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'Choice of law for formation of contracts: Solomon Lew v Kaikhushru Shiavax Nargolwala

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CHOICE OF LAW FOR FORMATION OF CONTRACTS

Solomon Lew v Kaikhushru Shiavax Nargolwala

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The appropriate choice of law rule for the formation of a contract is an intractable question. Various solutions have been offered, with none enjoying universal approval. In *Lew v Nargolwala*, the Singapore Court of Appeal held in favour of the application of a nuanced version of the putative proper law of a contract. It further held that that there was no role for the *lex fori* in resolving this classic conflict of laws conundrum. While the SGCA emphasised that the reasonable expectations of the parties would be accommodated through its approach, this note argues that this would not necessarily always be the case and that the SGCA was too quick to discount a role for the *lex fori*.

I. INTRODUCTION

The issue of the appropriate choice of law rule to govern the formation of a contract may perhaps be thought to have elicited far more academic attention[1] than is warranted by the relative infrequency with which the issue crops up in practice.[2] *Solomon Lew v Kaikhushru Shiavax Nargolwala*[3], a decision of the Singapore Court of Appeal ("SGCA") arising from two appeals against a decision of the Singapore International Commercial Court ("SICC"),[4] however, shows that the issue is not merely an academic one.

The case involved a luxury villa at the Andara Resort in Thailand. Due to restrictions under Thai law, foreigners who own immovable property normally do so through the medium of an offshore company whose sole assets are the relevant documents permitting the foreign nationals the right to occupy the property. The property would change hands by the relatively simple process of transferring the shares in the offshore company. The luxury villa in question was owned by Querencia Ltd, a British Virgin Islands incorporated company, which was controlled by the Nargolwalas, who were Singapore citizens. The potential buyer was Mr Lew, a well-known Australian tycoon. Mr Meury, the general manager of the Andara Resort, acted as a go-between for them. Unfortunately, he did not communicate each party's intentions and requests sufficiently clearly to the other. This led to the Nargolwalas selling the villa to another

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1 *Eg*, AJE Jaffey, "Offer and Acceptance and Related Questions in the English Conflict of Laws" (1975) 24 ICLQ 603; DF Libling, "Formation of International Contracts" (1979) 42 Mod L Rev 169; A Thompson, "A Different Approach to Choice of Law in Contract" (1980) 43 Mod L Rev 650; Michael Garner, "Formation of International Contracts - Finding the Right Choice of Law Rule" (1989) 63 Austl LJ 751; Adrian Briggs, "The Formation of International Contracts" [1990] LMCLQ 192; Jonathan Harris, "Does Choice of Law Make Any Sense?" (2004) 57 Current Leg Probs 305; Kelvin FK Low, "Choice of Law in Formation of Contracts" (2004) 20 Journal of Contract Law 167; Adeline Chong, "Choice of Law for Void Contracts and Their Restitutionary Aftermath: The Putative Governing Law of the Contract" in Paula Giliker, ed. *Re-examining Contract and Unjust Enrichment* (Leiden: Martinus Nijhoff, 2007) 155 at 155-181; Tan Yock Lin, "Good Faith Choice of Law to Govern a Contract" [2014] Sing JLS 307 at 318-320.

2 Chionh JC in *Pegaso Servicios Administrativos SA de CV v DP Offshore Engineering Pte Ltd* [2019] SGHC 47 at para 73 [*Pegaso*] commented on the "insubstantial" case law available on this point. Further, many of the frequently cited cases merely feature *obiter* comments on this issue.

3 *Solomon Lew v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 (CA) [*Lew SGCA*].

4 *Solomon Lew v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 (SICC) [*Lew SICC*] (noted in Shouyu Chong, "Choice of Law Governing a Contract Where Its Existence Is in Dispute: Clarifications from the Singapore International Commercial Court in *Lew, Solomon v Kaikhushru Shiavax Nargolwala*" (2021) 33 Sing Ac LJ 662).

party for a significantly higher sum than that offered by Mr Lew. Mr Lew thereupon sued the Nargolwalas for breach of an alleged oral contract for sale of the villa, breach of fiduciary duties and breach of trust in transferring the shares in Querencia to the third party buyer. He also sued various other parties. The success of all claims depended on whether there was a binding oral contract between the Nargolwalas and Mr Lew.

