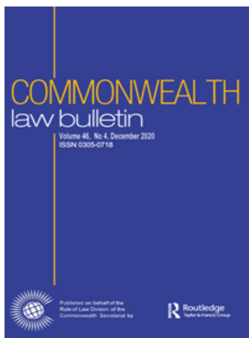

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Party autonomy in the choice of law under Indian and Australian private international law: some reciprocal lessons

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The outbreak of the COVID-19 pandemic will affect the performance of several contracts and is likely to increase the number of disputes before the courts. In agreements with a foreign element, the adjudication of the rights and liabilities will depend on the applicable law. Most legal systems have embraced the doctrine of party autonomy and, accordingly, permit the parties to expressly select the law to govern the disputes that arise from international contracts. India and Australia are no exception to this trend. In general, the courts in both the commonwealth countries have reported having been influenced by judicial practices of one another to develop their own law. Despite their common law roots, the interpretations attached to the doctrine of party autonomy in the choice of law have varied in some respects in these countries. The paper analyses the judicial trends on the subject and demonstrates the role that party autonomy will play in resolving international disputes where the performance has been affected by the eventualities such as the COVID-19 pandemic in India and Australia. The paper delves into the manner in which the courts in India and Australia may offer reciprocal lessons to each other to revolutionise to interpret the doctrine of party autonomy in the choice of law.

1. Introduction

The doctrine of 'party autonomy' refers to the freedom of the parties to select the court and the applicable law[1] to determine their rights and liabilities[2] in disputes

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[1]For a detailed discussion on the subject see, A Briggs, *Agreements on Jurisdiction and Choice of Law* (1st edn, OUP 2008) 37; PE Nygh, *Autonomy in International Contracts* (first published 1999, OUP 1999) [Nygh, Autonomy]; SC Symeonides, 'Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple' (2014) 39 *Brooklyn Journal of International Law* 1123; and *James Miller & Partners Ltd v Whitworth Street Estates* (Manchester) Ltd [1970] AC 593.

[2]See, M Schmitthoff, 'Doctrine of the Proper Law of the Contract in the English Conflict of Laws' (1940) 28 *The Georgetown Law Journal* 447, 450, referring to Bowen LJ *per Jacobs v Credit Lyonnais*, 12 QBD 589 (CA 1884); SC Symeonides, 'The Scope and Limits of Party Autonomy in International Contracts: A Comparative Analysis' in Franco Ferrari & Diego P Fernández Arroyo (eds), *Private International law: Contemporary Challenges and* the Continuing Relevance of Private International Law and New Challenges (Elgar, 2019) 101; A Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018) 313–316 [Mills, *Party Autonomy*]; JF Coyle, *A Short History of the Choice-of-Law Clause* (2019)

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that arise in international contracts.[3] Consider for example, two contracting parties from Melbourne and Scotland who have concluded an agreement for the sale of cloth. The parties may agree to have their disputes settled according to German law in the courts of that country because it is neutral and well-developed. As such, party autonomy operates as an extension to the freedom of contract,[4] and has assumed an exalted position in the principles of private international law of several countries in the recent years.

In civil law jurisdictions such as the European Union [EU], China, Russia, Japan and Turkey, the exact parameters of the doctrine of party autonomy and the limitations attached to it are explicitly enunciated in the statutory provisions of these legal systems.[5] Despite Brexit, the conflict of law rules that are applicable in the EU on the subject will continue to apply in the UK.[6] In comparison, the principles of private international law other common law jurisdictions such as India and Australia have primarily remained uncodified. They have rested on the principle of *stare decisis* where judicial precedents play a vital role in clarifying the law.

In particular, the laws of Australia and India have shared many commonalities. As former Justice of the High Court of Australia, Michael Kirby AC CMG has articulated,

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<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420162> [Coyle, *A Short History*] accessed 2 May 2020; G Tu, 'The Flowing Tide of Parties' Freedom in Private International Law: Party Autonomy in Contractual Choice of Law in China' (2019) *Journal of Private International Law* 234; the decision of the English court in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co*, 1984 AC 50 65; and A Setalvad, 'Setalvad's Conflict of Laws' (3rd edn, Lexis Nexis 2014), 500.

[3]See in this respect, Hague Conference on Private International Law, 'Commentary on the Hague Principles on Choice of Law in International Contracts' (approved 15 March 2015) <www.hcch.net/en/instruments/conventions/full-text/?cid=135> accessed 12 January 2020 [Commentary to the Hague Principles], which defines an agreement as 'international' '… unless the parties have their establishments in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State'. Also see, J Hill & MN Shúilleabháin (eds), *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) 1; Sagi Peari, *The Foundation of Choice of Law: Choice & Equality* (OUP: 2018) 79–125.

[4]G Rühl, 'The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Truancy' (2014) *Journal of Private International Law* 335, 338–339; Mortesen et al., *Private International Law in Australia* (4th edn, LexisNexis Butterworths, 2019) at 444, which states: 'The origins of the principle are probably found in 19th century notions of freedom of contract and, seen in that light, the principle is more readily understandable'.

[5]See the discussion below in Part two.

[6]See, Article 66 of the Withdrawal Agreement, and the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2019; Commission Decision of 22 December 2008 on the request from the UK to accept the Rome I Regulation (notified under document number C(2008) 8554) <www.eurodocs.org/081637> accessed 19 March 2020. For a discussion on the common law rules prior to the UK's membership to the Rome Convention which was superseded by the Rome I Regulation, see, A Briggs et al. (eds), *Dicey, Morris and Collins on the Conflict of Laws: Vol 2* (15th edn Sweet and Maxwell 2015) 1766–1780. [Dicey, Morris and Collins on the Conflict of Laws: Vol 2, 15th edn].

> both are common law countries, which are federations, which live by the rule of law, which are governed under democratic, parliamentary constitutions and which, in their different ways, protect fundamental human rights and basic freedoms.[7]

These similarities in the legal rules have provided an impetus for the deepening of the trade and investment relationship between the two legal systems. They have prompted the judges of the Supreme Court of both these legal systems to meet several times to discuss 'legal topics of mutual interest'.[8]

The decisions of the Australian courts have had some influence in shaping the principles of Indian law.[9] In the past, the Supreme Court of India has referred to the decisions of the Australian judiciary to clarify and develop the parameters of the fundamental rights available to its citizens.[10] In the area of private international law, the decision of the High Court of Australia in *Bonython v Commonwealth of Australia*[11] has played a pivotal role before the Indian courts to identify the applicable law in the absence of choice.[12]

There are no reported dicta where the Australian judiciary has referred to the decisions of its Indian counterpart to clarify the law. However, as Michael Kirby AC CMG indicates, the Australian judiciary has

> learned much of law and wisdom from the Supreme Court of India and [is] likely to do so in future as [the] links expand.[13]

The Australian-Indian trade-ties have continued to proliferate with both the legal systems looking towards one another for foreign direct investment to

[7]See, Shaun Star, 'Introduction' in Australia and India: A Comparative Overview of the Law and Legal Practice (Shaun Star ed) (1st edn Universal Law Publishing 2016) ix, referring to Michael Kirby AC CMG, 'India and Australia: A Neglected Legal Relationship and a Plan of Action' (Indo Australia Public Policy Conference, New Delhi, India 23–24 October 1996) at ff 1.

[8]Ibid, 23.

[9]See, Justice HL Dattu, 'Forward' in Australia and India: A Comparative Overview of the Law and Legal Practice (Shaun Star ed) (1st edn Universal Law Publishing 2016) vii.

[10]Ibid, referring to the decisions of the Supreme Court of India in *Vishaka v State of Rajasthan*, [1997] 6 SCC 241; *Zee Telefilms v Union of India*, [2005] 4 SCC 649; and *Bangalore Water Supply and Sewerage Board v A Rajappa*, AIR 1978 SC 548.

[11][1951] AC 201.

[12]For a detailed discussion on the application of the 'closest and most real connection' test in India, see, Saloni Khanderia, 'The Ascertainment of the Applicable Law in the Absence of Choice in India and South Africa: A Shared Future in the BRICS' (2020) Oxford University Commonwealth Law Journal 1, DOI: 10.1080/14729342.2020.1773019.

[13]Star (n 7) x, referring to Michael Kirby AC CMG, 'The High Court of Australia and Indian Law' in Supreme Court of India, Golden Jubilee Book, New Delhi (2000) at ff 8. Also see, https://www.businesstoday.in/opinion/columns/australia-india-business-and-trade-exchange-import-export-economy-partnership-investment/story/397535.html (mentioning that the two-way trade between Australia and India was $30 billion and advocating further trade increase between the countries) accessed 11 May 2020.

augment economic growth.[14] International trade and commerce has escalated between the two countries and has fostered the conclusion of contracts among parties belonging to these nations. The parties' choice of law would remain at the cornerstone while adjudicating disputes that may arise in connection to these contracts; but also all international agreements.

The paper delves into the reciprocal lessons that the two commonwealth jurisdictions may have to offer to one another in their journey of revolutionising the interpretation of party autonomy in the choice of law – amidst the chaos that prevails in the absence of codification. The comparative analysis would enable the lawmakers to not merely share their experiences more holistically but also learn from one another, and gauge how their legal principles and doctrines may be interpreted and developed according to global standards and best practices.

For most, the ongoing COVID-19 crisis is likely to impose new challenges in ascertaining the parties' freedom to choose foreign law to govern their contract. Are there any circumstances in which the courts in India and Australia will apply the provisions of its domestic law regardless of the parties' choice of foreign law while deciding disputes on non-performance of contracts due to the COVID-19 outbreak? To what extent will the courts in India and Australia validate the *force majeure* clause which permits the parties to terminate the international contract on the occurrence of such eventualities? These are questions which demonstrate the centrality of the party autonomy in the context of COVID-19 and the challenges it presents.

The paper is divided into five parts (including the introduction). Part two discusses the evolution and the success of the doctrine of party autonomy across legal systems. Part three examines the recent trends in Indian and Australian private international law in giving effect to the parties' choice of law clauses. It sheds light on the significance of English common law in developing the principles on the subject. It demonstrates the commonalities and the many divergences in the interpretation of the doctrine in the two countries despite its common law roots. It accordingly highlights some areas where the courts may share their wisdom to ensure that choice of law revolution in their country adheres to international standards and best practices. This part additionally highlights the ramifications of the COVID-19 outbreak in performing international contracts and demonstrates the significance of party autonomy for those challenges. Part four examines the areas where India and Australia may offer reciprocal lessons to each other. Part five provides the concluding remarks.

