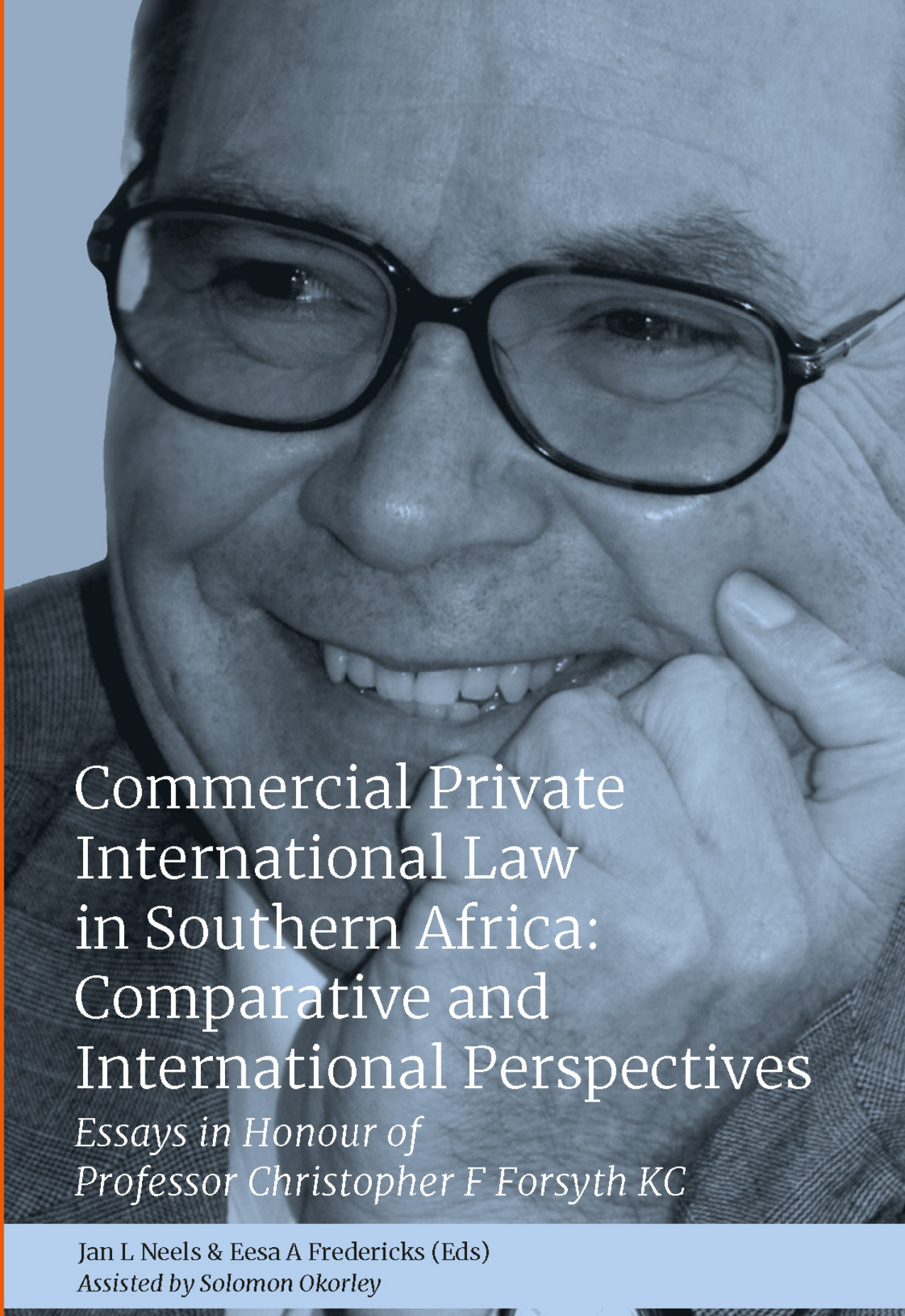


Commercial Private International Law in Southern Africa: Comparative and International Perspectives

Essays in Honour of Professor Christopher F Forsyth KC

Jan L Neels & Eesa A Fredericks (Eds)
Assisted by Solomon Okorley

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and sometime Professor of Private International Law
Life Fellow of Robinson College
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Preface

I feel greatly honoured and privileged to write this preface for *Commercial Private International Law in Southern Africa: Comparative and International Perspectives*, a *Festschrift* dedicated to celebrating the profound legacy of an eminent legal mind, Professor Christopher F Forsyth KC, in celebration of his 76th birthday.

I had the honour of meeting Professor Forsyth in 2015 at the *Private International Law Conference for East and Southern Africa*, held at the University of Johannesburg in September of that year. I was privileged to share the opening session with him, where I gave the opening address, entitled *Private International Law and its Public Law Relevance*, while Professor Forsyth delivered the keynote speech focusing on the subject *Jurisdictional Barriers to the Enforcement of a Kenyan Judgement in South Africa and vice versa.* It was a very engaging session, and the stimulating and insightful conversations we had during that conference remain highly memorable.

Compiled by highly esteemed scholars and practitioners, this *Festschrift* provides an excellent reflection on Professor Forsyth's enduring influence on legal scholarship and practice, particularly in private international law (or the conflict of laws), administrative law, and constitutional law across the Commonwealth and beyond.