Mr Lew argued that Singapore law governed the issue of formation of the contract whereas the Nargolwalas argued in favour of Thai law, under which an oral contract is less easy to enforce. At first instance, Thorley IJ sitting in the SICC found against the existence of a contract by applying Singapore law as the putative proper law of the contract but held that the Nargolwalas should bear their own and Mr Lew's costs on the question of the applicability of Thai law. Mr Lew appealed against the dismissal of his claims whereas the Nargolwalas appealed against the costs order. In a judgment delivered by Lord Mance IJ, the SGCA affirmed that no binding contract was concluded but it overruled the SICC on the costs issue. In doing so, it disapproved of the choice of law framework adopted by Thorley IJ on how to deal with the formation of contracts. It is this point which is the focus of this note.

Thorley IJ had been in favour of a flexible choice of law solution, where either the putative proper law of the contract or the *lex fori* could apply to determine if a contract had been formed depending on which law would best "serve the interests of justice".[5] This was rejected by the SGCA which embraced the application of a nuanced version of the putative proper law and strongly rejected any role for the *lex fori* in the entire process. It held that it was "highly arguable" that the applicable law was Thai law: the villa was located in Thailand, Mr Lew and Mr Meury were in Thailand at the material time and the arrangement was derived from Thai law which prohibited foreign nationals from owning immovable property in Thailand.[6] Thus, it overruled the SICC's decision to award costs against the Nargolwalas on the Thai law point.

II. Choice of Law Solutions

The appropriate choice of law rule to test the formation of a contract is a classic conflict of laws conundrum. Questions relating to the substance of a contract are generally referred to the proper law of the contract. However, when the very question is whether a contract has been formed, there can be no proper law of a contract unless and until a contract is formed. The primary solutions to this issue are the application of: (i) the putative proper law; (ii) the *lex fori*; or (iii) a hybrid test incorporating the putative proper law and another law.

The common law vacillates between options (i) and (ii). The English courts have preferred the former.[7] The Australian courts on the other hand have gravitated towards the latter.[8] However, there are hints that the Australian courts may move towards a more nuanced, hybrid model.[9]

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5 *Lew SICC*, *supra* note 4 at para 162.

6 *Lew SGCA*, *supra* note 3 at para 87.

7 *Eg*, *Albeko Schuhmaschinen v The Kamborian Shoe Machine Co Ltd* (1961) 111 LJ 519; *The "Parouth"* [1982] 2 Lloyd's Rep 351; *Union Transport plc v Continental Lines SA* [1992] 1 WLR 15; *Vis Trading v Nazarov* [2014] EWCA Civ 313 (Russian law applicable presumably because it was the putative objective proper law). See also *Timberwest Forest Ltd v Gearbulk Pool Ltd* [2001] BCSC 882 at para 31 [*Timberwest*]. *Cf Mackender v Feldia* [1967] 2 QB 590 at 603 [*Mackender*]; *The "T.S. Havprins"* [1983] 2 Lloyd's 356 [*Havprins*].

8 *Oceanic Sun Line v Fay* (1988) 165 CLR 197 (High Court of Australia) at 225 (Brennan J), 260-261 (Gaudron J) [*Oceanic Sun Line*]; *Hargood v OHTL Public Co Ltd* [2015] NSWSC 446 at para 23; *Central Petroleum v Geoscience Resource Recovery LLC* [2017] QSC 223 at para 49; *Republica Democratica de Timor Leste v Lighthouse Corp Ltd* [2019] VSCA 290 at paras 55-58.

9 See *infra* notes 50-54.

In relation to Singapore law, Chionh JC in *Pegaso* preferred the *lex fori* over the "illogical[ity]"[10] and "circularity"[11] of the putative proper law test. Conversely, there is *obiter* support for the latter approach in the SGCA decision of *CIMB Bank Bhd v Dresdner Kleinwort Ltd*.[12] Thus, prior to *Lew*, the applicable test for the formation of a contract under Singapore law was unclear.[13]

A. *Modified Putative Proper Law*

The SGCA's preferred solution in *Lew*, absent party choice specifically on the issue of formation, was a nuanced application of, in effect, the putative proper law of the contract ('modified putative proper law'). The putative proper law approach, as traditionally understood, functions as a rather blunt tool. One assumes that the contract is formed, and if so, the "contract" would have a proper law. The law which is identified to govern the contract *if* it is formed is then applied to determine whether the contract has been formed.[14]