2. The evolution of party autonomy

The 1939 English decision of the Privy Council in *Vita Food Products v Unus Shipping Company*[15] is considered as the seminal case on party autonomy in the choice of law. The dispute concerned the validity of the parties' choice of English

[14]See in this respect, Australian High Commission, *Doing Business with Australia-Australia's Trade with India*, <https://india.highcommission.gov.au/ndli/trade2.html> accessed 2 June 2020.

[15][1939] AC 277.

law to govern their contract, which was evidenced by a bill of lading.[16] The agreement was concluded between a Nova Scotian and an American company for the transportation of goods.[17] The agreement exempted the master from liability for loss that may occur to the products by negligence.[18] The (exemption) clause violated the Hague Rules, which were applicable in Newfoundland from where the goods were shipped.[19] Lord Wright, accordingly, confirmed that a dispute arising from an international contract would be governed according to 'the law, which the parties intended to apply'.[20] The selection of any foreign legal system was permitted. The parties' choice would prevail provided that it was '*bona fide* and legal'.[21]

The dictum did not clarify the nature and scope of the term '*bona fide*'. The interpretation attached to the term has been divided among legal scholars. Some scholarly writings have opined that the term '*bona fide*' refers to good faith,[22] and its interpretation is, therefore, subjective.[23]

Dicey,[24] Morris[25] and Kelly[26] have opined that a choice of law will be considered as made in bad faith if it contradicts the overriding mandatory norm of the legal system with which the contract is most closely connected - whether it is another system or the forum. The House of Lords in *The Hollandia* stated that the parties' choice of law would be regarded as not being *bona fide* if it resulted in the contravention of an overriding mandatory norm which would be applicable even if the parties had chosen another law.[27] The court discussed the validity of the parties' choice of Dutch law to govern

[16]Ibid.
[17]Ibid.
[18]Ibid.
[19]Ibid. The Hague Rules were incorporated in Newfoundland by The Newfoundland Carriage of Goods by Sea Act, 1932
[20]Ibid, 290.
[21]Ibid, 290
[22]P Kincaid, 'Rationalising Contract Choice of Law Rules' (1993) 8(1) *Ottago Law Review* 93, 112.
[23]Ibid, referring to JHC Morris, 'The Proper Law of a Contract: A Reply' (1950) 3 *International Law Quarterly* 197, 202–203 at ff 15 [Morris, The Proper Law].
[24]L Collins et al. (eds), Dicey and Morris on the Conflict of Laws, vol 2 (11th edn, Stevens & Sons 1987) 756 [Dicey and Morris on the Conflict of Laws].
[25]JHC Morris, '*The Scope of the Carriage of Goods by Sea Act 1971*' [1979] 95 *Law Quarterly Review* 59, 66 [Morris, Scope of Carriage]; and Morris, The Proper Law (n 23) 202–203.
[26]Kinciad (n 22) 112, referring to D St L Kelly, 'Reference, Choice, Restriction and Prohibition' (1977) 26 *International and Comparative Law Quarterly* 857, 870–871 at ff 20.
[27][1982] 1 All E.R. 1076, 1080. Also see, Dicey and Morris on the Conflict of Laws (n 24) 756; and Morris, Scope of Carriage (n 25) 66, which state that a choice of law would be disregarded for not being '*bona fide*' if it contravened the overriding mandatory norms of the legal system with which the contract has its closest connection.

their contract.[28] The parties' choice would result in a contravention of the Hague-Visby rules which would be applicable under the English Carriage of Goods by Sea Act 1971.[29] The parties' choice was, consequently, disregarded for not being *bona fide* and legal.[30]

Several civil law jurisdictions incorporate the doctrine of party autonomy in the codifications of their private international laws. The conflict of law rules of the EU serve as a prominent example. Party autonomy in the choice of law has continued to find a place in the Rome I Regulation[31] after first being 'anchored'[32] in the Rome Convention.[33] As a result, the parties have the freedom to select the law of any country to govern their contractual obligations. The choice of 'soft' law and non-State rules is not permitted.[34] Bonell defines 'soft law' as 'general instruments of normative nature with no legally binding force and which are applied only through voluntary acceptance'.[35] Common examples of soft law include, *lex mercatoria*, which refers to the principles formulated by global merchants to facilitate the regulation of trade and commerce in a particular area; model laws, restatements and codifications of customs by international and non-governmental organisations. The Rome I Regulation, however, allows the parties to incorporate by reference the provisions of such non-binding legal instruments into the terms of their contract.[36]

[28]Ibid.
[29]Ibid.
[30]Ibid.
[31]See, Recital 11 of Regulation (EC) No 593/2008 of the European Parliament and the Council on the Law Applicable to Contractual Obligations [Rome I Regulation]. Also see, Art. 3(1) of Rome I, which espouses the parties' freedom of choice of law.
[32]Rühl (n 4) 339.
[33]The Convention of the Law Applicable to Contractual Obligations, 19 June 1980, 80/934/EEC.
[34]See, Art. 3(1) of the Rome I Regulation.
[35]See, MJ Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (Transnational Publishers, 2005) 200–208; and MJ Bonell, 'Soft Law and Party Autonomy: The case of the UNIDROIT Principles' (2005) 51 *Loyola Law Review* 229, 229. [Bonell, Soft Law]. Also see, S Eiselen, 'Globalization and Harmonisation of International Trade Law' in Faure and Van der Walt (eds) *Globalization and Private Law: The Way Forward* (Edward Elgar 2008) 97, 123–125 [Eiselen, Globalisation]; Henry D. Gabriel, *'The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference'* (2009) 34 *Brooklyn Journal of International Law* 658; and Saloni Khanderia, 'Indian Private International Law *vis-à-vis* Party Autonomy in the Choice of Law' (2018) 18(1) *Oxford University Commonwealth Law Journal*, 1 [Khanderia, Party Autonomy] referring to the definition of 'soft law' in ff 32 at 5.
[36]See, Recital 13 of the Rome I Regulation.

These apart, legal systems such as China,[37] Japan,[38] Mexico,[39] South Korea,[40] Russia,[41] Switzerland,[42] Turkey[43] and Venezuela[44] similarly permit the parties to choose any legal system. It is irrelevant whether or not the parties' choice bears any connection to the transaction, to govern their cross-border contracts in their private international law codifications.

The parties' choice of law is valid insofar as it does not contradict the overriding mandatory norms and public policy of the domestic forum.[45] Most of these jurisdictions have special rules which aim to protect weaker parties such as consumers, employees and insurance policy-holders from the dangers of party autonomy.[46] Those are situations where one party is susceptible to being at a disadvantage and more vulnerable in comparison to the other party. In such circumstances, the parties' right to choose the applicable law is generally limited.[47]

In a related vein, the doctrine of party autonomy has retained itself as the cornerstone in the Hague Conference on Private International Law's Hague Principles on Choice of Law in International Commercial Contracts [the Hague Principles].[48] Stipulated in the form of non-binding recommendations, the Hague Principles intend to provide guidelines to the legislators, judges and

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[37]Art. 3 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations, 2010 [Law on the Laws]. Also see, Peter McEleavy, 'Current Developments: Private International Law' (2011) 60 *International and Comparative Law Quarterly* 1065, 1085.

[38]Art. 7 of the Japanese Act on the General Rules on the Application of Laws, 2007 [Japanese Act].

[39]Art. 7 of the Inter-American Convention of the Law Applicable to International Contracts, 1994 [Mexico City Convention].

[40]Art. 25 of the Conflict of Laws of the Republic of South Korea, 2001 [Conflict of Laws of South Korea].

[41]Art. 1210 of the Civil Code of the Russian Federation, 2006 [Civil Code of Russia].

[42]Art. 15 of Switzerland's Federal Code of Private International Law, 1987 [Swiss PIL].

[43]Art. 24 of the Turkish Code on Private International Law and International Civil Procedure, 2007 [Turkish PIL].

[44]Art. 7 of the Mexico City Convention.

[45]Overriding mandatory provisions are those, which cannot be derogated from and are applicable even when another foreign law is meant to govern the contract. See, Arts. 9 and 21 read along with Art. 3(3) and 3(4) of the Rome I Regulation; Arts. 4 and 5 of the Law of the Laws; Arts. 11 and 12 of the Japanese Act; Arts. 11 and 18 of the Mexico City Convention; Arts. 7 and 10 of the Conflict of Laws of South Korea; Arts. 17 and 18 of Swiss PIL; and Arts. 5, 6 and 31 of Turkish PIL. Also see generally, Rühl (n 4) and LM van Bochove, 'Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European International Law' (2014) *Erasmus Law Review* 147.

[46]See, Arts. 5–8 of the Rome I Regulation; Arts 16, 42 and 43 of the Law on the Laws; Arts. 11 and 12 of the Japanese Act; Art. 27 and 28 of the Conflict of Laws of South Korea; Art. 120 and 121 of Swiss PIL; and Art. 26, 27, 29, 30 of Turkish PIL.

[47]Ibid. Also see, Rühl (n 4) 347–351.

[48]Accordingly, to Art. 1, the Hague Principles only apply to 'choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer or employment contracts'. For a detailed discussion on the Hague Principles, see, JL. Neels, 'The Nature, Objective and Purposes of the Hague Principles on Choice of Law in International Commercial Contracts' (2015) 4 *Journal of South African Law* 774, 774–775.

arbitrators while interpreting,[49] supplementing[50] and developing[51] the rules on party autonomy. The Hague Principles advocates the acceptance of the parties' freedom to choose any foreign law, including soft law and non-State rules which are in the form of non-binding legal principles to govern their international commercial contracts.[52] The Hague Principles encourage the acceptance of party autonomy except when the choice contravenes the overriding mandatory provisions or is manifestly contrary to the public policy of the forum.[53]

3. The choice of law revolution in India and Australia

3.1. Historical developments: an overview

Neither Indian nor Australian private international law has been codified. The decision of the Privy Council in *Vita Food Products Incorporated v Unus Shipping Company*[54] has formed the genesis for the development of the rules on the subject in India[55] and Australia.[56] At the same time, the scope of the parties' freedom in selecting the governing law (also known as the proper law of the contract) has varied over time in these countries.

