\) Art (3)(1).
\(^ {20}\) Art 3 gives the example of a standard form contract known to be governed by a particular system of law even though there is no express statement to this effect, such as a Lloyds policy of marine insurance.
\(^ {21}\) Art 4.
\(^ {22}\) Other provisions of the Convention prevent fraudulent choices from being made. See Art 5(2) and 6(1) and other provisions concerning mandatory rules in Art 3(3) and Art 7. In English law the choice had to be bona fide and legal: see n 150 below.
\(^ {23}\) Art 3(1).
\(^ {24}\) Lagarde above n 6, at 96.
\(^ {25}\) Art 3(2).
\(^ {26}\) Pursuant to Art 9.
\(^ {27}\) Art 3(2).
As the Report\textsuperscript{28} points out, this freedom to change the governing law and the liberal approach to when a choice may be made is quite logical given the initial premise that freedom of contract has been accepted.\textsuperscript{29} As to the way in which the choice of law can be changed "it is quite natural that this change should be subject to the same rules as the initial choice".\textsuperscript{30}

This ability to change the proper law has been the subject of criticism; one writer considers that Article 3(2) is an "infelicitous aberration".\textsuperscript{31} The commentators argue that contracts cannot be born in a vacuum. A contract exists by virtue of some legal system and its effectiveness depends upon that legal system. Thus any attempt to alter the identity of the proper law must be referred in the first instance to the law which, for the time being, constitutes the very \emph{fons et origo} of the contract as a legally operative agreement. Fletcher, for example, maintains that if the original proper law of the contract would refuse to recognise the effectiveness of the parties' attempt to modify their contract, it cannot but be an "act of aggression"\textsuperscript{32} by the lex fori to interfere. He concludes that the validity of any change in the choice of law should be referred first to the law which constitutes the original choice of law in order to see whether it accepts the efficacy of the parties' attempt to modify their contract. Secondly the change should be referred to the substitute law in order to confirm the very same question. Only if both laws would allow the change should such be allowed to occur.\textsuperscript{33}

The parties may choose a law unconnected with the contract. However, if the parties do choose a foreign law when the contract is otherwise entirely connected with one country, then Article 3(3) provides that such choice shall not prejudice the application of mandatory rules of the law of that country. "Mandatory rules" are defined as rules "which cannot be derogated from by contract". North\textsuperscript{34} gives the following example: an action is brought in France, because of an agreement to submit to the jurisdiction of the French courts,\textsuperscript{35} but the contract, which relates to sale of goods, is wholly connected with England, both parties being resident there. Any exemption clause in the contract is regulated by the \textit{Unfair Contract Terms Act 1977} (UK) but the parties choose German law as applicable to the contract. The French court, whilst accepting the choice of German law in general, must apply the controls on exemption clauses contained in the 1977 Act because they cannot be evaded by choice of a foreign law,\textsuperscript{36} i.e they are mandatory in that they cannot be derogated from by contract.

The only other limitation on party autonomy within Article 3 is contained in Article 3(4), which states that the existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

\textsuperscript{28} The Report, Art 3.
\textsuperscript{29} As indeed it has in all EEC states. See Report, Art 3.
\textsuperscript{30} Ibid.
\textsuperscript{31} I F Fletcher \textit{Conflict of Laws and European Community Law: With Special Reference to the Community Conventions on Private International Law} (1982) at 159 (hereinafter cited as Fletcher).
\textsuperscript{32} See also Collins above n 5, at 44: Fletcher at 160.
\textsuperscript{33} Fletcher at 161.
\textsuperscript{34} North ch 1 at 13.
\textsuperscript{35} Under Art 17 of the 1968 \textit{Convention on Jurisdiction and Enforcement of Judgments}.
\textsuperscript{36} \textit{Unfair Contract Terms Act 1977} s 27(2) (UK).
Limitations on party autonomy

There are, however, further restrictions on party autonomy and these may be summarised as follows:

1. Freedom to select a law implies a freedom equal to both parties. The Convention considers that this freedom is illusory in respect of some contracts. There are, therefore, special rules relating to certain consumer and employment contracts.37

2. A forum may decide that some rules are so fundamental that they must be applied even though the contract is international. The Convention has a specific provision on forum mandatory rules.38

3. The forum may reject the parties’ choice of law if it is “manifestly incompatible with the public policy (‘ordre public’) of the forum”.39

4. Parties may not subject their contract to the whole chosen law including its conflict of laws provisions. In other words renvoi is excluded.40

5. Although it may at first appear that only Article 10 deals with the scope of the applicable law, many other provision of the Convention must be considered in this context.

Article 7, the most controversial article of the Convention, empowers the forum to apply the mandatory rules of a state with a close connection to the transaction if that state’s law requires the application of those rules, regardless of what the applicable law may be. This provision is a substantial modification not only on party autonomy but also of the subsidiary choice of law rules to be applied in the absence of choice by the parties.41

Whilst these limits are limits on party autonomy they are, where appropriate, also limits on the applicable law, which is the law applied in the absence of choice because it is closely connected with the contract.42

The scope of the applicable law43 and the concept of mandatory rules require further discussion.