Professor Forsyth's intellectual journey has spanned continents, legal traditions, and disciplines. Born in the United Kingdom but raised in South Africa, he first studied Mathematics and Mathematical Statistics at the (then) University of Natal before shifting to the study of law at the same university. The LLB from the University of Natal provided the foundation for his illustrious legal career. Forsyth proceeded to the University of Cambridge in the United Kingdom, where he gained a second LLB and, subsequently, a PhD degree, the latter marking the beginning of his global influence in the field of law. His thesis on *The Appellate Division of the Supreme Court of South Africa from 1950*, which was published in 1985 by Juta & Co in Cape Town under the title *In Danger for Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950–1980*, became a seminal, oft-cited work that set the stage for subsequent and rigorous scholarship in judicial studies and constitutional law.

Apart from his highly impactful contribution to the field of private international law, Professor Forsyth has also made an enormous contribution to the growth and evolution of administrative law. Highly renowned for his co-authorship of *Wade & Forsyth's Administrative Law* (OUP, since 2022 with IJ Ghosh) he has helped shape legal reasoning, both in theory and practice, in jurisdictions far beyond the United Kingdom. His insightful analyses of judicial review and public law principles have, over the years, significantly influenced courts, legal academics and legal practitioners in Commonwealth/common-law jurisdictions around the world.

Equally significant has been his special contribution to the growth and understanding of private international law in Southern Africa. His work *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (Juta, 2012) and its predecessors have been instrumental in ensuring the continued development of the discipline in Southern African jurisdictions that apply Roman-Dutch legal principles, making it an indispensable resource for both scholars and practitioners in those countries.

Beyond his scholarly achievements, Professor Forsyth has been an influential mentor and guide to generations of students and legal professionals. His tenure at the University of Cambridge saw him serve in multiple roles, including as the inaugural Sir David Williams Professor of Public Law. Professor Forsyth's dedication to legal education has extended to various institutions across Africa, the United Kingdom, and Asia, thus fostering a cross-continental dialogue on legal traditions and principles. His contributions to judicial training and capacity building in jurisdictions such as Malawi, South Africa, and Hong Kong underscore his commitment to the practical advancement of constitutionalism and the rule of law. In Malawi, his co-published manual, CF Forsyth & SD Matenje *Manual of Administrative Law for Malawi: A Guide for Ministers and Public Servants* (2002), has, over the years, been a very important orientation tool for government ministers and senior public servants.

The wide range and nature of the topics that the contributors have traversed provide a clear testament that this *Festschrift* is a very fitting tribute to a highly distinguished scholar of our times who has not only greatly contributed to the advancement of legal thought in the common-law world but has also nurtured a community of legal minds committed to the pursuit of justice with intellectual rigour. The contributions in this volume, which comprise personal reflections and academic essays, reflect the breadth and depth of the impact of Professor Forsyth's works, whether through doctrinal analysis, comparative perspectives, or his personal attributes of generosity, unwavering collegiality and robustness of thought.

In closing, a special word of thanks to all the contributors to this *Festschrift*. The illuminating and stimulating reflections provided in this volume honour the legacy of Professor Forsyth. As we celebrate his remarkable career, we acknowledge that his legacy will continue to shape legal discourse for generations to come. His scholarship, mentorship, and profound influence on legal systems worldwide continue to serve as an enduring source of inspiration.

It is my sincere hope that this *Festschrift* will not only honour Professor Forsyth's contributions but also serve as a catalyst for further scholarship in the respective fields of law to which he has dedicated his life.

Redson Edward Kapindu, PhD (Wits)
Judge of the High Court of Malawi
March 2025

Part I

Laudatio

The Contribution of Professor Christopher F Forsyth KC to the Development of Southern African Private International Law

A career in a world of influence rather than power

Jan L Neels[*]

Eesa A Fredericks[**]

1 Provenance and Studies

Christopher Forbes Forsyth was born in Richmond, Yorkshire (the United Kingdom) on Thursday, 29 September 1949. His parents were South African citizens and returned to South Africa by ship in the early 1950s, bringing the small Christopher with them. He attended primary school in Vereeniging and thereafter the Methodist-run St Stithians College in the North of Johannesburg, where Mr David Brindley had a definitive influence on his writing style. Christopher studied at the (then) University of Natal (Pietermaritzburg campus), where he attained a BSc degree in Mathematics and Mathematical Statistics in 1972 and an LLB degree in 1975. At the Faculty of Law, he was particularly influenced by Professor Exton Burchell. On Burchell's advice, Christopher went to Cambridge in 1975 and joined Gonville & Caius College, where he benefitted from (joint) seminars by Professor Otto Kahn-Freund and Professor Kurt Lipstein. In 1977, the University of Cambridge awarded him a second LLB degree. In 1982, Forsyth commenced doctoral studies at Cambridge and, in 1984, was awarded the PhD degree based on a thesis titled *The Appellate Division of the Supreme Court of South Africa from 1950*. The treatise was written under Dr Colin C Turpin's supervision and published by Juta & Co as *In Danger for Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950–1980*.[1]

* Professor of Private International Law and director of the Research Centre for Private International Law in Emerging Countries at the University of Johannesburg. Honorary Member of the UNIDROIT Governing Council. Member of the Academy of Science of South Africa.

