Marshall on the Proper Law of the Contract

Brooke Adele Marshall, who is an associate to the Chief Justice of the Federal Court of Australia, has published Reconsidering the Proper Law of the Contract in the last issue of the *Melbourne Journal of International Law*.

This article appraises the choice of law rule that applies where parties have either impliedly chosen, or failed to choose, the law governing their contract. It reconsiders the problems besetting the common law rule, known as the proper law of the contract, that were identified by Australia's Law Reform Commission twenty years ago. While the choice of law rule in Australia remains unchanged, it has undergone significant reform in the European Community and is now the subject of reform at the Hague Conference on Private International Law. Despite these reforms, a comparative analysis reveals that several of the common law problems persist. This article proffers a proposal for Australian legislatures based on the author's refined version of the Draft Hague Principles and the Rome I Regulation. It also suggests that the Hague Conference adopt these refinements. Under this proposal, tacit choice of law is absorbed as a subset of express choice and must be clearly established by the terms of the contract or the circumstances of the case. The probative value of an exclusive jurisdiction agreement will be made apparent in the drafting of the clause on tacit choice of law itself. It is further proposed that, in the absence of choice, the closest connection test be reduced to an escape clause applicable in default of fixed rules tailored to the exigencies of commercial contracting. The reformulated test will be used to ascertain the law of the country most appropriate for determining the issues arising in the case.