4. Scope of the applicable law

Article 1044 defines the scope of the applicable law. The first matter considered is that of interpretation.45

Interpretation and performance

Interpretation and performance are governed by the applicable law of the contract.46 The Convention thus sanctions cases such as Jacobs v Credit Lyonnais,47 where a seller, having agreed to deliver goods in Algiers, was unable to escape liability for non-performance by pleading an excuse permissible by French law but not by English law when the proper law

37 Arts 5 and 6.
38 Art 7(2).
39 Art 16.
40 Art 15.
41 See Lagarde above n 6, at 103.
42 Art 4.
43 The term ‘applicable law’ is used here to denote both an express choice of law and the law chosen by the court in the absence of such choice. In English terminology the applicable law is the proper law. The applicable law is also called the governing law. The objective proper law is the law chosen by the court in the absence of an express choice.
44 Art 10(1)(b).
45 Art 10(1)(a).
46 Arts 10(1)(a) and 10(1)(b).
47 (1884) 12 QBD 589.
was English law. However in the manner of performance "regard shall be had to the law of the country in which performance takes place." The precise scope of this would seem unclear. It was apparently included because it was a restriction which was frequently imposed by national laws and by several international conventions. The Report states that it is for the lex fori to determine what is meant by the "manner of performance".

Remoteness is still governed by the applicable law. On the other hand, the English rule according to which the measure of damages is a question of procedure will be slightly affected by the Convention. The Convention generally does not exclude the possibility that the calculation of damages — in other words, the quantification of the damage in terms of money — may be governed by the lex fori (law of the forum). But, if the proper law of the contract deals with this issue by a rule of law, this rule is to apply, because its existence shows that the question is one of substance not of mere procedure. For example, if the applicable law limited the amount of compensation, as in matters of transport, the debtor must not be charged with an amount of compensation higher than that provided by the proper law, even if the lex fori does not limit compensation. Any other solution would frustrate the expectations of the parties. In return, if the creditor has stipulated in the contract that the debtor ought to pay him a lump sum in case of breach of contract, the validity of this provision depends on the proper law. In the same way, if, according to the applicable law, damages should be paid in a lump sum and not by means of periodic payments, this law applies, because it lays down on this issue a "rule of law". "On this point, common law countries and civil law systems met each other half way".

Nullity is governed by the applicable law pursuant to Article 10(1)(e). North suggests that the difficulties with this Article are both theoretical and practical. As the Convention is limited to contractual obligations it is arguable that it does not apply to a right such as that to recover money paid under a void contract, this being a matter of quasi contract or restitution. North gives the example of a contract that is for the sale of a car. The parties are Englishmen and they choose French law as the applicable law. The car is to be delivered in France. The buyer pays the price; the contract is for some reason void; the car is never delivered and the buyer seeks the return of his money. There has been no factual connection with France as the money was paid in England and credited to the seller's English bank account. French law is only relevant because, notwithstanding the voidness of the contract, the choice of law clause is good by virtue of Article 8. North concludes that "it seems quite inappropriate for French law now to determine the extent to which the buyer is able to recover the money that he has paid under the void contract". One must remain unconvinced; delivery was to take place in France and there had been a definite intention.

48 Art 10(2).
50 See Lagarde at 55 et seq.
51 Ibid at 56.
52 North, ch 1 at 16.
53 The Contracts (Applicable Law) Act 1990 s 2 states that this Article shall not have the force of law in the United Kingdom.
54 Ibid.
55 Art 8 allows the validity of any term to be determined by the law which would govern it under the Convention if the contract or term were valid unless this would be unreasonable, when the concept of habitual residence becomes important. See Arts 8(1) and 8(2).
56 North, ch 1 at 16.
that French law apply, otherwise the Englishmen presumably would not have had a choice of law clause to that effect in their agreement. The Convention gives a reasonable answer. To apply the lex fori in this situation does not give effect to the parties’ intention and merely serves to weaken the concept of party autonomy by undermining its application.

**Material validity**

According to Article 8 the existence and validity of a contract is to be determined by the applicable law of the contract.

The objection which has been made in the past concerning this solution that this is a vicious circle, is not conclusive. There is no contradiction in having the law chosen by the parties determine whether or not the contract that the parties are to enter into according to that law is valid.58

The rule that the applicable law is to govern is a general rule. There are, however, special rules for specific topics. For example, the rule dealing with consent is found in Article 8(2). This paragraph provides that a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent, if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law of the contract.

The rule does not concern the validity of consent (mistake, misrepresentation, duress), but only the existence of consent. The problem is to determine whether the parties to an alleged contract reached an agreement. The negotiators of the Convention had particularly in mind the question as to whether silence can be treated as a manifestation of assent. But the rule can also apply to questions related to offer and acceptance. Suppose X, in country A, sends an offer to contract to Y, in country B, and the offer contains the proposal that the contract should be governed by the law of country A. Y does not reply to this letter, or he sends a letter of acceptance which is lost in the post. It may be that, by the law of country A, Y is bound, but by the law of country B he is not. Were these issues to be governed by the applicable law of the alleged contract, the law of country A, Y would be bound despite the fact that he would not have been bound under the law of his social and legal environment. "Such a result would seem to be unjust".59

In the event of such silence, two laws are applicable to the question of consent: the law of the contract and the law of the country where the silent party has his habitual residence.60 In the above example it is not unjust if the letter is lost. Two possibilities exist here. If Y knows that by the law of country A acceptance is complete on posting then when he posts the letter is lost irrelevant. He is bound by the law of country A. Nothing is unjust about this situation. In the second situation Y does not know that by the law of country A acceptance is complete on posting. Thus when the letter is lost he thinks he is not bound. It is not unjust to hold him to the contract because he accepted the law of country A to govern. He should have familiarised himself with its rules before so doing. There is no need to have a special rule in this lost letter situation. Party autonomy should apply. If Y does not reply then if the forum was England there would be no contract. Again it is not unfair. The lex fori can determine the matter.