** Associate Professor of Private International Law, deputy director of the Research Centre for Private International Law in Emerging Countries and Head of the Department of Mercantile Law at the University of Johannesburg. Member of the UNIDROIT Governing Council. The final text of the *laudatio* was completed during March 2025 in Johannesburg.

1 (Juta & Co, 1985).

2 Employment

Christopher commenced his academic career as a tutor for mathematics (1972–1975) and a temporary law lecturer (1975) at the University of Natal. He was appointed as a lecturer in law at the University of Canterbury in Christchurch, New Zealand (1977), and subsequently as a senior lecturer of Roman-Dutch law at the University of Cape Town (1978–1981). During his time at UCT, Christopher occasionally taught at the University of the Western Cape and the University of Fort Hare. Johann Schiller, whom he met at the University of Cape Town, became a lifelong friend and intellectual influence (Schiller's contribution on Forsyth's conceptual reasoning is included in this volume). At the University of Cambridge, Dr Forsyth was elected fellow in law of Robinson College (1983) and appointed as university lecturer in law (1988–2000), university reader in public law (2000–2005), professor of public law and private international law (2005–2016) and the inaugural Sir David Williams professor of public law (2016–2017) (Sir David Li funded the post). Professor Forsyth retired in 2017.

3 Various Positions

Forsyth was director of studies at Robinson College from 1983 until 2002. He was appointed as assistant director (1997–2001) and director of the Centre for Public Law (2001–2010) and manager of the African Studies Centre (2000–2002) of the University of Cambridge. Forsyth held many administrative appointments at the university, including proctor of Robinson College and university advocate (1994–1997, deputy from 1992). In addition, he acted as manager for the Smuts Memorial Fund (2003–2014).

Dr Forsyth was the British Council Visiting Fellow at the Chinese University of Hong Kong (1987 and 1989) and the British Council Visiting Fellow at the City University of Hong Kong (1997 and 2000). He was appointed extraordinary professor in public law (2002–2015) and honorary professor (2015–present) at the University of Stellenbosch. Professor Forsyth was the Cheng Yu Tung visiting professor in law at the University of Hong Kong from 2017 to 2019 and served as a visiting professor in the Department of Mercantile Law at the University of South Africa. Forsyth is an honorary legal academic advisory board member to the Faculty of Law of the Chinese University of Hong Kong (from 2005) and an academic advisor to the City University of Hong Kong (from 2014).

4 Teaching

Professor Forsyth taught a wide variety of subjects on the LLB and LLM levels while holding the appointments above, including Jurisprudence, Legal Method, Roman Law, the Conflict of Laws (Private International Law), the Conflict of Laws and Human Rights, Civil Law, the Law of Contract, the Law of Delict, the Law of Succession, Commercial Law, Public Law, Constitutional Law, Human Rights, Civil Liberties, Administrative Law, Judicial Review, Criminal Law, and the Law of Evidence.

Professor Forsyth acted as (external) assessor for universities in Botswana, China, Eswatini, New Zealand, South Africa, the United Kingdom, and Zimbabwe. He has supervised twenty PhD theses, including those of Professor David Bilchitz and Dr Chris Jenkins, who both contributed to this publication. In addition, he examined LLD, PhD and MPhil theses from universities in Australia, Belgium, the Netherlands, New Zealand, South Africa, Switzerland, and the United Kingdom. These include the doctoral theses of (i) Eesa A Fredericks at the University of Leiden, where Professor Forsyth formed part of the *promotiecommissie*;[2] (ii) Garth J Bouwers, where he acted as external examiner under a joint doctoral programme of the University of Lucerne and the University of Johannesburg;[3] and (iii) Faadhil Adams, in respect of which he was appointed external assessor for the University of Johannesburg.[4]

5 Research

Professor Forsyth's research covers various fields, including administrative law and other areas of public law in the United Kingdom and other Commonwealth countries; comparative law; the law of suretyship in Southern Africa; jurisprudence; and private international law in Southern Africa and the United Kingdom. A list of publications constitutes part 6 of this book. Articles and book chapters appeared primarily in the United Kingdom but also in Botswana, China, Germany, and South Africa. The article "Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, the Sovereignty of Parliament and Judicial Review" in the 1996 *The Cambridge Law Journal*[5] was translated into French and Spanish.[6] It stimulated a wide-ranging debate on the foundations of judicial review in the United Kingdom. Some articles were quoted or referred to by courts in Southern Africa (including the South African Supreme Court of Appeal) and the United Kingdom (including the Court of Appeal and the House of Lords). The author's books are mentioned in more detail below, but the textbook on Roman-Dutch private international law in Southern Africa is discussed in paragraph 14.

2 E A Fredericks *Contractual Capacity in Private International Law* (Meijers Research Institute, University of Leiden, 2016).

3 G J Bouwers *Tacit Choice of Law in International Commercial Contracts – A Global Comparative Study* (Schulthess, 2021).

4 F Adams *Choice of Non-State Law in International Commercial Contracts* (UJ thesis, 2023). Prof Richard F Oppong was an LLM student in Prof Forsyth's Comparative Public Law class at Cambridge in 2003–2004 (see his contribution elsewhere in this volume).