Common criticisms directed against the putative proper law approach are that it is illogical and might give rise to injustice.[15] In *Lew*, the SGCA attempted to deal with these criticisms. The SGCA observed that the three-stage approach of identifying the proper law of the contract—namely, the search for the express, implied and objective proper law—was an approach which was capable of application to the issue of contract formation, "focusing necessarily on the circumstances of the transaction or relationship alleged to have given rise to a concluded contract."[16] On the criticism of illogicality, the court stated that application of the three-stage approach would give effect to the reasonable expectations of the parties on the law which ought to apply to determine if they had made a binding contract.[17] On the criticism of injustice, the court thought that instances where this approach would give rise to a "grave injustice" would be rare.[18]

The court's rebuttal of the illogicality argument can be supported. It is convenient, simple and certain to have the same law govern as many aspects of a contract as possible.[19] The second criticism of injustice holds little weight if both parties had the foresight to agree that the issue of contract formation should be tested with reference to a particular law,[20] or both parties had negotiated with a view that a specific law would govern their contract, once formed.[21] In the latter situation, it would be but a small extension of the parties' intentions vis-à-vis the proper

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10 *Supra* note 2 at para 72.

11 *Ibid* at para 73.

12 *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR (R) 543 (CA) at para 30 [*CIMB*].

13 See also *William Jacks & Co (Singapore) Pte Ltd v Nelson Honey & Marketing (NZ) Ltd* [2015] SGHCR 21 at para 68.

14 As has been observed, strictly speaking the more accurate label is the "proper law of the putative contract": Briggs, *supra* note 1 at 199.

15 *Eg*, *Pegaso*, *supra* note 2 at paras 72-73; *Mackender*, *supra* note 7 at 602; *Trina (US) Solar v Jasmin Solar* [2017] FCAFC 6 at paras 130-131 [*Trina Solar*]. See also Briggs, *supra* note 1 at 198; Harris, *supra* note 1 at 316-317; Libling, *supra* note 1 at 170-171.

16 *Lew SGCA*, *supra* note 3 at para 76.

17 *Ibid* at para 72.

18 *Ibid* at para 77.

19 Edward I Sykes & Michael C Pryles, *Australian Private International Law*, 3rd ed (Sydney: Law Book Co, 1991) at 613.

20 A situation which the court acknowledged was theoretically possible but highly unlikely in practice: *Lew SGCA*, *supra* note 3 at para 70(a).

21 Yeo Tiong Min, "Private International Law: Law Reform in Miscellaneous Matters" (2003) at para 199, Appendix 1 to the Law Reform Sub-Committee, Singapore Academy of Law, *Report on Reform of the Law Concerning Choice of Law in Contract* (2004), online: <https://www.sal.org.sg/Resources-Tools/Law-Reform/Law-Reform-e-Archive-By-Date#2004>.

law of any concluded contract to apply that law to determine if a contract was formed. Even if no choice was made, there would be situations where the law with which the negotiations had the closest and most real connection will be reasonably clear. These were evidently the situations which the SGCA had in mind when it stated of the modified putative proper law approach: "Properly understood, this is not illogical and does not beg any questions."[22]

The SGCA's emphasis on giving effect to the reasonable expectations of the parties and its reference to factors leading up to the conclusion of the alleged contract does much to set this choice of law option on a firmer basis. However, the same factors are also usually relevant when ascertaining the proper law of the contract. The subject-matter of the negotiations and contract will be the same. The place where negotiations are conducted may end up being the place where the contract is concluded. This means the laws of closest connection to the negotiations and putative contract will likely be the same. An express or implied choice of law to govern a concluded contract is also a good proxy for parties' intentions as to the law governing the formation of the contract as parties normally intend the same law to govern all issues arising out of their relationship. Thus, the SGCA pivoted from discussing the law governing the parties' negotiations to endorsing, in effect, a modified version of the putative proper law approach.[23] This retains some of the problems inherent in the traditional putative proper law approach. It also presupposes that the ascertainment of a law which reflects the parties' reasonable expectations raises purely factual questions.[24] Further, it leaves unanswered what law would apply if the putative proper law is not in line with parties' reasonable expectations.