In India, party autonomy in the choice of law has been accepted since the pre-independence era.[57] However, Cheshire's objective interpretation of party

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[49]Commentary to the Hague Principles (n 3) para 3 to the Hague Principles, which defines 'interpretation' as 'the process of explaining, clarifying or construing the meaning of existing rules of private international law'.

[50]Ibid. The term 'supplementation' has been defined as 'the refinement of an existing rule of private international law, which does not sufficiently or appropriately provide for a particular type of situation'.

[51]Ibid. The term 'development' has been defined as the 'addition of new rules, where none existed before, or effecting fundamental changes to preexisting ones'.

[52]Arts. 2 and 3 of the Hague Principles.

[53]Arts. 11(3) and (4) of the Hague Principles. Also see, G Saumier, 'The Hague Principles and the Choice of Non-State "Rules of Law" to Govern an International Commercial Contract' (2014) 40(1) *Brooklyn Journal of International Law* 1, 5 *et seq*; R Michaels, 'Non-State Law in the Hague Principles in the Choice of Law in International Commercial Contracts' in Kai Purnhagen & Peter Rot (eds), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Springer 2014) 43.

[54](n 15).

[55]See for instance, the decisions of the Supreme Court of India in *British India Steam Navigation Co Ltd v Shanmughavilas Cashew Industries,* [1990] 3 SCC 481; and *National Thermal Power Corporation v Singer Corporation,* [1992] 3 SCC 551; and the decisions of the Delhi High Court in *National Agricultural Marketing v Alimenta S.A* (decision of 10 July, 2009); and *Swatch Ltd. v Priya Exhibitors Pvt. Ltd,* (101) DRJ 99.

[56]For the centrality of the *Vita Food* decision within the Australian private international law, see e.g. Mortesen et al, *Private International Law in Australia*, (4th edn LexisNexis Butterworths, 2019) 443–444; Davies *et al., Nygh's Conflict of Laws in Australia* (9th ed LexisNexis Butterworths, Australia 2020) 475 [Nygh, Conflict of Laws].

[57]See, *Brijraj Marwari v Anant Prasad* AIR 1942 Cal 509; *Indian and General Investment Trust v Sri Ramchandra Mardaraja Deo, Raja of Kalikote,* AIR 1952 Cal 508 [38]; *The State Aided Bank of Travancore Ltd v Dhrit Ram*, AIR 1942 PC 6 [8];

autonomy, which drew inspiration from Batifol's theory of 'localisation'[58] influenced the determination of the applicable law until the early 1990s.[59] The Supreme Court in *Delhi Cloth and General Mills Co Ltd v Harnam Singh*[60] and *British India Steam Navigation Co Ltd v Shanmughavilas Cashew Industries*[61] stated that the choice of a neutral foreign law was not permitted. The choice should have been of that law which forms the 'centre of gravity' of the agreement.[62] In other words, the parties' right limited to the choice of a law of the country in which, the contract is localised'.[63] By this principle, the parties could exercise their liberty to select the governing law by localising the contract and ensuring that the chosen legal system formed the 'centre of gravity' of the agreement. The parties could choose a foreign law by ensuring that the factors such as the place of contracting (*locus contractus*), place of performance (*locus solutionis*), the choice of forum (*lex fori*), the seat of arbitration, language and currency were localised in that legal system. Therefore, the parties were prohibited from 'picking out whatever laws they like from any part of the globe and agreeing those laws shall govern their contract'[64] for its susceptibility to produce 'strangely unrealistic results'.[65]

In Australia, Cheshire's interpretation has never gained popularity.[66] While refusing to fully associate the party autonomy doctrine with the notion of 'centre of gravity', early cases did require the parties to demonstrate some connection to the chosen law.[67] For example, in *Queensland Estates Pty Ltd v Collas*,[68] the court refused to accept parties' choice of a Hong Kong law because of a lack of a sufficient connection with the parties or their transaction.[69] Accordingly, both countries had historically set a significant limitation on the ability of the parties to

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VG Ramachandran, 'Conflict of Laws as to Contracts' [1970] 12 Journal of Indian Law Institute 269, 275; and Khanderia, Party Autonomy (n 35) 6–7.

[58]J Blom, 'Choice of Law Methods in the Private International Law of Contract' (1980) 18 *Canadian Yearbook of International Law* 161, 175.

[59]For a detailed discussion on Cheshire's objective interpretation of party autonomy in the choice of law, see, GC Cheshire, *Private International Law* (6th edn, Clarendon Press 1961) 215; and Khanderia, Party Autonomy (n 35) 1–2. Also see generally, M Wolff, 'The Choice of Law by the Parties in International Contracts' (1937) 49 *Juridical Review* 110.

[60]AIR 1955 SC 590.

[61][1990] 3 SCC 481.

[62]Ibid, [31]. Also see, the decision of the CHC in *Rabindra N. Maitra v Life Insurance Corporation of India*, AIR 1964 Cal 141 [16–18]; KB Agarwal & Vandana Singh, *Private International Law in India* (Kluwer 2010) 93; and Khanderia Party Autonomy (n 35) 8.

[63]AIR 1955 SC 590, [36], referring to Cheshire (n 59) 203. Also see, *Rabindra N Maitra* (n 62).

[64]Ibid, [37].

[65]Ibid.

[66]For traditional limitations on the party autonomy within Australia, see Nygh, Conflict of Laws (n 56) 477; Mortesen (n 56) 445–446.

[67]*Kay's Leasing Corp v Fletcher* (1964) 64 SR (NSW) 195 at 205. See also Mortesen (n 56) at 445; Nygh, Conflict of Laws (n 56) 475.

[68]*Queensland Estates Pty Ltd v Collas* [1971] Qd R 75.

[69]Ibid, 80–1.

determine the applicable law. In India, those limitations took place due to the adoption of Batifol's theory of localisation. In Australia, the case law required to demonstrate a link to the chosen law. A choice of a neutral law which was unrelated to the parties and the event was not possible.

3.2. The convergences

3.2.1. The choice of a neutral law

The interpretation of party autonomy has since undergone a remarkable transformation in India and Australia.

In India, the theory of localisation no longer finds favour. The Supreme Court in *National Thermal Power Corporation v Singer Corporation*[70] stated that the proper law of the contract should be determined according to the legal system, by which the parties intended the contract to be governed. [71]

The dispute arose from an international contract between an Indian and English company, which contained an express choice of law clause in favour of the English legal system.[72] Relying on Dicey's interpretation of party autonomy, the court further added that the express intention of the parties is generally decisive in determining the proper law of the contract. The only limitation on this rule is that the intention of the parties must be expressed *bona fide* and it should not be opposed to public policy.[73]

As opposed to Cheshire's objective interpretation, Dicey advocated the choice of *any* law, even when it does not coincide with the 'centre of gravity' of the contract.[74] The court stressed that the only limitation to the parties' right was that it was '*bona fide* and legal'.[75] The dictum, thus, strived to adhere to internationally accepted standards and best practices on the subject.

The Supreme Court in *Modi Entertainment Network and Another v WSG Cricket PTE. Ltd*[76] confirmed that the principles of Indian private international law permit the choice of any foreign law, including a neutral one. The court commented on the validity of the parties' choice in favour of the English courts and its law to govern all disputes arising from their transnational licensing agreement to telecast a cricket tournament being held in Kenya on television in India.[77] The central question in the case concerned the validity of party autonomy in the choice of court.[78] Quadri J stated that

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[70](n 55).

[71]Ibid, [14], referring to A Dicey, J Morris, & L Collins (eds), *Dicey and Morris on the Conflict of Laws* (11th edn, Sweet and Maxwell 1987) Rule 180: Sub-Rule (1), which defines 'the proper law of the contract'.

[72]Ibid.

[73]Ibid.

[74]See, Dicey and Morris on the Conflict of Laws (n 24) 1161–96; and Khanderia, Party Autonomy (n 35) 1, 2.

[75](n 55) [14].

[76][2003] 4 SCC 341.

[77]Ibid.

[78]For a detailed discussion on the implications of the Supreme Court's dictum in *Modi Entertainment Network* on party autonomy in the choice of court, see, Saloni Khanderia, 'The Hague Convention on Choice of Court Agreements and the

> the growing global commercial activities gave rise to the practice of the parties to a contract agreement beforehand … to have their disputes resolved by a foreign court of their choice as a neutral forum according to the law applicable to that court.[79]

Subsequent decisions of the Supreme Court have confirmed that party autonomy in the choice of law similarly extends to international commercial arbitration, where the doctrine has been held as 'virtually the backbone' and 'one of the foundational pillars'.[80]

The judiciary has consistently endorsed the parties' right to choose a governing law across India following the decisions of the Supreme Court in the dicta indicated above.[81]

The Australian jurisprudence follows a similar trajectory. The recent cases demonstrate that no connection is required between the parties, their transaction and the chosen law.[82] Consider, for example, the landmark case in Australian jurisprudence, *Akai Pty Limited v The People's Insurance Company Limited.*[83] This case involved a credit insurance contract between a New South Wales (NSW) and a Singaporean insurance company which provided credit insurance cover for the former. During the negotiation between the companies, the Singaporean company offered the following choice of law clause: 'this policy shall be governed by the laws of Singapore'. [84]

NSW was unwilling, however, to accept the application of Singaporean law. At the same time, the Singaporean company was reluctant to accept Australian law.[85] Ultimately, the parties decided to designate English law as a tie-breaker. In this case, the parties viewed the English law as reflecting a 'relatively certain and well-developed'[86] legal framework for adjudicating their rights and duties under a credit insurance contract. The High Court of Australia did not disregard

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Enforcement of Forum-Selection Clauses in Indian Private International Law' 9(3) *International Journal of Private Law* 125–136 (2019).

[79](n 76) [11].

[80]*Centrotrade Minerals & Metal Inc v Hindustan Copper Ltd*, [2017] 2 SCC 228. Also see, *Deveshi Mishra v Oriental Structural Engineers Pvt Ltd.,* [2018] 249 DLT 619.

