

THE AUSTRALIAN ADOPTION OF THE HAGUE CONVENTION ON CELEBRATION AND RECOGNITION OF THE VALIDITY OF MARRIAGES

G.E. Fisher*

Introduction

(a) The Convention

With the enactment last year of amendments to the *Marriage Act* 1961, Australia evinced the intention to give effect to the Hague Convention on Celebration and Recognition of the Validity of Marriages.¹ That intention has now been perfected with the proclamation of the relevant sections of the Amendment Act.²

The Convention was an outcome of the Thirteenth Session of the Hague Conference of Private International Law held in the Hague from 4-23 October, 1976.³ (It replaces an earlier Convention of 1902 which had not been well-received⁴).

This was the first of the Hague Conventions Australia signed and is the first it has legislatively implemented.

The Convention relates to the celebration and recognition of marriages the parties to which have connections with more than one country i.e. marriages involving a foreign element such as to come within the sphere of private international law. A marriage may present a significant foreign element through, for example, being celebrated abroad, or involving parties either or both of whom may be citizens of, or resident or domiciled in, a foreign country.⁵

In the two main Chapters of the Convention a new regime is prescribed for the celebration and recognition of such marriages: Chapter I concerns the requirements persons associated with a foreign law have to meet in order for a marriage to be celebrated in the *forum* (*forum* marriages), while Chapter II lays down rules with respect to the recognition to be accorded by the *forum* to marriages celebrated abroad (foreign marriages).

Which law or laws should be applied in these matters? To provide the answers, legal systems have elaborated within their private international law so-called choice of law rules.

-
1. The Hague Convention on Celebration and Recognition of the Validity of Marriages is hereinafter referred to as 'the Convention'. The Final Edition of the Final Act was completed at the Hague on 23 October 1976. The Convention was opened for signature on 1 October 1977, and is reprinted in (1977) 16 *International Legal Materials* 18 and in Australian Department of Foreign Affairs, *International Treaties and Conventions 1975-76*, Select Documents on International Affairs No. 24, A.G.P.S. (1977) at 159. Australia signed the Convention in July 1980: see Department of the Attorney-General, *Annual Report 1980-81*, A.G.P.S. (1981) at 21. The *Marriage Act* 1961 (Cth), as amended, is hereinafter referred to as 'the Act'. The *Marriage Act Amendment Act* 1985 (Cth), the amending legislation, is hereinafter referred to as 'the Amendment Act'.
 2. *Commonwealth of Australia Gazette*, no. S 153, 7 April 1986, proclaiming 7 April 1986 as the day on which sections 4, 10, 11, 12, 13 and 23 of the Amendment Act shall come into operation. Other sections of the Amendment Act dealt with miscellaneous matters and came into operation on the twenty-eighth day after Royal Assent, given on 29 March 1985.
 3. This was the first session of the Conference in which Australia participated: see H.P. Glenn, 'Conflict of Laws - The 1976 Hague Conventions on Marriage and Matrimonial Property Regimes', (1977) 45 *Can. Bar Rev.* 586. Australia joined the Conference in 1973. On the work of the Thirteenth Session generally, refer to P.W. Amram, 'Report of the Thirteenth Session of the Hague Conference on Private International Law', (1977) 71 *A.J.I.L.* 500, and W.L.M. Reese, 'The Thirteenth Session of the Hague Conference', (1977) 25 *Am. Jo. Comp. Law* 393.
 4. Convention of 12 June 1902 on the Conclusion of Marriage, reprinted in (1904) *Foreign Relations of the United States* 526. For a view of the shortcomings of this Convention, see M. Wolff, *Private International Law*, (1950), at 47, 50 and 312.
 5. On this idea of significant foreign element in marriage, see, e.g., Law Commission Working Paper No. 89 - Scottish Law Commission Consultative Memorandum No. 64 on Choice of Law Rules in Marriage (1985), at 4-5.

But choice of law rules with respect to marriage are not uniform among nations, and are sometimes complex and technical.⁶

The Convention endeavours to make more uniform provision throughout the world for choice of law in marriage and to moderate the restrictiveness of the rules imposed by the various legal systems. In so doing, it aims to make it easier for parties to marry, and to promote wider international recognition of marriages.⁷ The aim is to be effectuated by assigning a greater role to the law of the place of celebration, the *lex loci celebrationis*, as a basis of marriage validity.

(b) Choice of Law Background

When formal validity of marriage is in issue, most legal systems, including common law ones, already make reference to the *lex loci celebrationis* as the governing law.⁸ This approach on the whole reaches clear and satisfying results.

Where the Convention really makes its impact felt is in the area of essential validity of marriage (within which is comprehended matters of capacity, consent and personal defects).⁹ Some systems already refer to the *lex loci celebrationis* here, but many hold essential validity to be governed by the personal law, be that nationality or domicile.¹⁰

In Australia the common law rules as to essential validity generally refer us to the law of domicile, though with some uncertainties and qualifications.

The most important issue of essential validity is capacity to marry, but the precise nature of our reference to the law of domicile in this regard has not been resolved beyond doubt. Still dominant is the dual domicile theory, according to which capacity is governed by the law of each party's antenuptial domicile;¹¹ the alternative view is that capacity should be determined by the law of the intended matrimonial home of the parties.¹² On balance the authorities, including the recent Australian case of *In the Marriage of Barriga (No. 2)*,¹³

6. The rules of Australian private international law governing validity of marriage are discussed in P.E. Nygh, *Conflict of Laws in Australia*, (1984), and in E.I. Sykes and M.C. Pryles, *Australian Private International Law* (1979). Useful discussion of the common law choice of law rules is also provided in English texts such as J.H.C. Morris et. al., *Dicey and Morris on The Conflict of Laws*, ('Dicey and Morris') (1980); P.M. North, *Cheshire and North: Private International Law*, ('Cheshire and North') (1979) P.M. North, *The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland* (1977); J.H.C. Morris, *The Conflict of Laws*, (1984).