An instance where this may be the case is where the putative proper law adopts the position that silence amounts to acceptance. The SGCA itself referred to this situation but concluded that it was an "extreme possibility" and that the effect would be that no contract would come into existence under any law. The first conclusion is debatable;[25] the second obviously wrong.[26] The court declined to express an opinion if a caveat would need to be made for such a case, observing that in any event it would be "a very small caveat, very rarely applicable."[27]

One can however think of other examples where a caveat is required. In *CIMB*, the SGCA commented that when a plea of *non est factum* is raised, "everything in the contract must be discarded."[28] This observation was made in the context of a search for the governing law of an unjust enrichment claim where there was no dispute that the contract was void. However, when the issue before the court is whether a contract is void due to *non est factum*, self-evidently the issue must be tested with reference to a law. On the one hand, applying a choice of law clause[29] in the disputed contract to determine if the plea succeeds would seem to favour the party who maintains the contract exists. On the other hand, the party denying the existence of the contract

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[22] *Lew SGCA*, *supra* note 3 at para 72.

[23] Ibid at, in particular, paras 70(b)-(c), 73, 76 and 80. Cf Marcus Teo, 'A Negotiation-Based Choice of Law Rule for Contract Formation' [2021] LMCLQ 420.

[24] Similarly, see Mance J's (as he then was) view on applying a "dispassionate, internationally minded approach" in relation to art 8(2) of the *Rome Convention on the law applicable to contractual obligations*: *Egon Olderndorff v Libera Corporation* (1995) 2 Lloyd's Rep 64 at 70.

[25] See Lord Collins of Mapesbury, gen ed. *Dicey, Morris and Collins: The Conflict of Laws*, 15th ed (London: Sweet & Maxwell, 2012) at 1844 (n 406).

[26] There *would* be a contract under the law of state X.

[27] *Lew SGCA*, *supra* note 3 at para 77. Arguably, if the law, albeit not the *result* of application of that law, is in line with party expectations, the law ought to prevail subject to forum public policy negating any objectionable result.

[28] *CIMB*, *supra* note 12 at para 46.

[29] Or according weight to terms in the disputed contract which go towards the identification of the putative implied or objective proper law.

could have raised *non est factum* strategically, to "neutralise" the effect of the choice of law clause.[30]

In addition, when there are two competing putative proper laws such as may potentially be the case in a battle of forms situation, "it makes no sense to decide which one to choose by any putative law."[31] The double bootstraps approach inherent in the application of the putative proper law offers no solution if each law identifies itself as the putatively applicable law of the contract. It could be argued that the putative objective proper law should apply instead, but this was rejected in *The "Heidberg"*[32] on the basis that this would be unlikely to be any more correct than arbitrarily preferring one of the competing putative express proper laws.[33] There is a need for a mechanism to identify the law which best fits the parties' reasonable expectations.

While the SGCA stated that its modified putative proper law approach provides a "*principled*, not simply a pragmatic, approach"[34] to the question of contract formation, it can be seen from the above that there are some situations where it may be difficult to identify a "principled" law. Attention must thus be turned to the other choice of law options.

B. *Lex Fori*

The SGCA categorically rejected application of the *lex fori*, holding that it would be illogical to do so regardless of whether there were any connecting factors pointing towards the forum.[35] It viewed the application of the *lex fori* as an abrogation of the role of private international law to achieve uniform solutions.[36] Rejection of the *lex fori* as *the* choice of law rule for formation must be correct, for the reasons stated by the court, which are in short: parochialism and forum shopping.

The SGCA also rejected any fall-back role for the *lex fori*. It commented that: "Whenever there is an allegation of a binding agreement, it will necessarily be between parties in some context and language(s) in relation to some purpose(s) and/or place(s). The types of connecting factors which courts are used to analysing and weighing will be present."[37] In other words, the court will always be able to identify the putative proper law of the contract so that recourse to a default law is unnecessary.[38] Be that as it may, this leaves unanswered whether it would be *appropriate* to apply the putative proper law in the sense of it being a law which is "principled" as it reflects the reasonable expectations of the parties. It is this question to which the hybrid models are particularly attuned.

C. *Hybrid Models*

1. *The SGCA's View on Hybrid Models*

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30 See *CIMB*, *supra* note 12 at para 30.

31 *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] 2 Lloyd's Rep 471 (CA) at para 17 (dispute on whether an admitted contract contained a jurisdiction clause). See also Yeo Tiong Min, *supra* note 21 at para 194.

32 *The "Heidberg"* [1994] 2 Lloyd's Rep 287.

33 *Ibid* at 307. There was no dispute that a contract was formed on the facts but the judge stated that the same principles apply when there is such a dispute.

34 *Lew SGCA*, *supra* note 3 at para 72 [emphasis added].