[81]See in this regard, the decisions of the High Court of Bombay, Calcutta and Delhi in *Rhodia Ltd and Others v Neon Laboratories Ltd,* AIR 2002 Bom 502; *White Industries Australia Ltd v Coal India Ltd,* [2004] 2 Cal LJ 197; *Swatch Ltd. v Priya Exhibitors Pvt. Ltd,* (101) DRJ 99; *Shree Precoated Steels Ltd. v Macsteel International Far East Ltd. & Anr*, [2008] 2 Bom CR 681; and *Max India Ltd. v General Binding Corporation*, 2009 (112) DRJ 611 (DB); *Deveshi Mishra v Oriental Structural Engineers Pvt Ltd.,* [2018] 249 DLT 619.

[82]*Huntingdale Village Ltd v Corrs Chambers Westgarth* [2018] 128 ACSR 168 AT 209; *Ship 'Sam Hawk' v Reiter Petroleum Inc* [2016] 246 FCR 337 at 400, *Akai Pty Limited v The People's Insurance Company Limited*, [1996] HCA 39, 188 CLR 418, 423. Also see, Nygh, Conflict of Laws (n 56) 475; and Mortesen (n 56) 445–446.

[83](n 82).

[84]Ibid.

[85]Ibid, 423.

[86]Ibid, 423. Also see, Mortesen (n 56) 445–446

the neutral choice of the parties on the grounds of being unrelated to them or their transaction.[87]

From this perspective, both systems have reached a remarkable consensus about the identity of the parties' choice.

3.2.2. The choice of soft law and non-State law

While there are sufficient judicial dicta to illustrate the acceptance of the choice of a neutral/unconnected law under the principles of the Indian private international law, whether this freedom extends to the choice of soft law, remains unclear.

In matters of arbitration, Section 28 of the Arbitration and Conciliation Act 1996 endows the parties with the right to select non-State rules and soft law to govern their international commercial agreements. The arbitration tribunal is under an obligation to 'decide the dispute in accordance with the rules of law designated by the parties'.[88] At the same time, a close examination of the existing albeit limited dicta indicates the plausible rejection of the inclusion of *lex mercatoria* within the meaning and scope of the term 'soft law' under Indian private international law of arbitration.[89]

For instance, the Delhi High Court when called upon to decide a dispute arising from a contract containing an arbitration clause between an Indian and American corporation concerning construction supervision services stated in obiter that the parties are free to select 'general principles of law recognised by civilised nations'.[90] Therefore, parties to an international commercial contract may choose non-binding legal principles such as the UNIDROIT Principles on International Commercial Contracts (PICC),[91] The UNCITRAL Arbitration Rules,[92] and the International Chamber of Commerce's (ICC) INCOTERMS[93] as the proper law of their arbitration agreement. At the same time, the court opined that

> the expression '*lex mercatoria*' is not found in arbitration clauses, and some commentators have doubted whether it has any meaning. Those who do assign it a meaning, differ as to whether it is a separate body of international commercial law or equivalent to freedom from strict legal constraint.[94]

That said, it is doubtful whether the selection of soft law and non-State rules is permitted in matters of litigation. There are no judicial dicta which explicitly

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[87]Ibid, 440–442.
[88]Sec. 28(2) of the Arbitration and Conciliation Act 1996.
[89]See, *National Highways Authority of India v Sheladia Associates*, INC [2009] 113 DRJ 835 [30].
[90]Ibid.
[91]UNIDROIT, 'UNIDROIT Principles on International Commercial Contracts, 2016' <www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf>
[92]The text of the UNCITRAL Model Law is available at: https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.
[93]For detailed information on the ICC Incoterms, visit: https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-2020/
[94]*National Highways Authority of India* (n 89) [30].

accepts (or, for that matter, rejects) the parties' express choice of non-state rules such as the PICC as the proper law of the contract. However, a close examination of the Supreme Court's definition of the term 'proper law of contract' in *National Thermal Power Corporation* indicates that the Indian private international law will disregard the parties' choice of non-state rules.[95] As mentioned above, the court stated that the proper law refers to 'the legal system, by which the parties intended the contract to be governed'.[96] The use of the term 'legal system' suggests that only the choice of the substantive law of a country, as opposed to non-binding rules not belonging to any jurisdiction, will be permitted.

In a related vein, the comments of the Telecom Dispute Settlement and Appellate Tribunal (TDSAT), New Delhi in *Kumarina Investment Ltd. v Digital Media Convergence Ltd & Anr,*[97] which albeit of persuasive value, provides considerable support to the position that Indian private international law does not permit the choice of soft law. While determining the validity of the parties' (an Indian and Israeli company's) selection of the English law to govern their telecommunication agreement, the TDSAT in an *obiter* referred to the provisions of European conflict of law rules. Referring to Recital 13 of the Rome I Regulation and scholarly writings on the same, the TDSAT stated that insofar as the instrument stipulates that the 'contract will be governed by the law chosen by the parties' it implicitly excludes from its scope, the choice of rules of law not belonging to any legal system.[98] The TDSAT further referred to Recital 13, which, however, permits the parties to 'incorporate by reference into their contract' the provisions of a non-State law or international convention.[99]

The uncertainty concerning the possibility of incorporation of soft law can be witnessed in Australia as well. The decision of *Engel v Adelaide Hebrew Congregation Inc* discussed the possibility to designate Jewish Hallaha law to adjudicate the dispute between the parties.[100] Doyle CJ stated that

> [when] the parties to a contract are governed generally by Australian law, or of which Australian law is the proper law, [they] can agree to incorporate provisions of another system of law as provisions of the contract.[101]

Referring to the Court of Appeal of England's dictum in *Halpern v Halpern*,[102] *per* Waller LJ, the court stated that there must be certainty about what is being incorporated.[103] Besides, Doyle CJ stressed that

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[95](n 55) [14].
[96]Ibid.
[97]2010 TDSAT 73 [27].
[98]Ibid, referring to Andrea Bonomi, 'Rome I Regulation on the Law Applicable to Contractual Obligations' (2010) 10 Yearbook of Private International Law 165, 169. Also see, Setalvad, (n 2) 517.
[99]Ibid.
[100](2007) 98 SASR 402, 409.
[101]Ibid [36].
[102][2007] EWCA (Civ) 291.
[103]*Engel* (n 100), 409 referring to *Halperin* (n 102) [33].

> the incorporated law can apply only to, and operate only as part of, that part of the contract into which it is incorporated.[104]

Scholarly writings have understood the court's remarks as enabling the parties to incorporate substantive provisions of a non-state law (such as religious law) in the terms and conditions of their contract.[105] At the same time, the right does not appear to have been extended to the choice of soft law (to govern the entire contract) insofar as it does not represent an official law of one of the states. Scholarly writings opine that the possibility of incorporating a non-state framework does exist under Australian law.[106] In this regard, Mortesen comments that '[t]he current Australian law would probably prohibit such a choice' [of soft law].[107]

It would appear therefore that both systems tend to be more receptive to the incorporation of the provisions of the soft law within the terms and conditions of the contract, instead of a selection of soft law through a choice of law clause.

3.3. The divergences

Despite the many similarities between Australian and Indian private international law on party autonomy in the choice of law, the practice of the courts has differed in several respects while giving effect to the parties' choice. Although the laws of both these countries permit the courts to disregard the parties' choice of foreign law if it is not *bona fide* or if it is illegal and opposed to the public policy of the forum-State, the manner in which the courts have interpreted the parameters of these limitations have differed in several respects.

3.3.1. Limitations to the parties' choice: 'bona fide, legal and not opposed to public policy.'

As indicated above, the Indian Supreme Court in *National Thermal Power Corporation* clarified that the parties' freedom to choose the governing law is subject to being '*bona fide,* legal and not opposed to the overriding public policy'.[108] These limitations are directed to regulate the law relating to freedom of choice and protect the parties from the arbitrariness of party autonomy. It is not clear whether Indian jurisprudence will follow common law in suggesting that *bona fide* should be understood as referring to mandatory rules of the forum.[109]

In a similar vein, the Australian jurisprudence has remained perplexed on the point of the *bona fide* limitation.[110] A review of the case law reveals that there is only one case where the court has considered *bona fide* as a possible limitation to party autonomy, namely, *Golden Acres Ltd v Queensland Estates Pty Ltd*.[111] This case concerned an agreement between Queensland and Hong Kong companies

[104] Ibid, [36], emphasis added, referring to *Halperin* (n 102).
[105] Nygh, Conflict of Laws (n 56) 468; Mortesen (n 56) 438.
[106] Nygh, Conflict of Laws (n 56) 468; Mortesen (n 56) 438. Also see, *Re South Head & District Synagogue (Sydney)*, (2017) NSWSC 823 AT [29].
[107] Mortesen (n 56) 438, n.1
[108] (n 55) [14], referring to the remarks of Lord Wright in *Vita Food* (n 15)
[109] See, *The Hollandia* (n 27); Dicey and Morris on the Conflict of Laws (n 24) 756; and Morris, Scope of Carriage (n 25) 66
[110] Nygh, Conflict of Laws (n 56) at 477.
[111] [1969] Qd R 378.

which named the Hong Kong law as applicable. By referring to *bona fide*, Hoare J remarked that 'the attempted selection of this law was for no other purpose than to avoid the operation of the Queensland law'.[112] Not surprisingly, Australian scholars have suggested a reconsideration and a complete elimination of this concept as a possible limitation to the party autonomy doctrine.[113] It has been mocked as 'vague'[114] and as a law that 'should no longer be regarded as good law'.[115]

The public policy limitation has received much more attention in the Indian courts. The Indian law does not define the terms 'public policy' or 'opposed to public policy'. However, the Supreme Court has, in several cases articulated that a contract would be considered to be opposed to public policy when it tends to harm public interests and welfare in a 'substantially incontestable' manner.[116] A close examination of the existing dicta demonstrates the extreme caution that the judiciary in India would exercise in invoking the 'public policy' exception to such contracts.