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58 Lagarde at 49.
59 Ibid at 50.
60 See also Lagarde above n 6, at 101. This provision may be criticised. The fact that the letter is lost is irrelevant. He is bound by the law of country A. Nothing is unjust about this situation. In the second situation Y does not know that by the law of country A acceptance is complete on posting. Thus when the letter is lost he thinks he is not bound. It is not unjust to hold him to the contract because he accepted the law of country A to govern. He should have familiarised himself with its rules before so doing. There is no need to have a special rule in this lost letter situation. Party autonomy should apply. If Y does not reply then if the forum was England there would be no contract. Again it is not unfair. The lex fori can determine the matter.
letter whereby he accepts the governing law clause he knows his acceptance is complete.

**Formal validity**

The second point to make with respect to the scope of the applicable law is that the applicable law does not necessarily determine the formal validity of the contract. Article 961 provides that the contract is formally valid if it satisfies the formal requirements of either the applicable law or the law of the country where it was concluded. This applies if the parties are in the same country when the contract is concluded.

If parties are in different countries the contract "is formally valid if it satisfies the formal requirements of the law which governs it under the Convention or the law of one of those countries".62 Whilst this may be seen as an "extreme limit of favor validatis"63 the Article does provide two limitations.64 In consumer contracts and in contracts relating to immovable property the formal validity is governed respectively by the law of the consumer's habitual residence65 and by the law of the country where the immovable property is located.66

In conclusion it may be stated that the scope of the applicable law is wide. The basis rule is that the parties' choice of law decision governs the various contract issues that could arise. If the law is chosen by the court the same consequences flow.

**Capacity**

The Convention makes no provision for capacity67 except to the limited extent of Article 11. This provides that if the parties are in the same country, a natural person can only invoke his capacity under some other law, for example that of his domicile or nationality, if the other party was or ought to have been aware of it.

This provision does not apply to persons other than natural persons and both parties must be in the same country. A further limitation cited in the Report68 is that this article is only to be applied where there is a conflict of laws. The law which governs the question of capacity of the person claiming the disability must be different from the law where the contract was concluded and furthermore that person must be deemed to have full capacity by the lex loci contractus. Finally the burden of proof lies on the incapacitated party; it is he who must establish that the other party knew of his incapacity or should have known of it.69

As the Report points out70 the effect of Articles 1 and 11 is that each contracting state will continue to apply its own system of private international law to contractual capacity. Capacity can be seen as a personal issue and governed by the parties' national law.71 Thus uniformity is not to be achieved by the Convention in matters concerning capacity. The exclusion of these questions appears to be bound up with a reluctance to have the

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61 Art 9(1).
62 Art 9(2).
63 Lagarde at 53.
64 In Arts 9(5) and 9(6).
65 Art 9(5).
66 Art 9(6).
67 See Art 1(2)(a) and 1(2)(e).
68 See Report, Art 11.
69 Ibid.
70 Ibid.
71 Collins at 211.
Convention deal with any matters relating to corporation law, perhaps in the lights of the discussions on the 1968 Convention on the Mutual Recognition of Companies and Bodies Corporate. It is not, however, by any means certain that a general rule as to capacity of corporations would have encroached upon corporation law, but the consequence is that any important part of the law relating to contractual matters in the conflict of laws will remain regulated by a combination of the 1968 Convention and non-uniform rules of private international law.72

In relation to party autonomy the Convention’s provisions as discussed so far allow a wide freedom of choice and this choice is then applied to resolve most issues. The provision a mandatory rule does, however affect this general freedom, as is explained below.

The concept of mandatory rules73

The Convention refers in a number of places to mandatory rules74 but they are only defined “casually”75 in one place. Article 3(3) defines mandatory rules as “rules of law of a country which cannot be derogated from by contract”.

These rules are used in four different situations.
1. The term is used in certain consumer and employment contracts.76
2. The term is used in Article 3(3) which states that “the fact that the parties have chosen a foreign law ... shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only prejudice the application of .... mandatory rules”. This Article requires a choice of law decision by the parties and all the relevant contacts (save the actual choice itself) to point to another jurisdiction. This other jurisdiction could be the forum or a third state presumably.
3. Article 7(2) states that “nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract”. This permits mandatory rules to be used if they are the forum’s mandatory rules whether or not a choice of law clause exists.
4. Finally mandatory rules are used in a situation where the contract has a close connection with a given country irrespective of the chosen law. Article 7(1) states “when applying under the Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if, and in so far as, under the law of the latter country those rules must be applied whatever the law applicable to the contract ...”. In this situation a law may have been chosen by the parties or have been decided by the court in the absence of such choice.

72 Ibid.
74 Arts 3(3), 6, 7 & 9(6) respectively.
75 Jackson at 65.
76 See also s 9(6).
Both North\textsuperscript{77} and Jackson\textsuperscript{78} have pointed out that the meaning of the concept differs within these four situations. Jackson suggests the term ‘mandatory’ is used in the domestic law sense to mean that a rule cannot be derogated from by contract. This is how the term is defined in Article 3(3), and this is the meaning to be given to the concept if Articles 3(3), 5 or 6 apply. The objective in these Articles is clear. The parties cannot evade the application of any of the mandatory rules of their domestic law by a choice of law clause.\textsuperscript{79} However in a situation pertaining to Article 7(1) the concept is used in a conflict of laws sense to mean that such a mandatory rule overrides the process.\textsuperscript{80} North’s conclusion\textsuperscript{81} is that if one reads Article 3(3) and 7(1) together then

\begin{quote}
... a judge in England concerned with a contract whose proper law is French, but which is closely connected with Denmark, may apply Danish mandatory rules, i.e. rules which cannot be contracted out of, provided that, under Danish law, those rules are internationally mandatory, i.e. applicable in Denmark notwithstanding a foreign (here French) applicable law.
\end{quote}

There appears to be a choice between Article 3(3) and Article 7(1). If the court finds that all the contacts (save the actual choice itself) point to another jurisdiction the forum can decide that this other jurisdiction’s mandatory rules apply without considering how this other jurisdiction would view the issue. In North’s example if the judge finds all the contacts to be Danish he may then apply Danish mandatory rules to the contract even if it was a situation where Danish law would not apply such rules. This could easily arise if the states involved were not all members of the EEC. Article 3(3) applies.