35 *Ibid* at para 73.

36 *Ibid* at para 70.

37 *Ibid* at para 81.

38 *Cf Lew SICC*, *supra* note 4 at para 169.

Hybrid models temper the application of the putative proper law with another law. They usually take one of two forms. One model adopts as its main choice of law rule the putative proper law but allows its displacement in certain circumstances. An example is Article 10 of the Rome I Regulation which allows a party to rely on the law of his or her habitual residence to establish the lack of consent if "it would not be reasonable" to apply the putative proper law to determine consent.[39] Another variant of this model is suggested by Yeo Tiong Min. This provides that the putative proper law should apply if the parties have negotiated their contract with reference to a particular legal system unless the entire contract is disputed, in which case, the *lex fori* would apply to determine if a contract was formed.[40] Thorley IJ's framework bore similarities with this model; the SGCA's decision too, apart from its rejection of the last step, largely cohered with this framework. The SGCA rejected the last step of this model because it was concerned that whether the "entire" contract is in dispute could itself be disputed.[41]

The second usual hybrid model is exemplified by Adrian Briggs's suggestion.[42] The basic hallmarks of Briggs's approach, variants of which are also advocated by a number of other academics[43] are: (i) the *lex fori* identifies the putative proper law of the contract, and (ii) the putative proper law of the contract determines if the contract has been formed. One of the SGCA's concerns with Briggs's model was his suggestion that the proper law of the contract is a wholly subjective idea, the implication being that if the parties have not expressly or impliedly agreed to a putative proper law according to the *lex fori*, the matter stops there.[44] This does not cohere with the established three-step process to identifying the proper law of the contract,[45] whereby in the absence of an express or implied choice by the parties, the contract would be governed by the objective proper law. As the SGCA observed, application of the objective proper law of the contract, being the law of closest and most real connection with the contract, gives effect to the reasonable expectations of the parties which are objectively ascertained.[46] There is a place for the objective proper law of the contract, whether putative or otherwise.

However, shorn of the limitation of a purely subjective proper law, it is suggested that the two-stage approach works well and the SGCA was too quick to discount its utility. The SGCA's adoption of the putative proper law and *only* the putative proper law will not work in all situations, even in its modified form.

2. *Proposed Framework*

It is uncontroversial to suggest that a "principled" putative proper law is one to which both parties agree. With agreement present, it would be in line with the reasonable expectations of the parties for this law to be applied to the question of contract formation. However, the issue of agreement to the putative proper law may give rise to questions of law. It is thus proposed that where the parties dispute the applicable law for the issue of formation, the *lex fori* must first determine if the parties have agreed to the alleged choice of law clause for a putative express proper law or if the parties have agreed to the putative terms which go towards

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[39] *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 18 June 2008 on the law applicable to contractual obligations (Rome I)*, art 10(2) [*Rome I Regulation*]. See also *Hague Principles on Choice of Law in International Commercial Contracts*, art 6 [*Hague Principles*].

[40] Yeo Tiong Min, *supra* note 21 at para 201.

[41] *Lew SGCA*, *supra* note 3 at para 78.

[42] Briggs, *supra* note 1.

[43] Libling, *supra* note 1; Harris, *supra* note 1; Chong, *supra* note 1.

[44] Briggs, *supra* note 1 at 199-200.

[45] *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 (CA) at para 79.

[46] *Lew SGCA*, *supra* note 3 at para 79.

identifying the putative implied proper law or putative objective proper law of the contract.[47] This could then be said to be a putative proper law which reflects the reasonable expectations of the parties and can then be applied to determine if a contract was formed. However, if the answer is that there is no agreement leading to any of the three types of putative proper laws, in principle the court should apply the *lex fori* to determine formation of the contract in the absence of any other law being established to be applicable.[48] That said, given that no agreement to the putative term(s) of the contract was found by the *lex fori* during the search for a "principled" putative proper law, it would be very unlikely for the *lex fori* to find that a contract was formed.