7. Refer to the Preamble of the Convention.

8. See L. Palsson, *Marriage and Divorce in Comparative Conflict of Laws*, (1974), at 189-91. The classic statement of the common law view is found in *Berthiaume v. Dastous* [1930] AC 79. There are some statutory exceptions in Australia to the basic rule (see Division 3 Part IV and Part V of the Act); at common law there exists the exception of the doctrine of common law marriage (fully dealt with in the texts cited in footnote 6, *supra*).

9. Essential validity may be negatively defined as all matters of validity other than formalities; positively, it may be defined as embracing issues of capacity, consent and personal defects; capacity itself has a number of different aspects such as marriageable age, prohibited relationship, existing marital status and capacity for polygamy.

10. The *lex loci celebrationis* prevails in the United States, the Soviet Union and most Latin American countries, as well as in Denmark and South Africa; the personal law generally applies in common law countries and in Europe, with the former favouring the law of domicile, the latter the law of nationality. But in each case, and in each jurisdiction differently, there is a complex of exceptions and discretions. See Wolff, *supra* n.4 at 324-25; L. Palsson, *Marriage in Comparative Conflict of Laws*, (1981), *passim*.

11. As stated in Dicey and Morris, *supra* n.6 at 285:

— a marriage is valid as regards capacity when each of the parties has, according to the law of his or her antenuptial domicile, the capacity to marry the other.

12. Thus explained in Cheshire and North, *supra* n.6, at 331:

The basic presumption is that capacity to marry is governed by the law of the husband's domicile at the time of marriage, for normally it is in the country of that domicile that the parties intend to establish their permanent home. This presumption, however, is rebutted if it can be inferred that the parties at the time of the marriage intended to establish their home in a certain country and that they did in fact establish it there within a reasonable time.

13. (1981) 7 Fam.L.R. 909.

favour the dual domicile theory,¹⁴ though lately in England the law of the intended matrimonial home seems to have gained some support under the aspect of a law of 'real and substantial connection'.¹⁵

Furthermore, laws other than that of the domicile may also be relevant in some respects to the issue of capacity. The *lex fori* under its public policy doctrines may refuse to recognize a capacity or incapacity on the ground that to give effect to it would be unconscionable: *Cheni v. Cheni*.¹⁶ The exception to the law of domicile derived from *Sottomayor v. De Barros (No. 2)*¹⁷ allows an incapacity under a foreign domiciliary law, but unknown to the *forum*, to be disregarded if one of the parties has a *forum* domicile. And where marriage is celebrated in the *forum*, so that the *lex fori* is also the *lex loci celebrationis*, it seems that each party must have capacity under the rules of the *forum*.¹⁸ But, *pace Breen v. Breen*,¹⁹ the better view is that an incapacity under a foreign *lex loci celebrationis* is irrelevant.²⁰

It has been asserted that separate consideration has to be given to each aspect of capacity as different policy factors are at work,²¹ but it can be seen that the same choice of law rules are applicable to most incapacitating elements. The common law choice of law rules have been modified though in their effect on marriageable age by Part II of the Act.²² Existing marital status sometimes raises additional complications associated with the recognition of a prior divorce or annulment.²³

Apart from capacity, matters of consent and personal defects each raise their own choice of law questions which are still unresolved. While some authorities incline to the domiciliary law in these matters,²⁴ by analogy with capacity, there is uncertainty as to the nature of the test in particular instances.²⁵ And authorities, though of doubtful weight, may be found in favour of the *lex fori*²⁶ or the *lex loci celebrationis*²⁷ as the governing law.

14. For assessment of the extent to which the cases support either the dual domicile theory or the law of the intended matrimonial home, see Nygh, *supra* n.6, at 316-20, or Sykes and Pryles, *supra* n.6 at 250-52.

A full examination of the respective merits of the two theories is given in Cheshire and North, *supra* n. 6 at 332-35.

15. See *Lawrence v. Lawrence* [1985] 1 All E.R. 507 (Lincoln J); [1985] 2 All E.R. 733 (Court of Appeal). The case builds upon suggestions in *Vervaeke v. Smith* [1983] 1 A.C. 145 at 166 per Lord Simon of Glaisdale, and in *Perrini v. Perrini* [1979] Fam.84 (Baker P.).

16. [1965] P.85.

17. (1879) L.R. 5 P.D. 94. This case has been much criticized, e.g., Nygh, *supra* n.6 at 321; Dicey and Morris, *supra* n.6 at 302; Cheshire and North, *supra* n.6 at 342. In *Miller v. Teale* (1954) 92 C.L.R. 406 at 414, the High Court suggested the case should be 'confined to a condition imposed by the law of the domicile that a specified consent or consents should be given'.

18. Though the matter has not been resolved by judicial decision, English commentators support the view that a marriage celebrated in the *forum* is not valid if either of the parties lacked capacity under the *lex fori*: Dicey and Morris, *supra* n.6 at 300; Cheshire and North, *supra* n.6 at 343. This view has obtained statutory adoption in Australia in the context of marriageable age: s.10(2)(a) of the Act applies the marriageable age provisions of s.12 to all marriages celebrated in Australia (whatever the parties' domicile). And Nygh, *supra* n.6 at 322 suggests that it can be inferred from s.55 of the Act that there is a general policy that marriages between parties who lack capacity under Australian law shall not take place in Australia.

19. [1964] P.144.

20. *The Will of Swan* (1871) 2 V.R. (I.E.&M.) 47; *Reed v. Reed* (1969) 6 D.L.R. (3rd) 617.

21. *Radwan v. Radwan* (No. 2) [1973] Fam.35, where Cumming-Bruce J. held that capacity to enter into a polygamous marriage was governed by the law of the intended matrimonial home.

22. See Nygh, *supra* n.6 at 323-24; Sykes and Pryles, *supra* n.6 at 249.

23. These complications have been recently addressed in the United Kingdom by the Report on Recognition of Foreign Nullity Decrees and Related Matters, Law Commission No. 137; Scottish Law Commission No. 88, (1984) Cmnd. 9341.