5 1996 *The Cambridge Law Journal* 122. C F Forsyth "Public Interest Immunity: Recent and Future Developments" 1997 *The Cambridge Law Journal* 51 was translated into Spanish as C F Forsyth "La inmunidad del interés público: avances recientes y futuros" 2000 *Revista Chilena de Derecho* 513. There is also an article in Turkish: C F Forsyth (translation E Örücü) "Hakli beklentiler'in doğuşu ve korunmasi" 1986 *İdare Hukuku ve İlimleri Dergisi* 121 [C F Forsyth (translation E Örücü) "The Emergence and Preservation of Justified Expectations" 1986 *Journal of Administrative Law and Administrative Sciences* 121].

6 The editors were able to trace the Spanish version: C F Forsyth "De las hojas de parra y cuentos de hadas: la doctrina del ultra vires, la soberanía del parlamento y la revisión judicial" 2002 *Ius Publicum* 89.

Forsyth collaborated with the late Sir William Wade QC on the 7th, 8th and 9th editions of *Administrative Law*. After the passing of Sir William, he kept the 10th and 11th editions up to date and involved Julian Ghosh for the 12th edition, published in 2022. *Wade and Forsyth's Administrative Law*, now by Forsyth and Ghosh,[7] is a standard textbook on administrative law in the United Kingdom and other common-law jurisdictions; it is widely read by students and regularly relied upon by practitioners and judges throughout the Commonwealth. In a series of interviews with Ms Lesley Dingle,[8] Forsyth reports that he had the experience of counsel appearing before the Madras High Court referring to *Wade and Forsyth* in their argumentation, while the same book was "standing open on the judge's desk" – "that was a fascinating experience".[9]

The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC appeared in 1998,[10] edited by Christopher Forsyth and Ivan Hare. It consists of sixteen essays on vital aspects of public law written by leading public lawyers from the United Kingdom and the Commonwealth.

Forsyth's *Conflict of Laws*, a text on English private international law written for students preparing for undergraduate and final bar examinations, appeared in 1987[11] and was revised annually until 1995.

Forsyth took over *Caney's The Law of Suretyship*,[12] a standard textbook on the Roman-Dutch law of suretyship for students and practitioners, as from the third edition. For the fourth, fifth and sixth editions, he was joined by Professor Jopie Pretorius of the University of South Africa. The book is regularly relied upon by the courts in Roman-Dutch jurisdictions.

In 2012, *The Culture of Judicial Independence* appeared, edited by Shimon Shetreet and Christopher Forsyth.[13] This book consists primarily of a range of papers by distinguished scholars examining the development of a culture of judicial independence from a comparative perspective, as well as the conceptual foundations of judicial independence.

6 Style

Lesley Dingle describes Christopher's writing style as "quite distinctive and for a legal scholar quite unusual. It is slightly flamboyant and literary." "It is a feature of his writing and personality. Perhaps it is a reflection of the expansive way he views

7 (Oxford University Press, 2022). On the conceptual reasoning of Christopher Forsyth in administrative law, see the contribution by Johann Schiller in this volume and C F Forsyth "Showing the Fly the Way Out of the Flybottle: The Value of Formalism and Conceptual Reasoning in Administrative Law" 2007 *The Cambridge Law Journal* 325.

8 The relevant interview may be found at https://www.squire.law.cam.ac.uk/eminent-scholars-archive. See par 15 for more details.

9 (n 8) question 61.

10 (Oxford University Press).

11 (Holborn Law Tutors).

12 (Juta & Co, 6th ed, 2010).

13 S Shetreet and C F Forsyth (eds) *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Brill, 2012).

things, as well as his dry sense of humour."[14] She draws attention to Christopher's sense of style in her short biography in the Eminent Scholars Archive, as available on the website of the Faculty of Law, University of Cambridge:

> Signs of colour and metaphor are sprinkled through Christopher Forsyth's formal legal writings, and show up in many of his publication titles: I mention a few – golden metwand, In Danger for their Talents, Sleep of Reason, Fig Leaves and Fairy Tales, Showing the fly the way out of the flybottle, Mind the Gap, Heat and Light, and Final Frontier. To use such language shows not only an imaginative style, but also a high degree of self-confidence in one's writing. Brindley taught Christopher well.[15]

7 Conferences and Conference Proceedings

Forsyth convened the first international conference on human rights in South Africa, held in Cape Town in 1979. Despite opposition from the government, the conference was attended by over 300 participants from sixteen countries. Edited with Johann E Schiller, *Human Rights: The Cape Town Conference*[16] contains the proceedings of the conference. Given Professor Forsyth's involvement with the protection of human rights, it is befitting that this chapter, the *laudatio*, was substantially completed on Human Rights Day, 2024, the year of the 30th anniversary of democracy in South Africa.