The first stage focusses on whether there is agreement on the putative proper law. This need to first ascertain consensus on the putative proper law has most clearly been recognised by the Australian courts. The *locus classicus* in Australian law are the *obiter* comments of Brennan J and Gaudron J in the High Court of Australia judgment in *Oceanic Sun Line v Fay* in favour of application of the *lex fori* to determine contract formation.[49] A finer approach, however, has been alluded to by Beach J in *Trina Solar (US), Inc v Jasmin Solar Pty Ltd*,[50] a decision of the Full Court of the Federal Court of Australia. Both Greenwood J and Beach J[51] accepted the *Oceanic Sun Line* principle that the *lex fori* applies at common law to determine whether a contract was made between Trina (US) and Jasmin Solar.[52] However, Beach J's judgment appears to be more finely reasoned. On Trina (US)'s argument that New York law as the putative proper law ought to apply to determine if the contract had been formed, his Honour stated that: "… Trina US's arguments would appear to conflate the issue of consensus ad idem with the formation of a legally binding contract. The former element is a necessary but not a sufficient condition to establishing the latter element."[53] While Beach J did not explicitly state that there is a second stage whereby the putative proper law applies to determine if a contract was formed, tellingly, his Honour was of the view that consideration was a contractual element "moving beyond consensus ad idem. What I have said is not inconsistent with applying the putative proper law to questions of consideration."[54]

Consensus on the putative proper law need not mean contractual agreement according to the *lex fori*, in the sense of requiring fulfilment of all the elements for contractual formation under domestic law.[55] Pared down to its essence, consensus would amount to finding an offer and a matching acceptance. Other elements under domestic law such as the doctrine of consideration are superfluous to the issue of consensus; it goes instead to the question of whether the agreement is legally binding, or in other words, whether a contract was formed. Whether a contract was formed is for the putative proper law of the contract.

This model does not allocate an unwarranted role for the *lex fori*, a criticism levelled above against application of the *lex fori* as a stand-alone choice of law option. The advantage of

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47 See further, Chong, *supra* note 1 at 161-168.

48 *The "Heidberg"*, *supra* note 32 at 307-308.

49 *Oceanic Sun Line*, *supra* note 8 at 225 (Brennan J) & 260-261 (Gaudron J). It is not clear if Brennan J had in mind the finer approach later alluded to by Beach J in *Trina Solar*, *supra* note 15, as his Honour referred to the application of the law of New South Wales as the *proper law of the contract* to determine if the parties had reached agreement on the disputed clauses: *Oceanic Sun Line*, *supra* note 8 at 240. See also Garner, *supra* note 1 at 756.

50 *Supra* note 15 (noted in Michael Douglas, "Whether Law of the Forum Applies" (2017) 91 Austl LJ 201).

51 With whom Dowsett J agreed.

52 *Trina Solar*, *supra* note 15 at para 46 (Greenwood J), paras 134, 137, 139, 151 (Beach J). The majority and minority differed on the inter-relationship between the common law principle and the *International Arbitration Act 1974 (Cth)*.

53 *Ibid* at para 136.

54 *Ibid* at para 151.

55 *Cf* Briggs, *supra* note 1 at 203.

having this preliminary stage is that it offers the court a tool to identify a putative proper law which reflects the reasonable expectations of the parties. Situations such as whether silence ought to amount to acceptance, whether fraud perpetrated gives rise to *non est factum* or whether a mistake is fundamental enough to nullify consent, to give a few examples, cannot be resolved through a blunt application of the putative proper law, at least if one wants to apply a "principled" putative proper law which is fair to both parties. In a battle of forms situation, the *lex fori* can also play a tie-breaker role.

One may wonder why the applicable standards of consensus ought to be benchmarked to the *lex fori*'s standards. A few grounds of principle can be cited. First, the putative proper law is a connecting factor and it is axiomatic that the identification and interpretation of connecting factors is for the *lex fori*.[56] Secondly, when there is no argument on contract formation, but there is a disagreement as to its proper law, it is undisputed that the English court applies "the ordinary rules of English law relating to the construction of contracts"[57] to identify the proper law. It is inconsistent then to say that if there is a dispute on contract formation, the putative proper law identifies its own applicability.[58] Thirdly, unless and until a foreign law is shown to be applicable, it is well-established that the court will apply the *lex fori*.[59] Fourthly, if the issue of formation arises at the merits stage of trial, jurisdictional nexus to the forum would have been satisfied which suggests that there are at least some grounds for the *lex fori* to apply.[60]

What if the situation were to arise where the putative proper law of the contract is identified as the law of state X because, say, the *lex fori* determines the parties have agreed to a choice of law clause for the law of state X but the law of state X itself considers agreement to be lacking?[61] It is suggested that the objective of each stage ought to be kept in mind: the first stage deals with the identification of the putative proper law; the second stage deals with formation of the contract. Once the putative proper law is identified at the first stage, the question should not be re-visited.