24. For consent see, e.g., *Szechter v. Szechter* [1971] P.286; *In the Marriage of Suria* (1977) 3 Fam.L.R. 11, 541. For personal defects see, e.g., *Ponticelli v. Ponticelli* [1958] P.204; *De Reneville v. De Reneville* [1948] P.100.

25. See as to this, e.g., Nygh, *supra* n.6 at 324-26; Sykes and Pryles, *supra* n.6 at 257-58.

26. E.g., *Buckland v. Buckland* [1968] P.296 (consent); *Easterbrook v. Easterbrook* [1944] P.10 (personal defects).

27. E.g., *Parojcic v. Parojcic* [1958] 1 All E.R. 1 (consent); *Robert v. Robert* [1947] P.164 (personal defects).

The foregoing discloses an outline, admittedly peremptory, of the choice of law position with which the Convention has to deal in Australia.

2. Marriages Celebrated in the Forum

(a) Introduction

Chapter I of the Convention headed 'Celebration of Marriages' concerns the requirements in a contracting state for celebration of marriages: Article 1. It lays down the circumstances in which a contracting state is obliged to permit a couple to marry in its territory.

The requirements of the Chapter are introduced into Australian law by s.13 of the Amendment Act which inserts in Part III of the Act a new Division 2 titled 'Marriages solemnized after the commencement of section 13 of the Marriage Amendment Act 1985'.²⁸

(b) Time Factor

Of its very nature, the Chapter I regime is prospective. Sections 10, 11 and 12 of the Amendment Act are designed to preserve the operation of existing ss.22 and 23 of the Act as to marriages celebrated before the date on which Division 2 of Part III comes into effect; so s.10 inserts before s.22 of the Act the heading 'Division 1 - Marriages solemnized on or after 20 June 1977 and before the commencement of section 13 of the Marriage Amendment Act 1985'.²⁹

(c) Range of Division 2

Chapter I relates to the requirements of the forum for marriage under its law; Division 2 covers this ground.

The Division 2 provisions apply to all marriages solemnized in Australia: s.23A(1)(a).

Also covered are marriages under Part V of the Act, which provides for the solemnization of marriages in overseas countries by Australian marriage officers and defence force chaplains: s.23A(1)(b).

But Division 2 is said not to operate in relation to marriages regulated by Division 3 of Part IV of the Act, viz marriages solemnized in Australia by foreign diplomatic or consular officers: s.23A(2). Nevertheless, ss.55 and 56 of the Act are amended to apply the same rules for recognition of these marriages as apply in relation to Division 2 marriages, except for the provisions as to formalities.

(d) The Convention Rules

In Chapter I both formal and essential validity of *forum* marriages are dealt with.

Formal requirements of these marriages are by Article 2 governed by the law of the state of celebration.³⁰ This is unexceptional. And the principle in its application to marriages celebrated in Australia was already embodied in the Act.³¹

More significant, however, is the provision made for substantive requirements — i.e. matters pertaining to essential validity — in Article 3. That Article was designed to deal with the difficulties of migrants who find themselves unable to marry in the country to which they immigrated:³² often the country in which celebration of marriage is sought insists on its own

28. Division 2 is inserted after s.23 of the Act.

29. Sections 11 and 12 of the Amendment Act work only formal amendments to ss 22 and 23 consequent on the effect of s.10.

30. The reference to the law of the state of celebration in Article 2 includes its choice of law rules. In this sense, the Article is to be viewed as a *renvoi* rule. But this does not mean much here in the Australian context where the *lex loci celebrationis* is also the *lex fori*. The *forum* can permit foreigners to marry under the formalities of their own law, and Australia has done this in Division 3 of Part IV of the Act. *Renvoi* assumes more significance in Chapter II of the Convention.

31. The formal requirements laid down in Division 2 of Part IV of the Act (see esp. s.48) apply to all marriages solemnized in Australia except those under Division 3 of Part IV: s.40 of the Act. Marriages under Division 3 of Part IV may be celebrated under the law or custom of the foreign country, but now have to meet the requirements of s.23B(1) other than formalities: see ss 55 and 56 of the Act.

32. Hague Conference on Private International Law, Actes et Documents, (13th Session, 1976), Vol III at 152.

substantive requirements for marriage being complied with, and on each of the parties complying with the substantive requirements of his or her personal law.³³ Article 3 endeavours to liberalize the position by obliging the *forum* to allow the celebration of marriage where either:

- (a) the future spouses both comply with the internal law of the place of celebration, and one of them is either a national of that state or habitually resides there: paragraph 1 of Article 3; or
- (b) the future spouses each comply with the substantive requirements of the internal law of the relevant country designated by the choice of law rules of the place of celebration: paragraph 2 of Article 3.

It can be seen that Article 3 does not offer a comprehensive code for matters of essential validity: it pre-supposes existing domestic laws and choice of law rules, but superimposes on them its obligation to celebrate marriage. The Article undercuts the mandatory role both of the *lex loci celebrationis* and the personal law in precluding marriage in the *forum* by providing that each alone should be sufficient for marriage to be celebrated. This technique, however, raised a deal of controversy in the sessions of the Hague Conference.

States favouring the role of the personal law and its distributive application were critical of the displacement of that law worked by Article 3 paragraph 1 in requiring the forum to celebrate marriages where its own internal laws have been met.³⁴ The operation of that paragraph is diluted by the qualification that at least one of the parties is to be a national or habitual resident of the *forum*. But this would still allow the substantive requirements arising under a foreign domiciliary or national law to be disregarded if one of the parties marrying in the *forum* is habitually resident there.³⁵ Ultimately though, Article 6 permits derogation from Article 3 paragraph 1, so that a contracting state need not apply its internal law to the substantive requirements for marriage in respect of a party who neither is a national nor habitual resident of that state.