The court in *Ratan Chand Hira Chand v Askar Nawab Jung* stated that in international agreements, public policy 'may constitute a less serious threat to municipal institutions than would purely local transactions'.[117] The Supreme Court in *Renusagar Power Co Ltd*[118] and *Ssangyong Engineering & Construction Co. Ltd. v National Highways Authority of India (NHAI)*[119] clarified that the public policy of India would be considered to have been contravened when the agreement contradicts 'some fundamental principle of justice … prevalent concepts of good morals [or] deep-rooted traditions of the common weal'.[120] Judicial dicta further illustrate that the term 'public policy', thus, refers to that of India as espoused under Section 23 of the Indian Contract Act 1872 [ICA].[121] Accordingly, contracts governed by a foreign law will not be enforced in India if they contravene the public policy of India.[122] The choice of law will, therefore, be

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[112]Ibid, 385

[113]Mortesen (n 56) 445.

[114]Nygh, Conflict of Laws (n 56) 475

[115]Mortesen (n 56) 445.

[116]See, *Central Inland Water Transport Corporation Ltd v Brojo Nath Ganguly*, [1986] 2 SCR 278; *Ratan Chand Hira Chand v Askar Nawab Jung,* [1991] 3 SCC 67; *Gurmukh Singh v Amar Singh*, [1991] 3 SCC 79, 86; and Nilima Bhadbhade, *Pollock and Mulla on the Indian Contract and Specific Relief Acts* (Lexis Nexis Publications 2014) 525.

[117][1991] 3 SCC 67, 76–77. Also see, Bhadbhade (n 116) 524–525.

[118]1994 Supp (1) SCC 644.

[119]2019 SCC Online SC 677 [13], [28] and [37].

[120]*Renusagar Power Co. Ltd*. (n 118) [51–57] referring to *Loucks v Standard Oil Co of New York*, 172 App. Div. 227, 159 N. Y. Supp. 282; and *Ssangyong Engineering* (n 119) [13], [28] and [37].

[121]See, *Taprogge Gesellschaft MBH v. IAEC India Ltd,* AIR 1988 Bom 157 [11–13]; and *Kumarina Investment Ltd* (n 97). For a detailed discussion on ICA, Sec. 23, see, Bhadbhade (n 116) 524–566; and A Singh, 'Law of Contract and Specific Relief' (12th edn, Eastern Book Company, Lucknow) 255–288.

[122]See, the decisions of the Supreme Court of India in *Cairn India Ltd & Ors* [8.1, 28.1, 29] referring to its earlier decisions in *Shri Lal Mahal Ltd. vs. Progetto Grano Spa*, [2014] 2 SCC; *ONGC Ltd. v. Saw Pipes Ltd.,* [2003] 5 SCC 705, 723–24 [31];

disregarded if the consideration of the object of the agreement is unlawful under the Indian law;[123] or if it operates in restraint of marriage, trade or legal proceedings.[124]

The decision of the Bombay High Court in *Taprogge Gesellschaft MBH v. IAEC India Ltd.*[125] illustrates this point. The court decided to disregard an agreement between a German and an Indian company, where the latter agreed to refrain from selling or offering from sale some of the products manufactured by the former.[126] Rejecting as illegal, the court *per* Guttal J. stated that the agreement, although governed by foreign law, was to be performed in India and operated in restraint to trade.[127] According to Sections 23 and 27 of the ICA, such contracts are considered as void for being against the public policy of India.[128]

Similarly, the TDSAT in *Kumarina Investment Ltd.* clarified that the parties' choice of law agreement would be invalidated if it contravenes Sections 23, 27 and 28 of the ICA, which espouse the public policy of India.[129] Accordingly, the parties' choice will be construed as being illegal and opposed to public policy if it operates in the restraint of trade; restricts any party from enforcing its rights under the contract or otherwise extinguish or discharge the liability of any party.[130]

A review of the Australian jurisprudence on the point of public policy limitation suggests that its application has been restricted. In contrast to Indian jurisprudence, there is no tendency to equalise between the domestic public policy and the notion of this doctrine in Australian private international law. In the domestic realm, the principle of public policy plays an essential role in determining the validity and legality of contracts.[131] For a given domestic agreement to be valid, it needs to meet specific criteria of legality. For example, Australian courts will not enforce contracts for performance of crimes or contracts that unreasonably limit trade.[132]

When it comes to private international law vision of public policy doctrine, it is vivid that the Australian courts have adopted even a higher threshold in this regard. Despite some suggestions otherwise,[133] this context remains to be limited

Renusagar Power Co. Ltd. (n 118); and *Vijay Karia & Ors v. Prysmian Cavi E Sistemi SRL & Ors,* 2020 SCC Online SC 177.

[123]See, ICA, Secs. 23–25. Also see, Bhadbhade (n 116) 618–693; and Singh (n 121) 290–326.

[124]Ibid, Secs. 26–28. Also see, Bhadbhade (n 116) 481–617; and Singh (n 121) 255–290.

[125](n 121).

[126]Ibid.

[127]Ibid, [21]–[22].

[128]Ibid, [21]–[22].

[129](n 97) [11, 14, 16 and 17], while referring to the Supreme Court's dictum in the *National Thermal Power Corporation* (n 55).

[130]Ibid.

[131]See, A Robertson & J Paterson, *Principles of Contract Law* (6th edn, Thomson Reuters, 2020) 853–894.

[132]Ibid, 870–876.

[133]R Garnett, Substance and Procedure in Private International Law (OUP, 2012) at 339, 338, 362. While supporting a broad understanding of the public policy doctrine, Professor Garnett frankly acknowledges that public policy 'has typically been reserved in common law rules of private international law for serious cases'.

to highly radical circumstances,[134] such as situations when a foreign law provision violates 'some deep-rooted tradition of the common weal'.[135] While the majority of the decision on the public policy have arisen in the context of the question of recognition of foreign judgments,[136] the choice of law context of Australian jurisprudence has followed a very high standard for application of the doctrine. [137]

Australian courts have justified this position by referring to comity and respect for foreign states and foreign legal institutions.[138] The notion of public policy in private international law differs from its domestic conception.[139] Therefore, it seems to be clear that an Australian court will not disregard the parties' choice solely on the basis that the contract does not meet the requirements of the domestic policy.

Accordingly, the two jurisdictions seem to diverge on the point of *bona fide* and public policy limitations. India seems to have a more determinative vision of the former. Australia, on its part, does not seem to follow the Indian tendency of adopting the principles of public policy as indicated in the domestic law.

3.3.2. The protection of weaker parties

In some circumstances, the parties' choice of foreign law may additionally have to be disregarded to protect weaker parties. The longstanding position of the European jurisprudence is that private international law should serve as a vehicle for the protection of weaker parties under the contract. Considered as vulnerable, these parties need to be protected from party autonomy for several reasons.[140] Firstly, such parties are susceptible of being less informed as regards the content of the chosen law as compared to the stronger party such as the business person, employer or principal who routinely engages in concluding contracts and, is, thus, more familiar with the contents of the law that are likely to be advantageous to it.[141] Secondly, the weaker parties are also economically dependent on the other party and, are, therefore, prone to succumb to a choice of law clause.[142] Thirdly, such parties tend to be intellectually disadvantaged and capable of agreeing on the chosen law too quickly.[143]

The traditional position in the United States [US] is that weaker parties do not require special protection. Instead of favouring pre-built protective safeguards for particular contracts, one can opt for an assessment of the parties' interaction on

[134]Mortesen (n 56) at 447.
[135]See, *John Pfeiffer Pty Ltd v Rogerson*, (2000) 203 CLR 503, 541 referring to *Loucks v Standard Oil Co of New York*, 172 App. Div. 227, 159 N. Y. Supp. 282. Also see, M Douglas, 'The Impact of the Hague Principles of Choice of Law in International Commercial Contracts' (2018) 19 *Melbourne Journal of International Law* 1, 21–23.
[136]See, Mortensen (n 56) 240–247
[137]*Sykes v Cleary,* (1992) 176 CLR 77 at 112–113.
[138]See for instance, *Jenton Overseas Investment Pte Ltd v Townsing,* (2008) VSC 470 [22].
[139]See Nygh, Conflict of Laws (n 56) 454.
[140]Rühl (n 4) 339 *et seq*.
[141]Ibid, 342.
[142]Ibid, 343, 344.
[143]Ibid, 344, 345; and U Benoliel & SI Becher, 'The Duty to Read Unreadable' (2019) *Boston College Law Review* 2255, 2256–2269.

the case-to-case basis. Through a careful evaluation of particular interactions, this position aims to apply the traditional contract law doctrines of unconscionability and undue influence to address the equality of bargaining power in specific cases.[144]

The position under Indian private international law is similar to that in the US. India does not have any special provisions to safeguard the interests of weaker parties such as consumers, employees, commercial agents and insurance policy-holders from unhindered freedom to choose a foreign law. In such circumstances, the protection of weaker parties is likely to be achieved by ascertaining whether the parties' choice of law contravened the Republic's public policy.

Domestic contracts concluded between parties who are unequal in bargaining power are presumed to be unfair, unreasonable and unconscionable and, therefore, opposed to public policy under the parameters of Section 23 of the ICA.[145] In such cases, it has been held that freedom of contract will not be permitted if it results in taking advantage of 'oppressed or depressed people'.[146] For instance, in *Central Inland Water Transport Corporation Ltd v Brojo Nath Ganguly*[147] the Supreme Court struck down a clause in a contract between the government-owned corporation and an employee as void for being opposed to the public policy. The term stated that the latter could be removed by three months' notice or pay instead of the same without any reason.[148]

Although there is no exhaustive list on the types of contracts that will be considered to have been concluded with a weaker party, the Supreme Court in *Amrit Banaspati Co Ltd v State of Punjab*[149] has shed some guidance to this effect. The court observed that

> the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in the position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in the contract may be.[150]

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[144]See, SC Symeonides, 'Party Autonomy in Rome I and II from a Comparative Perspective', in *Convergence and Divergence in Private International Law* 513 (Katharina Boele-Woelki et al. eds., 2010); ZS Tang, *Electonic Consumer Contracts in the Conflict of Laws* (Hart: Hart Publishing, 2009) 238–241.

[145]See, *Central Inland Water Transport Corporation Ltd v Brojo Nath Ganguly*, [1986] 2 SCR 278. Also see, Bhadbhade (n 116) 562; and Singh (n 121) 285.

[146]See, *Pomal Kanji Govindji v Vrajlal Karsandas Purohit*, AIR 1989 SC 436. Also see, Bhadbhade (n 116) 562.

[147](n 145).

[148]Ibid.