On the other hand if the judge decides that the contract has only a close connection with another jurisdiction (as opposed to a total connection) he must consider what that other jurisdiction would do and he may only apply the mandatory rules of that other jurisdiction if that other jurisdiction would do so.

This interpretation of mandatory rules is supported by viewing the objectives of such rules. These have been summarised as follows:

The purpose of the rules which apply the term ‘mandatory rules’ differs. The purpose of Article 3(3) and Articles 5 and 6 is to restrict party autonomy in certain cases. The purpose of Article 9(6) is to replace the otherwise applicable law, whether chosen by the parties or the result of an objective choice of law, by the law of the situs. And the purpose of Article 7 is, in certain cases, to permit the application of a law other than the lex causae, be it the law of the forum or the law of a third country.\textsuperscript{82}

The effect of mandatory rules

In all the situations discussed above the court is given a discretion whether to apply the mandatory rules or not. Certain conditions must be met before the court may consider their applicability. For example Article 7(1) states three conditions:

i. the situation must have a close connection with the laws of that other country;

\textsuperscript{77} North ch 1 at 19 et seq.
\textsuperscript{78} Jackson at 65 et seq.
\textsuperscript{79} North ch 1 at 19.
\textsuperscript{80} Jackson at 65.
\textsuperscript{81} Jackson at 66.
\textsuperscript{82} Philip at 81.
ii. under the laws of that other country, the mandatory rules must be
applied whatever the law applicable to the contract;

iii. regard shall be had to the nature and purpose of the mandatory rules
and to the consequences of their application or non-application.

Once these conditions are fulfilled then Article 7(1) provides that effect
"may" be given to the mandatory rules, and in considering whether to do
so, regard shall be had to (a) their nature, (b) their purpose, (c) the
consequences of their application and (d) the consequences of their non-
application. Elements (c) and (d) were added to elements (a) and (b) at a
comparatively late stage. According to the Report, the addition of these
elements was intended to define, clarify and strengthen the rule, although
it is extremely difficult to see in what way they did so. The authors of the
Report go on to say that the expression "effect may be given" imposes
on the court the extremely delicate task of combining the mandatory
provisions with the law normally applicable to the contract in the particular
situation in question, and it was the novelty of this provision and the fear
of the uncertainty to which it could give rise that led delegations to ask for
the power to make reservations in respect of Article 7(1).

When the United Kingdom signed the Convention the right not to apply
the provisions of Article 7(1) was exercised. North suggests that the
United Kingdom thought Article 7(1) was a "recipe for confusion, in that
a judge might feel obliged to steer his way through three possibly mutually
inconsistent sets of mandatory rules; for uncertainty, an uncertainty which
freedom to choose the applicable law is intended, in the business commu-
nity, to avoid; for expense, in that proof of the mandatory rules of all
relevantly connected foreign laws might be called for; and for delay, in
that Article 7(1) might provide the means of delaying litigation inordin-
ately, with a fear that it might frighten potential arbitration and litigation
away from the United Kingdom".

To return to mandatory rules in general, the view has been advanced
that "it may not be too extreme to say that the idea of mandatory rules
overriding the choice of law process will come as a novel experience to
the English judiciary". However at the end of the day the effect in
England may be undramatic. Articles 5 and 6 only apply to certain
specific contracts and Article 3(3) can be seen as a clearer statement of
Lord Wright's 'bona fide' requirements in the Vita Food Products Inc v
Unus Shipping Co Ltd. In this leading English case Lord Wright said that
the parties choice must be bona fide and legal and not contrary to public
policy. Article 7(2) is arguably only a reiteration of what the cases did via
public policy or characterisation. Finally, Article 7(1) has not been accepted
by the United Kingdom. Even if it had been adopted, Collins has asked
"whether or not the discretion given by Article 7(1) goes far beyond current
English practice and would impose upon the judge a discretionary power

83 See Report, Art 7.
84 Collins above n 5, at 213.
85 See Report, Art 7.
86 By virtue of Art 22.
87 North, ch 1 at 19. See Jackson at 72 for a defence of Art 7(1): see also Philip at 100.
88 North, ch 1 at 20.
89 Jackson at 70.
90 See Jackson at 71 for a contrary view.
without given the slightest guidance as to how it is to be exercised", as at present occurs when the judge is asked to determine the proper or applicable law in the absence of choice. Furthermore Article 7(1) may not be as revolutionary as some would see it. English courts have considered rules applying in jurisdictions which are neither the forum nor the proper law. For example in Ralli Brothers v Compania Naviera Sota of Aznar Spanish law was applied although it was neither the lex fori nor the proper law.

Criticisms of the concept of mandatory rules
Most criticism is centred on Article 7(1). One objection is that it gives greater effect to a law of close connection than either the governing law or the law of the forum. Jackson points out that this is not a proper criticism as this is the aim of the Article itself. It is designed to operate in a situation where the mandatory rules of another jurisdiction are so important that they must be applied despite the governing law or lex fori. A second criticism of Article 7(1) is that it will create uncertainty. Legal advisers will not know how to advise clients and the judiciary will find it difficult to judge. Jackson merely emphasises the view that what is or is not a mandatory rule should not be too hard to determine. However this is not the point. It is the discretion which is conferred on the judge and the vague criteria provided by Article 7(1) that makes for the uncertainty. One can also disagree with Jackson concerning the case of establishing what is a mandatory rule in any given jurisdiction. He says that in so far as the rules are legislative, the responsibility is for the legislature to declare its view and in so far as they are judge-created rules they will be exceptional and will be clearly articulated as mandatory. This would seem an over optimistic view. Domestic statutes usually ignore the subject of conflict of laws and the common law does not have a heritage of classifying rules into mandatory and non-mandatory rules. To decide whether one's own law is or is not mandatory in any given situation is likely to be a difficult task; to decide the same of a foreign statute could be a Herculean undertaking.