By its insistence on marriages being celebrated when permitted under choice of law rules, Article 3 paragraph 2 can remove the need for validity under the internal or domestic rules of the celebrating *forum*. This outcome attracted most of the objections raised in the Conference to Chapter I. Many of the states were reluctant to require their marriage authorities to celebrate marriages invalid according to the substantive requirements of their own law, the *lex loci celebrationis*, even though valid by the foreign personal laws of the parties.³⁶ In an attempt to meet this concern, Article 5 allows contracting states to refuse to apply a foreign law otherwise applicable under Chapter I if such application is manifestly incompatible with the public policy ('ordre public') of the state of celebration. But this general and imprecise concession³⁷ did not turn the scale in favour of Article 3 paragraph 2 at the Conference.

33. Recall the Australian position outlined *supra*.

34. See Glenn, *supra* n.3 at 590.

35. This introduces a variant of the rule in *Sottomayor v. De Barros (No. 2)*, *supra* n.17. The effect could be to disregard an incapacity under a foreign domiciliary or national law if one of the parties is a national of the forum or habitually resident there. Article 3 paragraph 1 has been attacked for maintaining the *Sottomayor* rule: Law Commission Working Paper No. 89, *supra* n.5 at 168. But it has been defended as 'a welcome innovation *in favorem matrimonii*': T.C. Hartley, 'Hague Conference on Private International Law, Actes et documents (13th session, 1976)', *Reviews of Books*, (1979) 50 *B.Y.B.I.L.* 174 at 175.

36. See Glenn, *supra* n.3 at 590. For criticism from the United States of Article 3 paragraph 2, see Amram, *supra* n.3 at 501-502; Reese, *supra* n.3 at 393. United Kingdom reaction was also critical: see Law Commission Working Paper No. 89, *supra* n.5 at 168. It will be seen that Australia has adopted the Convention in such a way as to deprive Article 3 paragraph 1 of its criticized effect.

37. For an objection to such general clauses which leave it to contracting states to determine how widely they should extend 'the elastic conception of public policy', see Wolff, *supra* n.4 at 50.

All the attempts to overcome the objections to the basic approach of Article 3 did not succeed. A number of states represented at the Conference expressed the view that an early draft of Chapter I should not form part of the Convention.³⁸ Though Chapter I was finally included, contracting states are given the right in Article 16 to exclude its operation.

(e) Australian Implementation

Australia has adopted the optional Chapter I in such a way as to establish the *lex loci celebrationis* as the exclusive condition for marriage in the *forum*. This works a simplification of the provisions in the Chapter: the qualifications internal to Article 3 paragraph 1 are disregarded, the practical effect of paragraph 2 is neutralized, and the concessions in Articles 5 and 6 are rendered otiose.³⁹ The new Division 2 in Part III of the Act attains this result by incorporating our domestic marriage requirements into our private international law: pre-existing choice of law rules are supplanted, and the normal grounds for marriage under Australian law are accorded conflictual effect.

Formerly, s.23 of the Act specified the sole grounds on which marriages under Australian law were void, but that section was by s.22 'subject to the common law rules of private international law'. Only where our common law choice of law rules referred us to Australian law did s.23 come into operation. The new Division 1 in Part III of the Act continues ss.22 and 23, but only in regard to marriages celebrated prior to the commencement of the Amendment Act.

For marriages celebrated after the commencement of the Amendment Act, the new s.23B in Division 2 adopts the same grounds as laid down in s.23. But there is no equivalent to s.22 in Division 2, so that s.23B operates on the conflictual plane, overriding the common law choice of law rules. All marriages now celebrated in Australia (except Division 3 Part IV marriages as to formalities) or celebrated overseas under Australian law (as allowed in Part V of the Act) have only to comply with s.23B, regardless of the connection such marriages may have with other systems of law. As summed up in the Second Reading Speech of the Attorney-General to the Amendment Bill:

This amounts to a variation of Australia's "choice of law rules" and means that each of the parties to a marriage will only be required to meet the requirements of Australian law before they marry under that law.⁴⁰

Australia's approach to Chapter I provides a model for those states that do not wish to celebrate marriages invalid by their own domestic law, but that would otherwise be prepared to adhere to the Chapter. And the thorough-going acceptance of the *lex loci celebrationis* eliminates from *forum* marriages the uncertainties and difficulties associated with the common law rules of essential validity. But adherents to the traditional common law view will hardly look with approval at this supercession of the personal law, the law of domicile.

3. Recognition of Foreign Marriages

(a) Introduction

Chapter II of the Convention headed 'Recognition of the Validity of Marriages' applies to the recognition in a contracting state of the validity of marriages entered into in other states: Article 7. Described as 'the heart of the Convention',⁴¹ this Chapter has important consequences for international recognition of marriage, and is likely to achieve more acceptance among states than the optional Chapter I.

38. Hague Conference on Private International Law, Actes et Documents, (13th Session, 1976), Vol III at 150-153.

39. Article 4 of the Convention is thus unnecessary for Australia. It declares:

The State of celebration may require the future spouses to furnish any necessary evidence as to the content of any foreign law which is applicable under the preceding Articles.

40. House of Representatives *Weekly Hansard*, No. 3, 1985, at 616. A similar statement of the consequences for Australian law is provided in the Explanatory Memorandum to the *Marriage Amendment Bill* 1985, at 6.

41. Glenn, *supra* n.3 at 591.

For Australia, s.23 of the Amendment Act inserts in the Act a new Part VA styled 'Recognition of Foreign Marriages'; the object of this Part is to give effect in Australia to Chapter II of the Convention: s.88A of the Act.

(b) Time Factor

Article 15 of the Convention intends that the requirements of Chapter II should apply regardless of the date on which the marriage was celebrated.⁴² Conformably to this intent, s.88C of the Act applies the recognition regime to marriages solemnized whether before or after the commencement of Part VA. (Some consequences of this retrospectivity are examined later.)