[149]AIR 1992 SC 1075. Also see, Bhadbhade (n 116) 563–564.

[150]Ibid, 1611. Also see, Bhadbhade (n 116) 563–564.

The dicta indicated above, however, did not involve a conflict of law issue. As a result, there is no clarity on whether the courts in India would disregard a choice of law clause as a) *void ab initio* if the agreement is concluded with a weaker party; or b) valid unless its application is unfair and unreasonable.

In Australia, the protection of weaker parties is achieved through the provisions of the Australian Consumer Law [ACL].[151] The statute defines a 'consumer' as a person who purchases a product or service for a personal (rather than commercial) use,[152] or if given product or service falls under the nominal threshold of $40,000.[153]

The statute provides broad protection to consumers through a wide range of principles which intertwine with the traditional laws of contract and tort. For example, under the doctrine of 'unfair contract terms', the court can invalidate a clause in a consumer contract if that term is 'unfair'.[154] ACL requires the consumer to demonstrate that the term was a part of a 'take-it-or-leave' contract[155] and that the clause is drafted in a manner that protects only one of the parties.[156] In this way, ACL significantly lowers the high bar of the common law unconscionability doctrine[157] for challenging contractual terms on substantive grounds of unfairness.[158]

The doctrine of 'consumer guarantees' is also vital to determine the rights of consumers.[159] The court is empowered to incorporate specific provisions into the contract which benefit the consumers to guarantee the quality of the products purchased by the consumer and to assure that the product fits its stated purpose.[160] The legislation indicates that the parties cannot contract out the various consumer guarantees[161] and it is up to the consumer to decide which remedy s/he should receive in case of a significant breach of one of the consumer guarantees.[162]

In *ACCC v Valve Corporation*[163] (*Valve Corporation*), the Federal Court of Australia confirmed the extraterritorial application of the ACL in certain

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[151]Competition and Consumer Act 2010 (Cth)- Schedule 2 [ACL]. Also see, SG Corones, *The Australian Consumer Law*, 3d edition (Law Book, 2016) 2–45for a detailed discussion on the legislative history of ACL.

[152]ACL, Secs. 3(1)(b) and 23(3) and (4). In 2016, ACL further extended the application of some of its provisions to 'small business' contracts which are defined according the perimeters of the value of a given contract (up to $300,000) and the number of employees (up to 20 employees) that a given business employs.

[153]Ibid, Secs. 3(1)(a) and 23.

[154]Ibid, Secs. 23–28

[155]Ibid, Sec. 27.

[156]Ibid, Secs. 24- 25. Also see, Corones (n 151) 209–249, *ACCC v Chrisco Hampers Australia Pty Ltd* [2015] FC 1204; *ACCC v Richards & Sons Pty Ltd* [2017] FCA 1224; and *ACCC V Servcorp Ltd* [2018] FCA 1044.

[157]See*Commercial Bank of Australia Ltd v Amadio,* (1983) 151 CLR 447.

[158]For a discussion of this point, see JM Paterson, "The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts" 33 *University of Melbourne Law Review* (2010).

[159]ACL, Secs. 54–67.

[160]Ibid, 54–55.

[161]Ibid, Sec. 64 (1).

[162]Ibid, Sec. 259 (1)- 260.

[163][2017] FCAFC 224 (*Valve Corporation*). *Valve Corporation* was delivered in the Federal Court of Australia in 2016. It has been fully reaffirmed by the Full Court in

circumstances. The case involved a multibillion-dollar US company which sells online video games. No less than two million Australian consumers concluded an online contract with this company for a purchase of a video game/s. The agreement included a provision which waived the rights of the consumer for a refund.[164] On several occasions, the company refused to compensate Australian consumers when the video games did not work well.[165] The company relied on the aforementioned 'no-refund' term in the agreement and argued that the choice of the law of Washington validated such clauses.[166]

The court decided that the choice-of-law clause is not valid because it contradicted the doctrine of consumer guarantees under ACL.[167] The ACL would be unaffected by 'no-refund' term in the agreement and the fact that the State of Washington law was chosen.

There are at least two ways to understand *Valve Corporation*[168] on the point of the extraterritorial scope of ACL. One option is to ascertain if the application of foreign law will debilitate the position of the consumers.[169] In other words, the parties' choice of foreign law is valid as long as it does not diminish the rights available to the consumer under the ACL. The other option would challenge the validity of the party autonomy in consumer contracts altogether.[170] In this case, it could be argued that *all* choice-of-law clauses are not valid in the context of consumer transactions.

3.4. The challenges of COVID-19

3.4.1. Conceptual challenges

Circumstances such as the COVID-19 pandemic are likely to adversely affect the performance of several contracts, and especially those with a foreign element, due to governmental measures imposing lockdowns in most countries to curb the spread of the disease. The parties to a contract will be faced with many legal issues in the performance of the obligations for months to come. One of the critical questions facing the communities across the globe is an understanding of the status of contracts signed with the foreign party before, or even during the coronavirus outbreak. Some contracts of goods or services may not be able to be performed at all; while others may be hindered by delay or an increase in the original price. These predicaments will give rise to the question of compensation for non-performance.

2017 [*Valve Corporation v ACCC*) [2017] FCAFC 224, and afterwards, by denying the appeal leave, tacitly reaffirmed by the Australian Supreme Court: *Valve Corporation v ACCC* [2018] HCASL 99 (18 April 2018).

[164]Ibid, [2].

[165]Ibid [229–334].

[166]For a description of the factual basis of the case see, Ibid [1–41].

[167]ACL, Sec. 64 (1).

[168](n 165)

[169]Cf Art. 6 of the Rome I Regulation.

[170]R Garnett, 'Arbitration of Cross-Border Consumer Transitions in Australia: A Way forward' (2017) 39 (4) *Sydney Law Review* 569, 581–582. For a somewhat related question within the European law, see G Ruhl, 'The Unfairness of Choice-of-Law Clauses, or: The (unclear) Relationship of Art. 6 Rome I Regulation and the Unfair Terms in Consumer Contracts Directive' (2018) 55 *Common Market Review* 201.

The legal ramifications for consumers and businesses who have been affected by the non-performance of contracts due to the outbreak will largely depend on two aspects.

First – does the contract include a *force majeure* clause; and if, yes, is it valid? If not, what is the remedy available to the parties under the substantive law? In some countries, mainly civil law jurisdictions, the consequences of impossibility to perform will be dealt with under the doctrine of *force majeure*.[171] In common law systems, the doctrine of frustration of contract will regulate non-performance in such circumstances.[172] However, 'the situation expressed by all these words is basically the same'.[173]

Second, and most importantly, it will depend on the question of applicable law (with the party autonomy at its heart) to govern the transaction which becomes exceptionally important in light of the divergence between the systems on the matters of *force majeure* clauses and the doctrine of frustration.

A *force majeure* clause and/or the doctrine of frustration can be triggered depending on the time that the contract was concluded. For example, it could be argued that contracts concluded after the declaration of WHO on 11 March 2020, of COVID-19 as a pandemic will not be seen as an unforeseeable, supervening event. After that, the consequence of performance and non-performance will depend on the nature and structure of a particular contract. Most contracts contain a *force majeure* clause that permits the parties from being excused from performing their contractual obligations on the occurrence of certain listed unforeseen, supervening events beyond their control – that renders the execution of the contract impracticable, impossible or illegal. Typical illustrations of events included in the clause are war, strike, earthquake, epidemics or government restrictions. Therefore, government restrictions imposed to curb the outbreak of the pandemic, such as closing its borders may fall within the purview of the clause.

The general principles of the law of contract on excused non-performance would govern the contract in the absence of a *force majeure* clause or when it has been declared as invalid by the adjudicating authority.

Different laws adopt different standards to redress the parties for the inability to perform a contract due to an unforeseeable, supervening event such as the COVID-19 outbreak. Several civil law jurisdictions such as France,[174] Austria,[175] Germany,[176] Greece,[177] Italy,[178] the Netherlands,[179] Scandinavian countries[180]

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[171]See generally, MG Rapsomanikas, 'Frustration of Contract in International Trade Law and Comparative Law' (1979–1980) 18 *Duquesne Law Review* 551.

[172]Ibid 551.

[173]Ibid.

[174]See, E Hondius and HC Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (Cambridge University Press 2011) 144–145.

[175]See, Secs. 936, 1052, and 1170a of the Austrian Bügerliches Gesetzbuch (BGB), 1811.

[176]See, Sec. 313 of the German BGB, 1900.

[177]See, Art. 388 of the Greek Civil Code, 1946.

[178]See, Art. 1467 of the Italian Codice Civile, 1942.

[179]See, Art. 6:258 of the Dutch Civil Code, 1992.

[180]See, Art. 6.111 of the PECL 1999.

and, China[181] adopt a dichotomy in the solutions offered under their laws – in the form of *force majeure* and hardship to redress the parties for grievances caused by the occurrence of an unforeseeable, supervening event. These jurisdictions permit the parties to be excused from executing their contractual obligations under the doctrine of *force majeure* if the occurrence of an impediment such as the COVID-19 renders the performance impossible.[182] The non-performance must be uncontrollable, for instance, when it was led by a government, as opposed to a self-imposed lockdown.

In some cases, an unforeseeable, supervening event altered the equilibrium of the contract and rendered it more onerous (but not impossible) to perform.[183] In such circumstances, the laws of these countries permit the parties to renegotiate the terms of the contract under the doctrine of hardship (sometimes referred to as commercial impracticability).

The United States does not adopt any such dichotomy where it separates the effect of an impossible act with that which has become more onerous to perform. American courts, thus, equate commercial impracticability or hardship with impossibility by permitting the parties to terminate the contract in both these circumstances. Section 2-615 of the Uniform Commercial Code 1978 [UCC], which applies in part to all the 50 States read along with section 261 of the Restatement Second [Restatement 2d], accordingly, permits the parties to be discharged (and does not allow re-negotiation) if an 'extreme or unforeseen difficulty or expense' has altered the nature of the performance of the terms of the contract.[184]

In some countries such as the UK, India and Australia, non-performance for a supervening event such as COVID-19 will be dealt with under the doctrine of frustration of contract. As such, Indian[185] and Australian[186] laws of contract are predicated on the English common law. In the common law, the performance of a contract will generally not be excused unless the inability to execute the obligations is attributed to an unforeseeable, supervening event which rendered the agreement fundamentally different from the original contemplation of the parties.[187] The performance must, therefore, be made impossible[188] and not merely

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[181]See, Art. 117 of the Chinese Contract Law 1999; and Art. 26 of the Supreme People's Court of the People's Republic of China [SPC], 'Interpretation II of the Supreme People's Court on Several Issues concerning the Application of the Contract Law of the People's Republic of China' Fa Shi [2009] No. 5 (13 May 2009) [Interpretation II].