A related problem concerns the difficulty of introducing the concept of mandatory rules of a state which is not the forum nor which has had its law chosen by the litigants. Jackson points out that it is for the party who wants the mandatory rule to apply to convince the courts that such a rule should be given effect to. However if mandatory rules are so important that they should be allowed to override an express choice of law clause then there should be some mechanism for bringing them to the court's attention in the first place. It would seem quite unsatisfactory to leave their appearance to the whim of a litigant.

In North's illustration above if one party would still like the French choice of law clause to apply and the other would like the lex fori to resolve the issue, how is the court even going to consider Danish law? This is a likely fact situation given that one party could well have chosen the English forum because he wanted the lex fori to apply, seeing the advantages of having

93 Collins above n 5, at 213.
94 [1920] 2 KB 287.
95 Jackson at 73.
96 Ibid, and Philip at 107.
97 Jackson at 74-5.
98 By introducing a form of interest analysis Art 7(1) may be seen as having all the disadvantages of interest analysis generally with uncertainty being the greatest drawback of the approach.
99 Jackson at 75.
English law govern his agreement. Likewise it is very likely that given a choice of law clause existed initially, only one party will subsequently want to escape its consequences, the other being quite content to abide by the original provisions. This last criticism is not indeed unique to Article 7(1). It may be equally well argued in the context of the other mandatory rules.

The second major argument concerning mandatory rules relates to the question of their desirability. Mandatory rules could undermine the whole concept of party autonomy if frequently applied and they would introduce uncertainty into what should be an area of certainty.

Parties choose a law to govern their contract for at least two reasons. First a choice of law clause makes for certainty. The parties know in advance by which law their actions will be judged in the event of a dispute. Secondly and equally importantly, the parties together choose a law that will suit their particular circumstances. They could write out verbatim all the contractual terms necessary to govern any situation that might arise; they could also incorporate some provisions of a foreign law if they wished. However it is easier to state a law to govern if one can be found that suits both parties, as a choice of law clause is a shorthand way of expressing one’s wishes as to what is to happen in a given event. As a general statement it is true to say that a contract is ‘created’ by the parties and that pursuant to general contract law principles in common law countries the parties may contract out of most legislation. The parties may do more or less what they want. So if two Danes choose French law to govern their contract and one of them subsequently chooses England as the forum to resolve a dispute, why should an English judge apply some mandatory rule of Danish law to the litigants before him?

Given that the parties are of equal bargaining power they should not be haunted by some mandatory rule which they had avoided by a choice of law clause. There is nothing inherently wrong about wanting to avoid some rule of law. If the Danes are always going to be ensnared by Danish law they might just as well call it a day and not make a choice of law decision at all.

The desirability of mandatory rules of the lex fori applying in certain situations may also be questioned. Again there is the problem of ascertaining such rules but even if this can be done one wonders if such rules should be applied. Mandatory rules of the lex fori are designed to apply to domestic contracts. If the only connection between the contract and the forum is that one party has chosen the forum in which to litigate, it is not particularly appropriate to apply forum law when the parties have expressly chosen another law to apply to their contract. If the mandatory rule was of a protective nature then to apply it to parties in equal bargaining positions who have clearly rejected such protective rules (by choosing another law to govern) is to protect in an inappropriate situation.

If the only contact is the choice of forum then the only ground that the forum can have in interfering in an international contract containing a choice of law clause is if it is asked to uphold some rule which is manifestly incompatible with its own public policy.

The situation becomes a little different if the parties are doing something within the forum state that natives of the forum could not do. If in Denmark one must pay the government a fee for acting as a real estate agent then it is asking too much of a Danish forum to uphold French law and thus

100 Which let us suppose has no such requirement.
allow the Danish parties to escape payment, and the same conclusion would apply if the Danes were Englishmen. So is the Danish rule to be considered mandatory? One could argue that party autonomy applied subject to an overriding provision in the Danish legislation. The result is the same whether one used the terminology of mandatory rules or overriding statutes of the forum.\footnote{101} Party autonomy should prevail.

The conclusion thus far is that mandatory rules of a state which is neither the forum nor the governing law state should not be considered. Article 7(1) is not a good provision. Furthermore, in general Article 7(2) is not needed as a public policy exception will suffice in most situations where Article 7(2) would apply. However, fact situations could occur where, although not of a nature to evoke public policy, the forum cannot be expected totally to uphold party autonomy. Perhaps it is simpler to state that party autonomy is limited by overriding statutes of the forum rather than suggest mandatory rules of the lex fori dominate. The result is the same, the choice of law clause is still valid save where it conflicts with the statute or mandatory rule.

With Article 3(3), if the country most closely connected is neither the forum nor the country of the chosen law then the conclusion drawn above in the context of Article 7(1) would still apply. If the closely connected country was the forum then the conclusion drawn for Article 7(2) would apply.

Finally it should be noted that the Convention does not state that the mandatory provisions of the governing law operate. This is obvious. If one chooses a law to apply to one's entire contract, instead of applying different laws to different parts of one's contract (dépeçage) to avoid certain unwanted consequences, then the mandatory rules of the chosen law should and will apply.