In 1993, Forsyth initiated and convened a conference to discuss the South African Law Commission's working paper on judicial review.[17] He arranged conferences on constitutional reform in the United Kingdom (1998) and on judicial review (1999 and 2003) at the University of Cambridge. The proceedings of the 1999 conference were published as *Judicial Review and the Constitution*.[18]

Professor Forsyth initiated and arranged, together with the Faculty of Law of the Chinese University of Hong Kong, a conference entitled *Effective Judicial Review: A Cornerstone of Good Governance*, held in Hong Kong during 2008. The conference proceedings were published under the same title and edited by Christopher Forsyth, Mark Elliott, Swati Jhaveri, Michael Ramsden, and Anne Scully-Hill.[19]

14 Quoted from an email to the first editor, dated 11 July 2024 (correction dated 16 July 2024) (quotation with permission of Ms Dingle).
15 (n 8) – biography. See par 1 on Mr David Brindley. Christopher's writing style was also influenced by Prof Exton Burchell (see par 1).
16 (Juta & Co, 1979).
17 See South African Law Commission *Project 115 Administrative Justice – Report* (August 1999).
18 C F Forsyth (ed) *Judicial Review and the Constitution* (Hart, 2000).
19 C F Forsyth, M Elliott, S Jhaveri, M Ramsden, and A Scully-Hill (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, 2010).

It may be added here that Professor Forsyth was appointed as the national *rapporteur* for the United Kingdom on the role of public law in the conflict of laws for the purposes of the XII[th] International Congress of Comparative Law.[20]

8 Editing

Forsyth was secretary and member of the editorial board of *Acta Juridica* from 1976 to 1980 and a member of the editorial committee of *The Cambridge Law Journal* from 1990 until 2022 (sub-editor from 1993 to 1996). He also acted as a consultant editor for the *Reader's Digest Family Guide to the Law in South Africa*,[21] a 750-page guide to the South African legal system written for the layperson.[22]

9 Advising Governments

Professor Forsyth has been involved in working with or advising governments on constitutional and administrative legal issues in several countries, including giving evidence at, or submissions to, the South African Law (Reform) Commission (reform of the judiciary, and various issues of private international law); the South African Truth and Reconciliation Commission (on the judiciary); the Minister of Justice and Constitutional Development of Sri Lanka (constitutional reform); the Committee on Standards and Privileges (House of Commons, United Kingdom) (procedural reform); the President and Minister of Justice of Malawi (constitutional reform); and the government of Hong Kong (questions of constitutional and administrative law). He formed part of the British delegation to a workshop advising the Ukrainian Ministry of Justice on reforming administrative law. Forsyth and S D Matenje published *Manual of Administrative Law for Malawi: A Guide for Ministers and Public Servants*[23] as a practical guide to making reasonable and lawful decisions by those involved in day-to-day administrative decision-making.

10 Legal Practice

Professor Forsyth is a barrister of the Inner Temple (since 2003) and had chambers in 4-5 Gray's Inn Square, London, until 2022. He was elected an academic bencher of the Inner Temple in 2003. One year later, he was appointed as a recorder (part-time judge) on the South Eastern Circuit. In addition, he was authorised to sit as a deputy High Court judge in the Administrative Court. Forsyth was also admitted as an advocate of the Supreme Court (today the High Court) of South Africa.

20 C F Forsyth "The Role of Public Law in the English Conflict of Laws" in E K Banakas (ed) *United Kingdom Law in the 1980s: Comparative and Common Law Studies for the XII[th] International Congress of Comparative Law* (1988) 94.

21 (Reader's Digest Association of South Africa, 1982).

22 Also see pars 5 and 7 above.

23 (Government Printer, Zomba, 2002).

11 Serving the Police and the Community

After serving as the University of Cambridge representative on the Cambridgeshire Police Authority (1989–1995), Professor Forsyth served as an independent authority member from 1995 to 2003. For many years, he acted as chairman of the complaints panel. In addition, he acted as an independent member of the Cambridgeshire County Council's standards committee (2000–2010; elected chairperson in 2007).

12 Prizes and Grants

Professor Forsyth was awarded various prizes, scholarships, bursaries and research grants, including the Pietermaritzburg Attorneys Association prize (for mooting, 1974); the Gonville & Caius College graduates' prize for research (1976, 1982 and 1983); the Attorneys, Notaries and Conveyancers' Fidelity Guarantee Fund bursary for the study of private international law (1979); the Tapp research studentship awarded by Gonville & Caius College (1981–1983); the overseas research student award (Her Majesty's Government, 1982–1983); a grant from the Anglo American and De Beers chairman's fund (1982–1983); and the British Academy research award for the study of the constitutional status of the police (1985). The Hague Academy of International Law scholarship for study at the Peace Palace (1979) should be specifically mentioned. Professor Forsyth stated in the Dingle interviews that attending the private international law summer course inspired him to write his textbook on Southern African private international law.[24]

13 Appointment as Queen's Counsel

On 17 December 2020, the Ministry of Justice of the United Kingdom announced the appointment of Professor Christopher Forsyth as Queen's Counsel *honoris causa* by Queen Elizabeth II on the recommendation of the Lord Chancellor for his major contribution to the development of the law of England and Wales.[25] At the passing of Her Majesty, Professor Forsyth automatically became King's Counsel.[26]

24 (n 8) question 27.