(c) Range of Part VA

By Article 7, Chapter II is given a universal character, applying to marriages entered into in any other state, not only those entered into in other contracting states. Part VA of the Act operates on this basis of universality.

Marriage for Part VA purposes includes a reference to a purported marriage that is void or voidable: s.88B(3).

And 'Australia' in this Part of the Act includes, unless the contrary intention appears, the external territories: s.88B(1).

But, naturally, Part VA does not apply to marriages solemnized in a foreign country by Australian marriage officers and defence force chaplains under Part V of the Act: s.88B(3).⁴³

(d) The Recognition Regime

The broad effect of Chapter II is to establish the law of the place of celebration as a general validating law for foreign marriages: no distinction is drawn between matters of formal and essential validity.

Article 9 is the basic provision, paragraph 1 of which imposes an obligation, subject to the other provisions of the Chapter, to recognize any marriage validly entered into under the law of the state of celebration or which subsequently becomes valid under the law; paragraph 2 requires that a marriage celebrated by a diplomatic or consular officer in accordance with his law is similarly to be considered valid, provided the ceremony is not prohibited by the state of celebration.

Section 88C of the Act contains the four categories of foreign marriage to be recognized as valid in accordance with Article 9. These are:

- (1) Marriages solemnized in a foreign country and recognized as valid at the time of the ceremony by the local law, the *lex loci celebrationis*: s.88C(1)(a).
- (2) Marriages solemnized in a foreign country and invalid under the local law at the time of ceremony, but subsequently recognized as valid by that law: s.88C(2)(a).
- (3) Marriages solemnized in a foreign country by or in the presence of a diplomatic or consular officer of another foreign country and, at the time of the ceremony, recognized as valid under the law of that other foreign country, provided the solemnization was not then prohibited by the local law: s.88C(1)(b).
- (4) Marriages of the kind in category (3) which were invalid at the time of ceremony under the law of the other foreign country, but subsequently recognized as valid by that law: s.88C(2)(b).

The recognition of these marriages does not extend to where the foreign marriage is voidable under the relevant foreign law: s.88D(4), which provides that a marriage voidable under the local law in categories 1 and 2, or under the other foreign law in categories 3 and 4, shall not be recognized as valid at any time while the marriage is voidable under that law.

42. Though a state may reserve the right under Article 15 not to apply Chapter II to marriages celebrated before the Convention enters into force in relation to that state.

43. Chapter II of the Convention and Part VA are only concerned with marriages celebrated under the law of other countries.

The reference in Article 9 is to the 'law', not the 'internal law', of the state of celebration. The Article is accordingly to be viewed as a *renvoi* rule i.e. it refers to the whole of the law of the state of celebration, including its rules of private international law.⁴⁴ Australian adoption of Article 9 does not preclude *renvoi*. At first sight, the expression 'local law' employed in s.88C might suggest an intention to ignore foreign choice of law rules, but its definition in s.88B(1) is in fact compatible with *renvoi*: 'local law' means, in relation to a marriage solemnized in a foreign country, 'the law in force in the foreign country or in that part of the foreign country in which the marriage was solemnized.' Inclusion of *renvoi* does, of course, complicate what would otherwise be a generally simple process of discerning the content of the *lex loci celebrationis*.⁴⁵

(e) **Time Factor (Continued)**

The operation of s.88C may result in certain marriages previously denied effect in Australia being now validated. This retrospective validation is possible in two ways. Firstly, as noted above, s.88C, in accordance with Article 15, applies the new recognition regime to marriages solemnized whether before or after the commencement of Part VA of the Act. Secondly, the particular provisions in s.88C(2)(a) and (b), conforming to Article 9, allow recognition of marriages initially invalid under, but later recognized as valid by, the *lex loci celebrationis*.

Validation of marriage by change in a foreign *lex causae* had been anticipated by the common law in *Starkowski v. Attorney-General*.⁴⁶ There, recognition was accorded to a marriage invalid as to form under the *lex loci celebrationis* but validated by a subsequent and retrospective change in that law. The principle of the case can also be regarded as extending to essential validity at common law,⁴⁷ so as to permit retrospective validation by the law of domicile, though there are suggestions to the contrary in *Ambrose v. Ambrose*.⁴⁸

A problem occurs in regard to retrospectivity when a marriage which was initially invalid subsequently attains validation but one of the parties has in the meantime entered into another marriage recognised as valid. Which marriage should prevail? This question was expressly left open by the House of Lords in *Starkowski v. Attorney-General*,⁴⁹ a case concerned with change in the *lex loci celebrationis*. On the basis of *Ambrose v. Ambrose*,⁵⁰ however, it can be submitted that the common law would not have recognized the validation of the first marriage by the *lex loci celebrationis*. This approach of giving preference to the

44. The *lex loci celebrationis* 'includes requirements flowing from application of the celebrating state's private international law': Glenn, *supra* n.3 at 592. It is customary for Hague Conventions to use the expression 'internal law' if *renvoi* is to be excluded. (*Renvoi* is excluded from Article 3 of the Convention by use of the expression 'internal law', but applies to Article 2: see footnote 30, *supra*.)

There are indications that the common law rule applying the *lex loci celebrationis* to formal requirements is to be regarded as a *renvoi* rule. Thus, where the *lex loci celebrationis* allows foreigners to be married according to their personal law, a marriage so celebrated will be upheld as formally valid: *Taczanowska v. Taczanowski* [1957] P.301. Some commentators suggest that this reference to the *lex loci celebrationis* in formalities of marriage is an alternative reference to either its conflict rules or its domestic rules: Dicey and Morris, *supra* n.6 at 76; Cheshire and North, *supra* n.6 at 76.

45. Application of *renvoi*, though, may tend to promote greater uniformity of status and support a policy in favour of marriages. For discussion of the arguments in favour of *renvoi* in formal requirements at common law, see Law Commission Working Paper No. 89, *supra* n.5 at 34-35.

46. [1954] A.C. 155.