[182]For a detailed discussion on force majeure in civil law jurisdictions, see, M Katsivela, 'Contracts: *Force Majeure* Concept or *Force Majeure* Clauses?' (2007) 12(1) *Uniform Law Review / Rev. dr. unif.* 101, 112.

[183]See, Hondius & Grigoleit (n 174) 144–145.

[184]See, Comment 4 to Sec. 2–615 of the UCC; and Comment (d) to Sec. 261 of the Restatement 2d.

[185]See, Saloni Khanderia, 'Commercial Impracticability under the Indian Law of Contract: Assessing the Role of the UNIDROIT Principles' 7(2) *UCL Journal of Law and Jurisprudence* 52, 62 *et seq*. [Khanderia, Commercial Impracticability].

[186]See, Robertson and Paterson (n 133) 401–407.

[187]See, the decision of the English court in *Krell v Henry*, [1903] 2 KB 740.

[188]See, the decision of the English court in *Taylor v Caldwell*, 122 Eng Rep 309 KB 1863.

more onerous to perform.[189] Accordingly, an inability to perform an international contract, which is governed by the law of any of these countries, due to mitigating circumstances caused by a situation such as the COVID-19 outbreak would result in the 'frustration' of an agreement if the occurrence of the pandemic was supervening, unforeseeable and, destroyed the very purpose of the agreement. In other words, the parties to an international contract, which has been concluded *after* the outbreak of the COVID-19 pandemic and, cannot be performed would not be able to successfully rely on the defence of 'frustration' since its occurrence was no longer unforeseeable. In such circumstances, the aggrieved party may sue the party in default for a breach of contract under the Indian law.

3.4.2. The significance of party autonomy

The doctrine of party autonomy, its nature, scope and limits will play a central role before all courts in the COVID-19 environment - including those situated in India and Australia.

The plot thickens due to the growing number of mandatory provisions and *force majeure* certificates across the globe which aim to specifically address the problems of non-performance of contracts due to the outbreak. For instance, the governments of Italy[190] and Greece[191] have undertaken specific measures to regulate the non-performance of transport, accommodation and package travel contracts. These have been designated as overriding mandatory provisions to fight the COVID-19 pandemic. Obligations arising from such agreements, whose performance has been affected by the coronavirus outbreak will, consequently, be construed as impossible by being an overriding mandatory norm under the Italian and Greek laws, regardless of the law chosen by the parties. In a related vein, the governments of Russia[192] and China[193] have issued *force majeure* certificates to absolve companies, which are located in its territories from liability for non-performance of contractual obligations with foreign parties as a result of the outbreak of the pandemic.

Will the courts in Australia and India impose similar mandatory norms when the parties have chosen a foreign law to govern their contract – whose performance has been impeded by the pandemic? Will the courts in these countries

[189]See, *British Movietonews Ltd. v. London and District Cinemas* [1952] A.C. 166, 185 *per* Lord Simon; and *Wates Ltd v Greater London Council,* [1984] 25 BLR 1; G Treitel, *Frustration and Force Majeure* (3rd edn, Sweet and Maxwell Publications, London 2014) 299–300; and Khanderia, Commercial Impracticability (n 185) 62 *et seq*. [Khanderia, Commercial Impracticability].

[190]See, Arts. 28 of Decree-Law No. 9/2020 and 88 of Decree-Law No. 18/2020 (dated 17 March 2020) read along with art 1463 of the Italian Civil Code. Also see, E Piovesani, 'Italian Self-Proclaimed Overriding Mandatory Provisions to Fight Coronavirus' 19 March 2020, <conflictoflaws.net> accessed 6 May 2020.

[191]See, Arts. 61, 65, 70 and 71 of Acts of Legislative Content of 13 April 2020, read along with Art. 44 of the Greek Constitution. Also see, A Anthimos, 'Covid-19 and overriding mandatory provisions' 15 April 2020, <conflictoflaws.net> accessed 6 May 2020.

[192]See, E Pannebakker, '*Force majeure* certificates' issued by the Russian Chamber of Commerce and Industry' 17 April 2020, <conflictoflaws.net> accessed 6 May 2020.

[193]ZS Tang, 'Coronavirus, *Force Majeure* certificates and Private International Law' 1 March 2020, <conflictoflaws.net> accessed 6 May 2020.

validate the *force majeure* clauses when the performance has been affected by the outbreak?

Consider by way of illustration: a Austrian seller and an Australian buyer concluded a contract on 25 December 2019 for the sale of cotton-wool and, explicitly agreed to resolve any dispute arising from their contract under French law. The price of cotton-wool was fixed at Rs 1,000 per quintal. The parties agree that time would be the essence of the contract and, the goods must be delivered in Munich on/before 5 April 2020. As a result of the outbreak of the COVID-19 pandemic, the government of Russia imposed a lockdown for 40 days from 26 March 2020, restricting the movement of goods and persons. The seller is, consequently, unable to perform the contract on time. The contract contains a *force majeure* clause which absolves the defaulting party from liability on the occurrence of *inter alia*, an epidemic. Besides, the provision permits the parties to terminate the agreement if the performance becomes onerous to perform due to supervening events such as the outbreak of an epidemic.

Consider this scenario before an Australian court. Scholarly writings demonstrate that the courts will validate *force majeure* clauses in business-to-business [B2B] contracts.[194] Based on the principle of freedom of contract, the parties are free to incorporate a provision in their agreement that defines the nature of the unforeseeable event and its legal consequences. In this way, the parties can contract out the application of the doctrine of frustration as applicable in Australia and decide to be regulated by foreign law.[195] In the present illustration, the Australian court would, accordingly, decide the dispute according to French law which has been chosen by the parties even though its provisions differ.

A related point applies concerning the question of the interpretation of the *force majeure* clause. Based on the general rules of contractual interpretation, the adjudicating authority will focus on the literal interpretation of the *force majeure* clause. In the case of ambiguity in the language, it will refer to the rules of purposive interpretation and the surrounding circumstances of the parties' interaction.[196]

The legal analysis of the *force majeure* clauses dramatically changes when it comes to business-to-consumer [B2C] contracts. In such circumstances, it becomes crucial to determine whether the provisions of the ACL will apply to a given contract. As mentioned in Part 2, consumers (and to some extent, small businesses) are protected because the law intervenes into the ordinary contractual relationships between the parties. If the ACL does not apply to the contract, the principle of party autonomy will play a performant role. In such circumstances, the law chosen by the parties will govern the contract. Given the relatively minor restrictions on the party autonomy to determine the applicable law,[197] the Australian court will most likely validate a choice of law clause. The parties' choice of French law will, thus, resolve such key contractual issues such as the questions of the validity and interpretation of the *force majeure* clause. In the

[194]See, Robertson and Paterson (n 133) 401–407.
[195]Ibid.
[196]See, *Ecosse Property Holdings Pty Ltd v Gee Dee Nominess Pty Ltd* [2017] HCA 12; and Robertson and Paterson (n 133) 315–316.
[197]See Part 3 above.

absence of such a clause, the chosen law will determine the doctrine of frustration of which system will govern the litigation.

The Austrian government has issued a *force majeure* certificate to the seller to certify the outbreak of the virus in the country. The question of the application of the mandatory rules of a given system and the significance of the *force majeure* certificates in Australia will become relevant only to the degree the law chosen by the parties takes those into account. Australian law does not have a clear position on the treatment given to mandatory rules of other legal systems.[198] If French law governs the transaction, the significance of the *force majeure* certificate issued to the Russian seller should be assessed according to that law.

The analysis of the abovementioned changes dramatically if a given contract is classified as B2C contract under the ACL. In such circumstances, the court's dictum in *Valve Corporation* will play a significant role.[199] As indicated above, the parties' choice of French law may not apply to the extent that it contravenes the substantive provisions of the ACL and lessens the rights of the consumer(s) in comparison to that under Australian law. In this case, a comparative analysis should take place, which would compare consumer rights under ACL and French law. In this case, French law may continue to play a role on the question of the validity and interpretation of the *force majeure* clause in the contract.

If the *force majeure* clause is drafted in a one-sided manner that operates in disadvantage to the consumer - for instance, when it only allows one party to terminate, the court may deem it invalid on the grounds of being 'unfair' under the ACL.[200] That means that *force majeure* clauses in consumer contracts will not be enforced and the doctrine of frustration will apply. The ACL does not contain any provisions that deal with the non-performance of contracts due to the occurrence of unforeseen circumstances.[201] Therefore, the governing law chosen by the parties (French law) will govern their rights and liabilities in such cases.

If, however, the Australian court decides to adopt the other interpretation of *Valve Corporation*, then it would exclude the application of French law altogether in a consumer contract.[202] In this case, the ACL will operate as an overriding mandatory rule and will invalidate the choice of law clause which names French law. In such circumstances, the Australian rules of contractual interpretation will apply to decide the validity of the *force majeure* clause. The provision would have to meet the standard of being a fair term under the ACL. In the absence of the *force majeure* clause or in case of invalidation due to the unfair terms doctrine, the Australian doctrine of frustration will apply.[203]

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[198]See, Mortesen (n 56) 458–459; and Peari (n 3) 215–219.

[199]For the two possible interpretations of *Valve Corporation* see, the text accompanying notes 168–170.

[200]ACL, Sec. 23.

[201]See, ACL Secs. 54 & 55.

[202]For this interpretation of *Valve Corporation* see, the text accompanying notes 168–170.

[203]Due the differences the Australian states and territories on the point of the frustration doctrine, the legal analysis is even more complex than that. The states of NSW, South Australia [SA] and Victoria have different laws in relation to frustration of contract as opposed to other states. A consumer that might have an entitlement of a full refund under the NSW's law, may not have the same entitlement under WA law. See e.g.