From the English point of view given that Article 7(1) is eliminated the rules may well have little effect. They are optional and judges may be loath to embark on an enquiry that is time consuming and can be resolved by other means. European litigants not wishing to have mandatory rules apply to their contracts may simply avoid the Convention's provisions by the use of arbitration and choice of forum clauses.\footnote{102} It all seems an enormous anticlimax.

5. The applicable law in the absence of choice\footnote{103}

The applicable law in the absence of choice is the law of the country with which the contract is most closely connected. This rule is contained in Article 4(1). The Convention attempts to make this general principle more precise by use of presumptions\footnote{104} the most important of which is that of characteristic performance.\footnote{105} However the presumption of characteristic performance does not apply if it cannot be determined\footnote{106} and the other presumptions shall be disregarded "if it appears from the circumstances as a whole that the contract is more closely connected with another country".\footnote{107}
The concept of characteristic performance

Article 4(2) states that ".... it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or in the case of a body corporate or unincorporate its central administration...". The Convention does not define the term beyond this and the Report merely cites examples of what amounts to the presumption. For example the Report suggests that the payment of money is not the characteristic performance of a contract for the supply of goods or services, rather it is the performance of the obligation for which payment is due, i.e. the provision of the goods or services. This means that there is a presumption in favour of the seller's law. At the end of the day, however, this is only a presumption which may be displaced if the contract is more closely connected with another country.

It has been suggested that "calling the supply of goods or services more 'characteristic' than the payment of money provides a verbal agreement for preferring the law of the supplier's home state or business establishment over that of the payer". Diamond contends that there is no empirical evidence to support such "extravagant claims" and the concept has been criticised by a number of writers as "arbitrary" and "bound to disappoint the hopes of certainty it raises".

Collins considers that the Report tends to gloss over the problem of characteristic performance by emphasising that in bilateral or reciprocal contracts one of the parties usually merely has to pay money, and the characteristic performance of the contract is not the payment of money, but the performance for which payment is due (for example provision of a service or delivery of goods) which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction. However with certain contracts such as distribution contracts "it can hardly be said that it is necessarily the case that the obligation of the producer and not the distributor comprises the essential characteristic of the contract". Other writers make similar observations and conclude that "the more complex a transaction the less helpful the criterion becomes".

109 Art 4(2).
110 See Art 4.
111 By Art 4(5).
113 A L Diamond "Conflict of Laws in the EEC" (1979) 32 Current Legal Probs 155 at 159.
115 Ibid.
116 Juenger above n 112 at 301.
117 Collins above n 5 at 209.
118 Ibid at 210. For example see Evans Marshall & Co v Bertola [1973] 1 WLR 349 (concerning the distribution of sherry in England). Under Article 4(2), the contract would be governed by Spanish law (the law of both the central administration and the place of business of the Spanish company) if the production and delivery of the sherry reflected the performance which was characteristic of the contract, and by English law (the law of the distributor's central administration and relevant place of business) if the acceptance and promotion of the sherry was regarded as the performance characteristic of the contract.
119 Juenger above n 112 at 301.
120 Ibid.
Furthermore, the concept of characteristic performance capriciously confers a choice-of-law privilege upon those who engage in a consistent course of conduct to supply goods or services. These are often the very parties best able to evaluate the risk of going business internationally and to hedge against it by means of choice-of-law and forum-selection or arbitration clauses.\textsuperscript{121}  

The concept also clashes with Articles 5 and 6 of the Convention which favour economically disadvantaged parties.\textsuperscript{122}  

North\textsuperscript{122} points out that the main purpose of this presumption is to provide a compromise – a compromise between those who seek certainty and predictability in the determination of the applicable law under Article 4(4) and those who, like English lawyers, see merit in the flexibility of the general rule and see little virtue in presumptions and believe that, if there are to be presumptions, they must be rebuttable, (which however can defeat their very object).

Whilst some writers consider that the adoption of the concept is “a praiseworthy exercise of the draftsmen to try to formulate a rule which should give more certainty than the closest connection test”,\textsuperscript{123} others\textsuperscript{124} suggest that all in all, the Convention’s attempt to localize contracts by means of a “mysterious, almost mystical, concept”\textsuperscript{125} like earlier proposals having a similar thrust, is but another “unconvincing production of divination rather than inquiry”.\textsuperscript{126} Since it focuses on the home state law of one of the parties, rather than on their common concerns, the test cannot easily be reconciled with the proper law approach it is meant to clarify.

It may be asked whether Article 4 does more than resurrect the presumption that the law of the place of performance is to govern. If presumptions are to be used, contrary to recent developments in the field, then they must be capable of precise application. For example the presence of an arbitration clause could be seen as a clear presumption that can easily be applied to assist in the determination of the proper or applicable law. The concept of characteristic performance is simply too inherently vague to provide the court with any clear assistance.

As a minor matter it would have been preferable if the term ‘system of law’ had been used instead of ‘country’. Contacts with a country emphasise geographic contacts, which are often fortuitous.\textsuperscript{127}  

\textit{Effects of the Convention}  

Finally a note on the effects of the Convention. It seems that amongst English writers “there is a general agreement that adoption of the Convention will effect no fundamental changes in English law”\textsuperscript{128} and “it will be rare for a court to reach a result on the Convention rules different from that which it would reach today”.\textsuperscript{129} Specific articles have been criticised and on a wider scale the Convention has been condemned because it has not incorporated theories considered desirable.\textsuperscript{130} At an even more general

\textsuperscript{112}Ibid.  
\textsuperscript{122}North ch 1 at 15.  
\textsuperscript{123}Schultsz above n 103 at 186.  
\textsuperscript{124}For example Diamond.  
\textsuperscript{125}Referring to Diamond above n 113 at 169.  
\textsuperscript{126}Juenger above n 112 at 302.  
\textsuperscript{128}Collins at 215.  
\textsuperscript{130}R J Weintraub “How to Choose Law for Contracts and how not to: the EEC Convention” (1982) 17 Texas Int LJ 155 at 155-6 criticised the Convention for having no general rule of validation.
level the Convention has been attacked for usurping the Hague Conference's territory:

The Common Market has apparently chosen to pre-empt for itself codification of the rules of conflict of laws, thus blocking the Hague Conference from doing the job for which it was created. This is a heavy responsibility. Having the Conference operate at the Market's pleasure, to pick up crumbs here and there is not likely to appeal to the other Member States.131

Many American writers see similarities between the Convention and “American ideas”.132 Ehrenzweig, for example, was the first to differentiate between ordinary and consumer contracts.133 Article 7 has been seen as introducing a form of interest analysis.134 Interest analysis135 has been adopted by the majority of American courts.136 A choice of law is made after an evaluation of the specific conflicting rules (not the conflicting jurisdictions) and of the relative interests of the different legal systems that have some connection with the case at bar.137 Juenger138 has listed a number of matters where the Convention and the Restatement (Second) are similar or identical.

It would appear correct to conclude that many scholars see the Europeans with their EEC Convention as having gone a long way down the road of the American conflicts revolution. But at the same time it must be recalled that whilst similarities may be seen between the Restatement (Second) and the Convention differences do exist.139 Furthermore it may be stated that the goals and aims of interest analysis are very general and could be seen as applying in all situations where the choice of law problem exist. It must also be remembered that the Convention and Restatement serve very different purposes. The Convention is directed to the future whilst the Restatement (Second) purports to state the law.140 However to the extent that the Convention has similarities with interest analysis it may be said to share the criticisms of that approach. Lack of certainty is probably the greatest criticism that can be levelled at the Convention,141 and this lack of certainty results from the introduction of mandatory rules and the concept of characteristic performance which in no way assists an already uncertain test.

By way of conclusion one may contrast the views of North and Mann. The latter considers the Convention “one of the most unnecessary, useless

131 K H Nadelman “Clouds over International Efforts to Unified Rules of Conflicts of Laws” (1977) 41 Law and Contemp Prob 54 at 71; and see F A Mann (1983) 32 ICLQ 265 at 266: “Harmonisation throughout the EEC leaves the rest of the world out of account”.
134 Lagarde above n 6 at 91.
138 Juenger above n 112 at 302 et seq.
139 Ibid at 297 et seq.
140 Reese, the Reports for the Restatement (Second) does however call it a “transitional document” that was “written during a time of change and chaos where there was little indication of the direction that would be taken by future developments in choice of law...”, W L M Reese “American Trends in Private International Law: Academic & Judicial Manipulation of Choice of Law Rules in Tort Cases” (1980) 33 Vand L Rev 717 at 734.
and, indeed, unfortunate attempts at unification or harmonisation of the law that has ever been undertaken" and he "fervently" hoped that no British Government would ratify it. He consequently greatly regrets the Contracts (Applicable Law) Act 1990. He alludes to the hazards of statutory interpretation and suggests that the Convention may allow certain EEC countries to improve their law at the expense of Britain which "is expected to sacrifice one of the most satisfactory indigenous bodies of law". North on the other hand suggests that "at the end of the day the result of implementation of the Rome Convention in England will be that the choice of law rules in contract are put on a clear, firm, statutory basis. There will be no great substantial change in the rules which have worked well for a long period. But there will be the benefit of substantial harmonisation throughout the EEC in an area of law of real significance for the free provision of goods and services within the Community".

Both writers may be seen as partially correct. The Convention by Article 3 clearly supports party autonomy and clarifies certain related matters and by being put on a firm statutory basis the Convention should work well with respect to party autonomy. However Mann may be seen as correct in considering the Convention "useless" when there has been no choice of law decision made by the parties.

Williams states that perhaps the main advantage to the English lawyer will be that he will be able to find the relevant law in a relatively short and succinct piece of legislation rather than have to embark on a tortuous investigation into the often ambiguous, often conflicting case law.

From a New Zealand perspective the Convention has little to offer by way of new concepts. Its general characteristic of supporting party autonomy may however be seen as sound. As Williams notes above the Convention will make the law easy to find. Legislation in New Zealand would have the same effect. It must be preferable to find out conflict of laws provisions for choice of law and international contracts set out clearly in a statute rather than have to 'hunt about' as is the present situation.

II. AUSTRALIAN LAW REFORM COMMISSION REPORT 1992

The Australian Law Reform Commission states that:

The Commission recommends that the parties' right to choose the law to govern their contract should be upheld provided that the choice is express or can be clearly inferred from the circumstances. If the indications are not clear, the court should not be free to infer the choice but should apply an objective test of the proper law.

At common law a choice of law clause would only be given effect to if it was "bona fide, legal and not contrary to public policy". It has never been clear what this actually means. The Australian Law Reform Commission therefore recommend that the limitations on parties' autonomy on

142 F A Mann (1983) 32 ICLQ 265 at 266.
144 Ibid at 266.
145 North ch 1 at 23.
147 Ibid.
149 Para 8.9.
150 Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 277.
151 See para 8.11.
the ground of lack of bona fides should be replaced with rules to determine when parties cannot evade the operation of a mandatory law on the place of closest connection.\footnote{152 Para 8.13.} The Commission considers that the function of public policy is useful but limited.\footnote{153 Para 8.15.}

In the Commission’s view the requirement that a contract be legal by its place of performance is a useful and necessary rule. It is recommended that uncertainty at common law as to whether it is a rule of the proper law, or itself a choice of law rule, be overcome by making express legislative provision providing that the place of performance can be pleaded as a defence in so far as it prohibits performance of part or the whole of the obligations of that place.\footnote{154 Para 8.17.}

The Commission would reject a choice of law clause when the circumstances in which the contract was made lead to the view that enforcement would be unconscionable. The objective proper law would provide the governing law of the contract.\footnote{155 Para 8.25.} This is in harmony with the European Convention.