47. Nygh *supra* n.6 at 219-20.

48. (1960) 25 D.L.R. (2d) 1.

49. *Supra* n.46.

50. *Supra* n.48.

second marriage is adopted by s.88D(5) with respect to any conflict of marriages occurring as a result of Part VA.⁵¹

(f) Limits on Recognition

While the Convention accords primacy to the *lex loci celebrationis*, it nevertheless permits a contracting state to refuse to recognize a foreign marriage valid according to the law of the country of celebration, where one of the grounds of Article 11 is established. Article 11 declares:

A Contracting State may refuse to recognize the validity of a marriage only where, at the time of the marriage, under the law of that State —

1. one of the spouses was already married; or
2. the spouses were related to one another, by blood or adoption, in the direct line or as brother and sister; or
3. one of the spouses had not attained the minimum age required for marriage, nor had obtained the necessary dispensation; or
4. one of the spouses did not have the mental capacity to consent; or
5. one of the spouses did not freely consent to the marriage.

However, recognition may not be refused where, in the case mentioned in sub-paragraph 1 of the preceding paragraph, the marriage has subsequently become valid by reason of the dissolution or annulment of the prior marriage.

The grounds of non-recognition found in Article 11 are allowed for in the Act by s.88D(1), and embodied in the other sub-sections of s.88D. Accordingly, a marriage solemnized in a foreign country will not be recognized as valid where, at the time of the marriage:

- (1) Either of the parties was a party to a marriage with some other person, and the marriage was at that time recognized as valid in Australia: s.88D(2)(a), giving effect to sub-paragraph 1 of Article 11;
- (2) One of the parties being domiciled in Australia, either of the parties was not of marriageable age as provided in Part II i.e. by ss 11 and 12: s.88D(2)(b), adopting in part the exception in sub-paragraph 3 of Article 11;
- (3) Neither of the parties being domiciled in Australia, at any time while the female party is under 14 years or the male party under 16 years i.e. under the absolute minimum age according to s.12: s.88D(3), giving effect to sub-paragraph 3 of Article 11;
- (4) The parties are within a prohibited relationship according to s.23B(1)(b), as defined in s.23B(2) to (6): s.88D(2)(c), giving effect to sub-paragraph 2 of Article II;
- (5) The consent of either of the parties was not a real consent according to s.23B(1)(d): s.88D(2)(d), giving effect to sub-paragraph 5 of Article 11 as to free consent and sub-paragraph 4 of the Article as to mental capacity.

As with Article 9, Article 11 involves *renvoi*, the reference to the law of the contracting state including its rules of private international law. But s.88D subsumes *renvoi* by its intention to operate directly in the sphere of private international law.

51. Section 88D(5) states:

Notwithstanding any other provision of this Part, where —

- (a) a marriage (in this sub-section referred to as the 'initial marriage') has, whether before or after the commencement of this Part, been solemnized in a foreign country;
- (b) at the time of the solemnization of the initial marriage, that marriage was not recognized in Australia as valid;
- (c) after the solemnization of the initial marriage, and whether before or after the commencement of this Part, either party to that marriage entered into another marriage (in this sub-section referred to as the 'subsequent marriage'); and
- (d) at the time when the subsequent marriage was solemnized -
 - (i) the subsequent marriage was recognized in Australia as valid; and
 - (ii) the initial marriage was not recognized in Australia as valid,
 the initial marriage shall not be recognized at any time in Australia as valid.

Under s.88D, domestic requirements of Australian law pertaining to the grounds of Article 11 are given conflictual effect. The exceptions in s.88D to the recognition regime for foreign marriages follow in most respects the requirements stipulated in ss 23 and 23B for valid marriage in Australia or abroad under Australian law. The vitiating factors of pre-existing marriage, prohibited relationship and lack of consent are, *mutatis mutandis*, identical; only some minor variation is apparent with respect to marriageable age. As a recent comment has it, 'The effect is to make absolute, in relation to the recognition of foreign marriages, some of the provisions of Australian domestic law relating to the essential validity of marriages.'⁵² In the result, basic requirements of the *lex fori* condition the operation of the validating effect of the *lex loci celebrationis*.

Some comment may be offered on the marriageable age provisions in s.88D. That in s.88D(2)(b) clearly accepts the decision in *Pugh v. Pugh*,⁵³ where it was held that the marriageable age requirements of English law applied to all English domiciliaries wherever a marriage might be celebrated, and denied an English domiciliary of age the capacity to marry a spouse under age, even though that spouse did not possess an English domicile. In requiring for the foreign marriages of non-domiciliaries the absolute minimum marriageable age permitted in our domestic law, s.88D(3) gives statutory content to the principle that our courts will on grounds of public policy refuse to recognize any marriage of very young minors. Interestingly, s.88D(3) envisages that the marriages of under-age non-domiciliaries may be validated when each party attains marriageable age.

Apart from the specific exceptions allowed in Article 11, Article 14 excuses a contracting state from the obligation to recognise a foreign marriage 'where such recognition is manifestly incompatible with its public policy ("ordre public")'. The Australian legislature has not seen fit to avail itself of this broad exception since the public policy requirements of our law have been sufficiently satisfied by the terms of s.88D.

(g) Residual Validation

Articles 9 and 11 do not constitute an exclusive code of validity or a complete reference to the *lex loci celebrationis*: they deal only with the case where the marriage is valid by that law.

Chapter II of the Convention provides no new rules for the recognition of foreign marriages which are invalid under the *lex loci celebrationis*. Any recognition of such marriages depends upon the residual private international law rules of the contracting state i.e. the prior choice of law rules of the *forum*. Validation under those rules is envisaged by Article 13.

It is declared in Article 13 that the Convention 'shall not prevent the application in a contracting state of rules of law more favourable to the recognition of foreign marriages'. This provision is availed of in s.88E of the Act.