Lastly, it could be queried why the second model ought to be preferred to the first model which provides for a fall-back option should it not be appropriate to apply the putative proper law. Both models share the same objective: to ensure that it would be reasonable and fair to apply the putative proper law. The first model however deals with this issue at the second stage, whereas the proposed model deals with this issue at the first stage. Of the two, it is suggested that it is preferable for this issue to be ventilated at the outset rather than retrospectively.[62]

III. Further Comments

It has been suggested above that there should be no conflation between the issues of consensus to the putative proper law and formation of the contract. It is further suggested that another conflation has obscured the search for the appropriate choice of law approach on this issue: that of formation and validity of the contract. There is a modern tendency to assimilate the two

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56 JG Collier, 'Conflict of Laws' [1989] All ER Rev 61. See also *Havprins*, *supra* note 7 at 358-359.

57 *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572 (HL) at 603.

58 *Cf Timberwest*, *supra* note 7 at para 30.

59 *The "Heidberg"*, *supra* note 32 at 307-308.

60 *Chong*, *supra* note 1 at 166-167.

61 See, *eg*, the concern raised in *The "Heidberg"* on Briggs's model, *supra* note 32 at 307.

62 *Chong*, *supra* note 1 at 169.

issues[63] which then elides the conceptual difference between the two.[64] It is not necessarily the case that a choice of law solution appropriate for one is equally appropriate for the other. Material validity arises where there is no question that the contract was formed, but rather the question is whether the contract can be set aside due to a vitiating factor such as fraud, duress or misrepresentation. Insofar as the common law is concerned, the effect of these vitiating factors on the contract is also usually to render it voidable and void only from the moment of avoidance, rather than void *ab initio*.[65] All this underlies the fact that there is a contract in the first place. It makes sense to apply the proper law of the contract (not the *putative* proper law of the contract) to determine whether the contract is materially valid, because a contract which exists would have a proper law[66] and it is trite that substantive issues pertaining to the contract ought generally to be subject to this proper law. Crucially, unless the vitiating factor directly impugns the proper law itself,[67] there is no unfairness to either party—whether affirming or disputing the contract's validity—in applying the proper law to determine this issue. Whereas if the very issue is whether there is a contract in the first place, "[t]he question of whether a person has manifested consent to be bound cannot be governed by matters contained within the very contract about which the person disputes having manifested agreement."[68]

IV. Conclusion

The search for the appropriate choice of law rule for the formation of a contract has been hampered by two types of conflation: one between formation of the contract and consensus on the putative proper law, the other between formation and material validity of the contract. Once it is appreciated that each issue deserves separate treatment, the way forward becomes clearer.

The SGCA in *Lew* sought to place the putative proper law approach on a sounder basis, namely by emphasising that it ought to be a law which gives effect to the reasonable expectations of the parties and by taking into account factors relating to the negotiations leading up to the alleged contract. However, there will be some situations in which the modified putative proper law approach will not yield clear answers. It is suggested that more than a "very small caveat" is required; instead, finesse is needed in identifying the putative proper law. It is proposed that in all cases where the parties dispute the applicable law to the issue of formation, there should be a preliminary step in which the *lex fori* determines whether there is consensus to the putative proper law. This would then be a "principled" putative proper law which can be applied confidently to the question of contract formation.

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63 *Eg*, *Rome I Regulation*, *supra* note 39, art 10(1). Art 10(2) however differentiates between the existence and validity of consent. See Giuliano-Lagarde Report OJ [1980] No C 282/28. See also Hague Principles, *supra* note 39, art 6(1)(a), commentary at paras 6.6-6.7; *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 (CA) at paras 157-158.

64 A clear distinction was drawn by Edelman J (then of the Federal Court of Australia) in *Jasmin Solar Pty v Trina Solar Australia Pty Ltd* [2015] FCA 1453 at para 80 [*Jasmin Solar*]. See also *Trina Solar*, *supra* note 15 at paras 128-129; *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 (CA) at para 21; *Lew SGCA*, *supra* note 3 at para 31.

65 *Cf* certain types of mistake which render a contract void *ab initio*. If a mistake affects consensus, it should be dealt with under the preliminary *lex fori* step.

66 See *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] 1 AC 50 (HL) at 65.

67 *CIMB*, *supra* note 12 at paras 44-47.

68 *Jasmin Solar*, *supra* note 64 at para 86 (Edelman J).