25 https://www.gov.uk/government/news/new-queen-s-counsel-welcomed-by-lord-chancellor (17 Dec 2020) and https://www.law.cam.ac.uk/press/news/2020/12/professor-christopher-forsyth-awarded-qc-honoris-causa (18 Dec 2020). Prof Forsyth was introduced as follows on the UK government's website: "Christopher Forsyth is a legal academic and Emeritus Sir David Williams Professor of Public Law in the University of Cambridge. He specialises in Public Law and Private International Law as well as other aspects of legal theory, comparative legal studies, and judicial history. He has contributed to juristic reflection on the constitutional foundations of judicial review, and to wider public discussion about judicial review and constitutional fundamentals, giving evidence to several parliamentary inquiries on a range of constitutional topics. His analysis of the law of judicial review has been influential and has been routinely relied upon by both Counsel and judges. Christopher's academic work has contributed to the question of how to square the sovereignty of Parliament with the judges' power on judicial review of administrative action. It has also emphasised the justified priority of doctrine and principle in judicial reasoning."

26 See https://www.barcouncil.org.uk/resource/chair-of-the-bar-death-queen-elizabeth.html (8 September 2022).

14 Southern African (Roman-Dutch) Private International Law

In 2022, in the series of interviews with Ms Lesley Dingle, Professor Forsyth stated: "[M]y work in [the area of private international law] has been quite influential and I take pleasure in that."[27] Forsyth's first article on private international law appeared when he was a temporary lecturer in Pietermaritzburg. Titled "What Happens When the *Lex Causae* Changes?",[28] it is a sophisticated and still valuable discussion of the time element in *Sperling v Sperling*[29] and beyond.

In 1981, while employed at the University of Cape Town, Dr Forsyth published *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the Supreme Court* with Juta & Co in Cape Town. The section on jurisdiction was written by Professor T W Bennett, also of the University of Cape Town (his tribute to Christopher is included in this volume). The second edition was published in 1990, and the third in 1996. The fourth edition, published in 2003, and the fifth edition, published in 2012, carry the title *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts*. The book expanded from 384 pages in the first edition to 504 in the fifth.

The 1981 edition was the first book on Roman-Dutch private international law to be published since Paulus Voet's *De Statutis Eorumque Concursu Liber Singularis* in 1661.[30] Many significant contributions to South African private international law had at that stage been made by, in particular, Professor Ellison Kahn of the University of the Witwatersrand,[31] Professor Basil Edwards of the University of South Africa,[32] and Professor J C W van Rooyen of the University of Pretoria.[33] Forsyth recognises Kahn's contribution in particular: "Perceptive

27 (n 8) question 71. Also see question 86.

28 1975 *South African Law Journal* 368.

29 1975 3 SA 707 (A).

30 For a translation, see A B Edwards (ed) *The Selective Paulus Voet* (*Fundamina Editio Specialis*, 2007). Forsyth (2012) devotes proper attention to the Roman-Dutch and Roman-Frisian authors in all chapters (see 41-47 for a general discussion). It may be mentioned here that, in a highly sophisticated consideration of the work of Bartolus, known as the father of private international law, N E Hatzimihail *Preclassical Conflict of Laws* (Cambridge University Press, 2021) 336 subscribes to Forsyth's interpretation of the commentator's use of the statute theory (which "could be used multilaterally to determine whether a foreign statute would be applied within the forum" – Forsyth (2012) 37, referring to K Lipstein "The General Principles of Private International Law" 1972 I *Recueil des cours* 97 116), as compared to the standard incomplete contemporary understanding.

31 Professor Kahn's most important works on private international law are: E Kahn "Jurisdiction and Conflict of Laws" in H R Hahlo *The South African Law of Husband and Wife* (Juta & Co, 1975) 529 and E Kahn "Conflict of Laws" in M Corbett, G Hofmeyr and E Kahn *The Law of Succession in South Africa* (Juta & Co, 2001) 580 (for the current version, see G Hofmeyr and M Paleker *The Law of Succession in South Africa* (Juta & Co, 2023) ch 24, revised by Justice I Farlam).

32 Professor Edward's most important work on private international law, as revised by Professor Kahn, is A B Edwards and E Kahn "Conflict of Laws" in W A Joubert *et al* (eds) *The Law of South Africa* volume 2 part 2 (LexisNexis, 2nd ed, 2003) 287 (for the current version see M Dendy "Conflict of Laws" in W A Joubert *et al* (eds) *The Law of South Africa* volume 7 part 1 (LexisNexis, 3rd ed, 2019)).

33 J C W van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (Juta & Co, 1972).

readers of my textbook will find his influence on every page. That book stands on the shoulders of a giant."[34]

Nevertheless, Forsyth's book was the first in Southern Africa to provide an overview of the whole field of private international law.[35] He thus almost singlehandedly saved private international law from virtual extinction in Southern Africa and guaranteed its future survival – today, the field may even be described as flourishing, with many (relatively) young authors working in the area. Not many academics can claim that they were instrumental in the continued existence of a whole field of study in an important region of an emerging continent. Professor Geo Quinot, therefore, appropriately refers to Professor Forsyth's "Diceyan contribution" to private international law (and other fields) in our region.[36] We found approximately a hundred references to Forsyth's book in the electronic law reports of the Southern African countries over the past three decades alone, including decisions of the Industrial Court of Botswana;[37] the Court of Appeal of Botswana;[38] the High Court of Eswatini (previously Swaziland);[39] the Supreme Court of Eswatini;[40] the Labour Appeal Court of Lesotho;[41] the Court of Appeal of Lesotho;[42] the High Court of Namibia;[43] the Supreme Court of Namibia;[44] the Labour Court of South Africa;[45] the High Court of South Africa, and its predecessors;[46] the South African Supreme Court of Appeal and its predecessors;[47] the High Court of