Firstly, the operation of common law rules is preserved as a residual basis for recognition. Section 88E(1) provides that a foreign marriage, not otherwise recognized under Part VA, but recognized as valid under the common law rules of private international law shall be recognized as valid in Australia. But s.88E(2) does not allow such recognition where one party to the marriage is domiciled in Australia and either party at the time of the marriage was not of marriageable age within the meaning of Part II. Thus, unlike in Division 2 of Part III dealing with *forum* marriages, the law of domicile is not completely removed from our choice of law with regard to essential validity; its relevance though is limited to sustaining, subject to minimum marriageable age requirements if one party is domiciled in Australia, foreign marriages not recognized under the broad regime of the *lex loci celebrationis*.⁵⁴

52. H.A. Finlay, A.J. Bradbrook and R.J. Bailey-Harris, *Family Law: Cases and Commentary*, (1986), at 99.

53. [1951] P.482. The implications of the decision are closely analysed in North, *supra* n.6 at 120.

By s.88E(3) it is ensured that the provisions of Part VA will not limit or exclude the operation of Commonwealth, State or Territory laws which expressly or impliedly deem marriages to be valid for particular purposes.

Lastly, s.88E(4) ensures that the provisions of Part VA will not limit or exclude the operation of any other law of the Commonwealth, State or Territory deeming a union in the nature of a marriage (e.g. a polygamous marriage) to be recognized as a marriage for particular purposes. An important consequence of this is to preserve the operation of s.6 of the Family Law Act 1975 (Cth), which for the purposes of all proceedings under that Act deems a polygamous union entered into outside Australia to be a marriage.

(h) Incidental Question

For what is thought to be the first time in a Hague Convention, an Article is included dealing with the 'incidental' or 'preliminary' question.⁵⁵ The determination of the validity of a marriage is often not done in isolation; it may occur as a question incidental to the resolution of main questions such as succession or other property matters, claims to support or entitlements, and actions for damages in tort.⁵⁶ Should an incidental question of marriage validity be determined by the system of private international law which governs the main question, or should it be determined independently by the private international law rule of the *forum*?

The approach of Article 12 paragraph 1 is to treat marriage as an all-purpose concept⁵⁷ independent of any main or primary question: it provides that the rules of Chapter II are applicable 'even where the recognition of the validity of a marriage is to be dealt with as an incidental question in the context of another question'. But Article 12 paragraph 2 undercuts this approach by providing that such rules need not be applied where the 'other question' (the main question) is governed under the choice of law rules of the *forum* by the law of a non-contracting state. Article 12, then, does allow a compromise between contending positions.⁵⁸

In implementing Article 12, Australia has determined to adhere to the basic approach of paragraph 1, not exercising the facility of paragraph 2 to derogate from it. Accordingly, s.88F declares:

Notwithstanding any other law, the question whether a marriage solemnized in a foreign country is to be recognized in Australia as valid shall be determined in accordance with the provisions of this part, whether or not the determination of the question is incidental to the determination of another question.

54. Put more positively, in the words of the Second Reading Speech, House of Representatives *Weekly Hansard*, No. 3, 1985, at 616:

Essentially, the Convention operates as a gloss upon the common law, as it will provide an additional basis upon which the recognition of validity of foreign marriages may be afforded.

55. As outlined in Dicey and Morris, *supra* n.6 at 46, an incidental or preliminary question typically arises when three conditions are fulfilled - (i) the main question must by the conflict rules of the *forum* be governed by a foreign law, (ii) an incidental question must arise which is capable of arising in its own right or in other situations and has its own choice of law rule, and (iii) the *forum's* choice of law rule for the incidental question must lead to a different result from the corresponding choice of law rule adopted by the country whose law governs the main question.

56. For the range of incidental questions, refer to the exhaustive examination in A.E. Gotlieb, 'The Incidental Question Revisited - Theory and Practice in the Conflict of Laws', (1977) 26 *I.C.L.Q.* 734. Also see by the same author, 'The Incidental Question in Anglo-American Conflict of Laws', (1955) 33 *Can. Bar Rev.* 523.

57. On marriage as an all-purpose concept or otherwise, see W.L.M. Reese, 'The Hague Convention on Celebration and Recognition of the Validity of Marriages', in R.B. Lillich (ed), *The Family in International Law: Some Emerging Problems*, (1981), 1.

58. On the one hand, this compromise has been criticized as 'a pretty rough and ready one': Law Commission Working Paper No. 89, *supra* n.5 at footnote 10 at 167. On the other hand, it has been suggested that it 'should not work out badly in actual practice': Amram, *supra* n.3 at 502. Reese, *supra* n.3 at 394 concludes: 'This compromise is certainly ingenious. It may, however, be unprincipled'.

For the purposes of s.88F, the provisions of Part VA include where appropriate the common law rules of private international law.

(i) Excluded Unions

Only normal religious and civil marriages are within the scope of Chapter II. Some unusual types of marriage are expressly excluded from the application of the Chapter by Article 8: marriages celebrated by military authorities, marriages celebrated on board ships or aircraft, proxy marriages, posthumous and informal marriages. While a state could choose, if it wishes, to apply the Convention rules to these marriages, Australia has not specifically attempted to do so. Nevertheless, the terminology of Part VA allows for the inclusion of foreign proxy marriages, these already having been capable of recognition if they complied with the formalities of the *lex loci celebrationis*.⁵⁹

No regime is laid down in the Convention or Part VA of the Act with regard to the recognition of foreign polygamous marriages. Actually polygamous marriages are denied recognition under ss 88C and D, however, by the requirement in s.88D(2)(a) that either party not be already married. Nothing, though, would seem to preclude a potentially polygamous marriage contracted abroad from being recognized under ss.88C and D. Of course, s.88E(1) recognizes as valid foreign polygamous marriages, not otherwise within Part VA, if valid according to the common law rules of private international law.⁶⁰

Though not expressly excluded, irregular unions in the nature of homosexual marriages are not in the contemplation of the Convention. The internationally accepted meaning of marriage does not extend to such unions.⁶¹ And in Australian law marriage is understood as 'the union of a man and a woman to the exclusion of all others voluntarily entered into for life'.⁶²

(j) Matters of Proof

Proof of validity under Chapter II of the Convention is assisted by the direction in Article 10 that where a marriage certificate has been issued by a competent authority the marriage is to be presumed valid until the contrary is established.