On the question of mandatory rules, the Commission recommends that “where the objective proper law of the contract is a law of a State or Territory which has mandatory legislation which applies to a question arising under the contract the question should be decided in accordance with the legislative provision. Where the objective law of the contract is the law of an overseas place which has mandatory legislation which applies to a question arising under a contract and which cannot be excluded by the operation of choice of law rules a majority of the Commission recommends that that question may be decided in accordance with the legislation of that place”.\footnote{156 Para 8.36.} The Commission recognises that whilst “the distinction between internationally mandatory rules and domestically mandatory rules is clear in Continental law it is quite novel in the common law”.\footnote{157 Para 8.35.} The criticisms levelled at mandatory rules in the context of the European Convention above equally apply in the Australian context.\footnote{158 It may be noted that Justice Nygh and the present writer dissented from recommendation 8.36. See n 52, p 92 of the Report.}

At common law, and therefore still the law in New Zealand, the proper law of the contract in the absence of a choice by the parties, is the law of the country with the ‘closest and most real connection’ with the transaction. The Commission recognises the criticisms levelled at this test and also acknowledges the difficulties and limitation of the European Convention’s rule of characteristic performance. However it is noted that the rule of characteristic performance has been adopted in two international Conventions, and into the domestic law of numbers of states (Austria, Denmark, Switzerland).\footnote{159 Para 8.48.} It was emphasised in submissions to the Commission that rules for international commercial contracts must be practical and in harmony as far as possible with international trends. The Commission recommends that in regard to interstate and international contracts, the proper law of the contract where the parties have not chosen a law, should be the law of the place that has the most real and substantial connection with the contract. The place with which a contract has the most real and substantial
connection should be presumed to be the place where the party to the contract that is to effect the performance that is characteristic of the contract habitually resides unless the contract has its most real and substantial connection with another place. Finally the Commission considers certain particular categories of contracts. Contracts for the sale of land is one such category. The presumption of characteristic performance does not apply to contracts for the sale of land. The presumption is in favour of the situs of the land. This is also the position at common law and, in the Commission’s view, should be retained. Therefore the Commission recommends that in contracts concerning immovable property, “the place of closest connection should be presumed to be the place where the property is”.

The Commission makes no recommendation on contracts for the sale of goods. With regards to individual employment contracts the Commission recommends the adoption of the law of the place of habitual employment as the principal means of establishing the proper law of an employment contract in the absence of choice. With regards to other common law rules the Commission considers that capacity according to either the law of the relevant party’s residence of the proper law of the contract should suffice to make a valid contract. Formation of a contract is to be governed by the proper law of the contract.

The chapter on contracts concludes by considering consumer contracts and fair trading. Similarities may be drawn to the European Convention. Both feel a need to distinguish such contracts as consumer contracts.

To conclude, it appears that if Australia enacts its Draft Choice of Law Bill 1992 and implements the above recommendations it would not be out of harmony with the European legislation in so far as international contracts are concerned. Both favour party autonomy subject to certain limitation. Both reject the present law whereby a court will infer a choice if the situation is such that the parties have in fact made a decision but have failed to articulate their choice. Both favour the concept of characteristic performance.

CONCLUSION

Strong similarities exist between the new English law and the proposed Australian legislation. The new English approach is to limit party autonomy by reference to mandatory rules. Australia has chosen to limit the freedom of choice in similar terms. These jurisdictions have likewise shown a uniform approach to situations where there has been no choice made by the parties. The rule of characteristic performance has been adopted.

The present proper law approach does have difficulties. The extent to which parties may choose a law to govern their transaction has always been

160 Para 8.49.
161 Paras 8.50 and 8.51.
162 Paras 8.52-8.55.
163 Para 8.58.
164 Para 8.71 states “The Commission recommends that the law should provide that consumer contracts are to be governed by the law of the place where the consumer was when he or she entered the contract provided that, if it were a term of the contract that supply or delivery were to be in another State, the other State’s law should apply. Given the specific features in common in Australian consumer law this rule should be confined to the States and Territories of Australia. To avoid an overlap of provisions the rule would need to apply only when the contract was entered and the goods were to be supplied within Australia. If, for instance, the consumer entered a shop in Sydney and bought goods to be delivered in New Zealand this rule would not apply.”
hazy. The Australian Law Reform Commission took the charitable view that this was due to the paucity of case law in the area.\textsuperscript{166} The inherent vagueness at present surrounding the limits of party autonomy should be addressed in the interest of international trade.

In the writer's opinion it would seem appropriate for New Zealand, in the interests of international harmony, to adopt the rule of characteristic performance, despite the greyness of the concept. With regards to party autonomy it would be appropriate to consider whether choice should be limited by reference to mandatory rules. Uniformity would suggest so. It might be, however, that the same ends could be arrived at by using the more familiar concepts of public policy and overriding statutes. It is inevitable that some legislation must be sufficiently important to override when it conflicts with party autonomy. If public policy was also utilised to limit the freedom of choice in necessary situations it is possible that the same results would be achieved. The Convention and the Australian Report appear in many ways to be in agreement as to the desirable boundaries of autonomy. Whether it is appropriate to use Continental terminology such as mandatory rules must be considered.

New Zealand is now lagging behind Europe and its neighbour Australia by retaining the traditional proper law approach to choice of law issues for international contracts. It must be hoped that reform is on its way. Harmony and uniformity require New Zealand to pay close attention to overseas developments.

\textsuperscript{166} Para 8.11.