Next, consider this scenario before an Indian court (for instance, when the parties agreed on its jurisdiction). There is no clarity on the validity of a *force majeure* clause when a foreign law has been chosen. Whether the doctrine of frustration of contract applicable under the ICA will decide the validity of the *force majeure* clause will depend on whether the Indian courts will apply it as an overriding mandatory provision.

In the domestic realm, judicial dicta demonstrate that the courts will disregard a *force majeure* clause in a contract unless the performance of the contract has been hindered by an unforeseen, supervening event which has rendered its performance impossible and not merely onerous.[204] Unlike the Australian jurisprudence, there are no special rules for B2B or C2B contracts in India. The Supreme Court has in a plethora of cases denied validating *force majeure* clauses in contracts which permit the parties' to terminate the agreement due to the occurrence of any circumstance which does not render the performance impossible (for instance, due to hardship).[205] Such *force majeure* clauses have rarely if ever been recognised by the courts in India; and, the existing dicta is merely persuasive.[206] The failure to perform the obligations according to the original contemplation of the parties would amount to a breach of contract in such circumstances.[207]

The Supreme Court in *South East Asia Marine Engineering and Constructions Ltd v Oil India Ltd* has clarified that a *force majeure* clause must coincide with the provisions of Section 56 of the ICA which 'lays down a rule of positive law and does not leave the matter to be determined by the parties'.[208]

According to the doctrine of frustration of contract, which is regulated under Section 56 of the ICA, the parties may be discharged from their contractual obligations if the occurrence of an unforeseeable and supervening event has rendered its performance as impossible. Likewise, an agreement may be considered as void under Section 32 of the statute if its performance is contingent on the occurrence of an event, which has become impossible.

The non-performing party need not prove that the performance has become physically or literally impossible to invoke the defence available under

NSW (Frustrated Contracts Act 1978); South Australia (Frustrated Contracts Act 1988); Victoria (Australian Consumer Law and Fair-Trading Act 2012). See also Clive Turner et al, *Concise Australian Commercial Law*, (5th edn Thomson Reuters, 2019) 195. This raises a related question on the scope of Valve Corporation: the extraterritorial scope of ACL in the context of the *Australian* state and territories.

[204]See, the decision of the Supreme Court in *Markfred Vanaspati & Allied Industries v Union of India*, [2007] 7 SCC 679 [headnote]; and *Energy Watchdog v Central Electricity Regulatory Commission & Ors*, [2017] 12 SCC 80 [37, 39, 41, 42, 45].

[205]See, Khanderia, Commercial Impracticability (n 188) 65, referring to *Coastal Andhra Power Limited v Andhra Pradesh Central Power Distribution Co. Ltd & Others*, Decision of the Delhi High Court, OMP No. 267 of 2012 (decided on 2 July 2012) [5, 7, 8, 24].

[206]See, Khanderia, Commercial Impracticability (n 188) 66–67, referring to *Uttar Haryana Bijli Vitran Nigam Ltd. v. Central Electricity Regulatory Commission*, Decision of the Appellate Tribunal for Electricity, decided on 7 April 2016.

[207]Ibid.

[208]2020 SCC Online 451 [23]. Also see, *Energy Watchdog* (n 204) [34].

Sections 56.[209] It must, however, establish that the execution of the terms of the contract has become radically different from the original contemplation of the parties and, has 'totally upset the very foundation upon which, the parties rested their bargain'.[210] Such impossibility must, therefore, go to the root of the contract to affect the existence of the agreement. Thus, the doctrine of frustration of contract under the Indian law extends to the impossibility to perform the agreement by a change in circumstances caused due to situations such as *vis major*, acts of God, war, strike and viral outbreaks similar to COVID-19 provided that the occurrence was supervening and unforeseeable.[211] By this principle, contractual obligations, which cannot be executed due to the COVID-19 epidemic would not be construed as 'frustrated' if the agreement was concluded after the outbreak of the viral infection in India or, where its non-performance was not led by a governmental-imposed lockdown but, by a voluntary measure by the non-performing party.

Similarly 'habendum clauses' which permit the parties to renegotiate the price of (and not terminate) the contract due to an unforeseeable, supervening event such as COVID-19 will also be regarded as invalid and the courts will disregard the same if the event did not render the agreement impossible.[212] The parties may, however, ameliorate the 'harshness' of the doctrine of frustration of contract by restoring the benefit that they had received under the agreement when it became void.[213]

That said, there is no jurisprudence to indicate whether the Indian courts would validate the *force majeure* certificates issued by a foreign government (in this scenario, Russia). The answer to this question depends on whether the doctrine of frustration of contract which is dealt with under Section 56 of the ICA will be construed as an overriding mandatory norm in India. If yes, the provisions of Indian law of contract on frustration and *force majeure* will govern the contract. If, however, Section 56 is not considered as an overriding mandatory norm, then French law will continue to regulate the rights and liabilities of the parties even if its provisions differ from Indian law.

4. Lessons for India

In general, Indian and Australian private international laws are similar in several respects. The decision of the Privy Council in *Vita Food*[214] has been instrumental in shaping the principles on the subject in both the countries. The courts will give effect to the parties' choice of foreign law even if it has no connection to their transaction. As a result, the courts in India and Australia will disregard the parties' choice if it has not been made in good faith and is, therefore, not *bona fide* or if it results in the violation of the public policy of the forum. Likewise, neither India

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[209] *Satyabrata Ghose v Mugneeram Bangur & Co,* AIR 1954 SC 44 [9].
[210] Ibid.
[211] See, the decision of the Supreme Court in *Dhanrajamal Gobindram v. Shamji Kalidas & Co*, AIR 1961 SC 1285 [17–19], referring to the dictum of the English courts in *Lebeaupin v. Richard Crispin & Co,* [1920] 2 KB 714.
[212] *South East Asia Marine Engineering* (n 208) [18].
[213] Ibid, [23] referring to ICA, Sec. 65.
[214] (n 15).

nor Australia has been unmoved by the developments in the west and in particular, in the EU. The judiciary in both these countries has demonstrated an openness towards accepting the choice of soft law and non-State law insofar as its provisions are not chosen to govern the entire contract but have instead, been incorporated by reference in the terms of the parties' contract.[215]

Despite being similar at many levels, a close examination demonstrates a greater proactiveness on the part of the Australian lawmakers to develop the principles on the subject and advocate an interpretation which promotes access to justice and protect the interests of parties who are likely to be exploited by the unhindered freedom to select the law. Australian private international law, on its part, provides significant protection of weaker parties' rights through the provisions of the ACL.[216] In comparison to Indian private international law which offers no clarity on the status of the chosen law when its provisions result in the debilitation of the interests of a weaker or more vulnerable party, the ACL offers a more nuanced solution to this predicament. The legislation provides a comprehensive framework for the protection of consumer rights. The statute empowers the courts to invalidate a term in the contract which derogates the rights of consumers by being unfair or incorporate specific terms to benefit the consumer, depending on the situation.[217] In particular, the decision of the Federal Court of Australia in *Valve Corporation*[218] represents a remarkable extension of the ACL beyond the domestic borders of the country. Though the decision, the court clarified that the provisions of the ACL would continue to regulate all international consumer contracts regardless of whether the parties had chosen foreign law.

In this manner, Australian law is better equipped to cope with the challenges of globalisation, and in particular, those brought about by eventualities such as the COVID-19 pandemic. The existing jurisprudence clarifies that, in B2B contracts, the courts will enforce the parties' choice of law even if the chosen law – for instance, German law offers different solutions to parties, whose contracts have been affected by such eventualities.[219] In B2C contracts, however, the provisions of the ACL will have extraterritorial effect if the chosen law hampers the rights of consumers.[220]

The principles of Indian private international law offer no resolution to the parties unless a supervening eventuality has destroyed the very foundation of the contract. In doing so, it prevents access to justice to parties when an eventuality such as the pandemic may have rendered the contract more onerous to perform due to dramatic price fluctuations. Although the Supreme Court of India in *Amrit Banaspati Co*[221] provided some guidance to the effect that contracts with weaker parties would be presumed to violate the country's public policy by being unfair and unreasonable, the dictum did not relate to a conflict of law issue. Accordingly, the status of the parties' choice of law in consumer contracts

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[215] See text accompanying notes 101–104.
[216] See text accompanying notes 151–170.
[217] See, ACL, Secs. 23–28 and 54–67.
[218] (n 163).
[219] See text accompanying notes 199–200.
[220] See text accompanying notes 202–203.
[221] (n 149).

remains nebulous. India would benefit from a legislation which is similar to Australia's ACL. In the meanwhile, it is suggested that the Supreme Court develop guidelines to protect the interests of weaker parties by the power vested in it though Article 141 of the Constitution of India which mandates all the courts in India to adhere to the law declared by the former.[222]

5. Concluding remarks

Our comparative analysis of Indian and Australian systems has revealed interesting findings on the point of the application of the principle of party autonomy in the choice of law. On the one hand, significant similarity has been witnessed. Both countries support the choice of a neutral law and the incorporation of the provisions of soft law and non-State rules within the terms of the contract. The selection is valid if it adheres to the *bona fide* requirement. On the other hand, the systems diverge concerning the scope and application of public policy doctrine and the mandatory scope of the consumer protection rules. While Australia has extended the comprehensive framework of consumer protection legislation beyond its national border, India lacks a similar type of legislation. Instead, India has adopted a relatively broad conception of public policy doctrine which may have a related effect on the question of applicable law. Perhaps, each system is balanced in its own way.

Epidemics such as the COVID-19 have always shaped history – in part because we are forced to re-evaluate our traditional thinking. Understanding the scope and limits of party autonomy will be crucial for businesses and consumers in the coming months and years. Eventualities such as these heighten the need for a comprehensive analysis of the notions of overriding mandatory rules, public policy and other central aspects of the party autonomy, which we have been witnessed within the systems. Internal coherency and harmonisation of choice of law rules amongst the systems are, therefore, desirable. Sharing the heritage of the UK common law tradition, looking at the bright future of the trade relationships, India and Australia deserve a harmonised vision of party autonomy. While the differences between the systems exist, the gaps are not unbridgeable.

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[222]See, Constitution of India 1950, Art. 141, which provides that '[t]he law declared by the Supreme Court shall be binding on all courts within the territory of India'.

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