In accordance with the Article, s.88G provides that a document purporting to be either the original or a certified copy of a certificate of a marriage in or under the law of a foreign country, and to have been issued by an authority of that country, is to be *prima facie* evidence of the facts stated and the validity of the marriage, except if it is proved that the authority of the foreign country by which the document purports to have been issued was not, at the time of issue, a competent authority.⁶³

4. Conclusion

As a means of attaining its purposes, the Convention places a fair amount of reliance on the *lex loci celebrationis*. This expedient has been attacked for displacing the personal law from its pre-eminence in matters of essential validity.⁶⁴ The personal law, the law to which the parties 'belong', is often regarded as having the most appropriate connection with marital status.⁶⁵ But there is disagreement among legal systems as to what the personal law

59. At common law, the proxy aspect of a foreign marriage pertains to formal validity, referred to the *lex loci celebrationis*: *Apt v. Apt* [1948] P.83, applied most recently in Australia in *Re B.* (1983) F.L.C. 91, 332.

60. For the possibilities of validity of foreign polygamous marriage under the common law rules, refer to Nygh, *supra* n.6 at 301-2; Sykes and Pryles, *supra* n.6 at 236-38.

61. See the response from Senator Gareth Evans to the worries of some Opposition Senators that homosexual unions might be recognized under the Convention: *Senate Weekly Hansard*, No. 3, 1985, at 402.

62. Section 43(a) of the *Family Law Act 1975* (Cth), following the common law concept of marriage classically enunciated in *Hyde v. Hyde* (1866) L.R. 1 P. & D. 130.

63. Article 23 of the Convention gives a procedure for identifying such authorities in contracting states – informing the Ministry of Foreign Affairs of the Netherlands. The definition of competent authority in s.88G(3) includes any authority prescribed in relation to a foreign country or part thereof by regulations made under the Act.

64. An attack from the common law perspective is made in Law Commission Working Paper No. 89, *supra* n.5 at 168.

65. See, e.g., T.C. Hartley, 'The Policy Basis of the English Conflict of Laws of Marriage', (1972) 35 *M.L.R.* 571 at 576.

should be, some adhering to domicile, others to nationality. The Convention chose the *lex loci celebrationis* as a compromise between the competing domiciliary and nationality principles, though it remains to be seen whether this will satisfy enough states. While many states recognize the claims of the personal law, the *lex loci celebrationis* is hardly unknown in the area of essential validity,⁶⁶ and is admitted even by critics to provide 'a clear, certain and simple solution, which would work easily in practice'.⁶⁷

Through Division 2 of Part III of the Act, Australia has implemented Chapter I of the Convention in such a way as to facilitate marriage by removing the need to comply with the common law choice of law rules, while at the same time maintaining the policy of the *forum* that its own domestic rules have to be satisfied for marriage within its territory. The rule of *lex loci celebrationis* in *forum* marriage makes the governing law certain and predictable. Relatedly, this rule points to the law which is convenient both for the parties and marriage officials: parties marrying in Australia have only to meet the requirements of domestic law, and Australian marriage officials are relieved of having to examine the content of foreign law.⁶⁸

In accordance with Chapter II of the Convention, Part VA of the Act establishes the recognition regime for foreign marriages. A policy to be discerned here relates to international uniformity of decision: the objective is to lessen the incidence of limping marriages (i.e. marriages recognized as valid in some states but not in others) and so enhance common recognition of status. Ultimately though, the success of the Convention provisions in this regard will depend upon the extent to which they are accepted in the international community. But Australia's adoption of Chapter II also promotes a policy of validation of marriage by the *forum*. Because of their technicalities and complexities, the common law choice of law rules operate in a way restrictive of recognition. The *lex loci celebrationis*, usually easy to ascertain and apply, is introduced as an overriding basis for recognition, while the possibilities of validity at common law are preserved.

The Convention does not attempt to lay down a complete choice of law code for *forum* or foreign marriages, and its provisions allow some scope for variation in its adoption by contracting states. While the Convention has been criticized for leaving many issues 'still dependent on the unharmonized, unreformed choice of law rules of the individual states',⁶⁹ it was probably unrealistic to expect the parties to the Hague Conference to reach comprehensive agreement in what is a difficult area of law. But the Convention regime is given coherence and unity by its underlying theme of favouring in the international context the institution of marriage (*favor matrimonii*).

At the least the Convention, by its emphasis on the role of the *lex loci celebrationis* as a basis of marriage validity, goes some distance towards rendering more harmonious the various choice of law systems and relaxing the rigor of their requirements. For Australia, adoption of the Convention is rightly to be seen as 'a major step in private international law'.⁷⁰

66. For the states that accept the *lex loci celebrationis* as a governing law in this area, refer to footnote 10, *supra*. Until *Brook v. Brook* (1861) 9 H.L.C. 193, the common law accepted the *lex loci celebrationis* as applicable to all aspects of marriage validity.

67. Law Commission Working Paper No. 89, *supra* n.5 at 75. In contrast, domicile, the common law idea of personal law, is a technical concept, even after its recent reform in Australia by the uniform *Domicile Acts*. On the reforms to domicile effected in Australia, see, e.g., Nygh, *supra* n.6 at 133-48.

68. These considerations are of especial interest for Australia in view of its large migrant population. In 1983, 35 per cent of all marriages taking place in Australia involved at least one party who had been born overseas: House of Representatives *Weekly Hansard*, No. 3, 1985, at 616.

69. Law Commission Working Paper No. 89, *supra* n.5 at 169.

70. Department of the Attorney-General, *Press Releases by the Attorney-General 1984*, Vol. 2, No. 42/84, at 1.