34 C F Forsyth "The Provenance and Future of Private International Law in Southern Africa" 2002 *Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law* 60. E Kahn "Ruminations of a Quondam Would-be South African Conflicts Lawyer" 2002 *Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law* 125, again, refers to the influence of his mentor, Walter Pollak QC (125). See W Pollak *The South African Law of Jurisdiction* (Hortors, 1937). For the second and third editions, see D Pistorius *Pollak on Jurisdiction* (Juta & Co, 1993) and D E van Loggerenberg *Pollak on Jurisdiction* (Juta & Co, 2019).

35 Today, we also have: Edwards and Kahn (2003), E Schoeman, C Roodt and M M Wethmar-Lemmer *Private International Law in South Africa* (Kluwer Law International, 2014) and the sections on Southern African jurisdictions in R F Oppong *Private International Law in Commonwealth Africa* (Cambridge University Press, 2013).

36 See the tribute by G Quinot "A Diceyan Contribution to Scholarship Across Fields and Continents: A Personal Tribute to the Work of Christopher Forsyth" in this volume.

37 See www.saflii.org and www.botswanalii.org.

38 *ibid.*

39 See, for instance, *Umcebo Mining (Pty) Ltd v USA Distillers (Pty) Ltd* 1890/2012 [2017] SZHC 202 (6 Oct 2017) per https://eswatinilii.org. See the discussion in J L Neels "Characterisation and Liberative Prescription (the Limitation of Actions) in Private International Law – Canadian Doctrine in the Eswatini Courts (the Phenomenon of Dual Cumulation)" 2021 *Journal of Private International Law* 361.

40 See, for instance, *USA Distillers (Pty) Ltd v Umcebo Mining (Pty) Ltd* 89/2017 [2018] SZSC 28 (24 Aug 2018) (discussion in Neels (2021)) and *USA Distillers (Pty) Ltd v Improchem* 17/2020 [2021] SZSC 51 (4 June 2021), per https://eswatinilii.org.

41 See https://lesotholii.org.

42 *ibid*.

43 See www.saflii.org and https://namiblii.org.

44 *ibid*.

45 See www.saflii.org.

46 *ibid.*

47 *ibid* (at least eighteen decisions).

Zimbabwe;[48] and the Supreme Court of Zimbabwe.[49] These are courts of all six Southern African countries that share the mixed Roman-Dutch/English heritage of private international law.[50] Indeed, there are hardly any cases dealing with private international law that do not refer to Forsyth. It is therefore indisputable that Professor Forsyth has made a phenomenal contribution to the development of Southern African private international law. Today, it would be unthinkable for any academic publication on private international law in Southern Africa not to include references to this standard work.[51] Ellison Kahn said of the book in 2001: "Fortunately Dr Christopher Forsyth published a detailed and scholarly work on this branch of the law in 1981, which is now in its third edition. To him I would like to pay a tribute."[52]

As Forsyth states in the preface to the fifth edition, "there has developed a small community of scholars across the world interested in the development of Roman-Dutch private international law". Here he is referring to scholars from Belgium, Botswana, China, South Africa, and the United Kingdom.[53] The current publication shows that interest in Southern African private international law today has expanded to authors from Canada, the Democratic Republic of the Congo,

48 See, for instance, *Coutts & Co v Ford* 1997 1 ZLR 440 (H); and *Tiiso Holdings (Pty) Ltd v Zimbabwe Iron & Steel Co Ltd* HC 4972/09 [2010] ZWHHC 95 (5 July 2010) per www.zimlii.org. See the discussion of the *Coutts* case in J L Neels "Tweevoudige Leemte: Bevrydende Verjaring en die Internasionale Privaatreg" 2007 *Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law* 178; and in J L Neels "Falconbridge in Africa. *Via media* Classification (Characterisation) and Liberative (Extinctive) Prescription (Limitation of Actions) in Private International Law – a Canadian Doctrine on Safari in Southern Africa (*hic sunt leones!*); or: *semper aliquid novi Africam adferre*" 2008 *Journal of Private International Law* 167.

49 See www.zimlii.org. For a recent example, see *Delta Beverages (Pty) Ltd v Blakey Investments (Pty) Ltd* [2022] ZWSC 59 (30 May 2022). Also see, for all countries listed, https://africanlii.org.

50 Forsyth (2002) 68-69; Forsyth (2012) 17-19; J L Neels "South African Perspectives on the Hague Principles" in D Girsberger, T Kadner Graziano and J L Neels (gen eds) *Choice of Law in International Commercial Contracts. Global Perspectives on the Hague Principles* (Oxford University Press, 2021) 350 n 1; Schoeman, Roodt and Wethmar-Lemmer (2014) 13-14. Sri Lanka also has a mixed Roman-Dutch/English common law. See, for instance, *De Costa v Bank of Ceylon* (1969) 72 NLR 457 547: "In Ceylon, although our common law is the Roman-Dutch Law, the principles of English Law have been introduced from time to time .... Much has been said about the necessity to apply the principle of our common law – the Roman-Dutch Law – without adulterating it with the English Law. This view appears to be far too out-dated and quite contrary to the progress and development of our law. In fact, Tambiah J in *Kamalawaihie v de Silva* (1961) 64 NLR 252 ... stresses the inroads made by English Law into the legal system of Africa" (per www.commonlii.org). Indeed, whenever a new edition of Forsyth (2012) appears, some copies will be sold to customers in Sri Lanka. For a relatively recent decision of the Court of Appeal of Sri Lanka on private international law of contract, see *International Science and Technology Institute Inc (Isti) v Rosa* (1994) 3 Sri LR 233 (11 Oct 1994) per www.commonlii.org. However, with reference to this decision, L Marasinghe *Private International Law* (Vijitha Yapa Publishers, 2016) states: "[T]he applicable private international law in the Sri Lanka courts ... is the private international law applied in the courts in England" (3).

51 See J L Neels "C F Forsyth *Private International Law* (2012)" 2013 *South African Law Journal* 642.

52 Kahn (2002) 125.

53 Forsyth (2012) vi-vii.

Germany, Ghana, Japan, Malawi, the Netherlands, Nigeria, Portugal, Switzerland, Tunisia, and the United States of America (with personal contributions from a selection of the same countries, as well as Austria, Mauritius, and New Zealand). At his retirement, Forsyth leaves the world of private international law in Southern Africa a much better place than he found it 44 years ago at the first publication of *Private International Law*.

Professor Forsyth deserves gratitude not only for the original publication of *Private International Law* and keeping it up to date but also for his personal assistance and friendship with the people working in the field. He has mentored the next generations of Southern African conflicts scholars and is therefore known as the doyen of Southern African private international law. All Southern African conflicts authors routinely use Forsyth's text as their starting point for further argumentation.

Professor Forsyth has a unique relationship with the Research Centre for Private International Law in Emerging Countries[54] at the Faculty of Law, University of Johannesburg, and its associates. He never tired of providing letters of recommendation and reports, as well as reading doctoral theses. He also graciously received guests from UJ in Cambridge, including Professors Letlhokwa George Mpedi and Jan L Neels, in the context of establishing the African Commercial Law Foundation.[55] In addition, in 2015, he was the chair of the "Forsyth Commission", which made recommendations for the future development of the Faculty of Law at the University of Johannesburg. It may be added that this *Festschrift* appeared during the celebration of the 20th year of existence of the University of Johannesburg (2005-2025).

Dr Forsyth himself initiated the first contact. The first author of this chapter unexpectedly received a hand-signed letter from Cambridge, dated [Thursday] 5 March 1998, and kept it for the next 27 years (it was located after various intensive searches through dusty documents):

> Dear Professor/Dr (?) Neels,
>
> I am just dropping you a note to thank you for your positive review of the third edition of *Private International Law*.[56] Some reviewers of this edition seem to

54 previously called the Institute for Private International Law in Southern Africa and then the Institute for Private International Law in Africa.

55 (2014–2020). See Prof Mpedi's contribution "Christopher Forsyth's links to an African university" in this volume. Through the good offices of Prof Forsyth, Prof Neels delivered a paper on "Social justice, constitutional values and the recognition of Muslim and Hindu marriages in South African law" at the University of Cambridge on 20 September 2010. See J L Neels "Constitutional aspects of the Muslim Marriages Bill" 2012 *Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law* 486; and J L Neels "The positive role of public policy in private international law and the recognition of foreign Muslim marriages" 2012 *South African Journal on Human Rights* 219.

56 J L Neels "Forsyth *Private International Law* (1996)" 1998 *Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law* 175 ("Die onderhawige standaardwerk van Forsyth het geen aanbeveling nodig nie" (175)). Also see J L Neels "Forsyth *Private International Law* (1990)" 1990 *Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law* 553 ("By die deurlees van die tweede uitgawe van hierdie standaardwerk oor die internasionale

> have taken the view that it is too complicated for students while other[s] that it is not complicated enough for practitioners. I am so pleased that you do not fall into either of those categories.
>
> I am sorry that I seem to have overlooked your comment on *Laurens v von Höhne*,[57] especially since I have found your work valuable in several other areas – particularly on the Domicile Act[58] and the partial exclusion of *renvoi*.[59] Anyway, I would like to request that you send me a copy of anything else that you might write on private international law, so that I can be sure that there is no such gap in future editions.
>
> Yours sincerely,
> Christopher Forsyth[60]

Not quite three months later, the following fax, dated [Tuesday] 19 May 1998, was received, containing a similarly motivational statement for an emerging conflicts lawyer:

> Dear Jan,
> Just a quick note of thanks to you for sending me 1994 *THRHR* 687,[61] 1994 *Stell LR* 288[62] and 1995 *TSAR* 282.[63] I was very interested in the *via media* piece but particularly by "Die voorlopige regsoordeel in die internasionale privaatreg", which I think is very valuable.
>
> Yours sincerely,
> Christopher[64]

privaatreg, kom 'n mens onwillekeurig onder die indruk van die belesenheid van die skrywer en die daaruit voortvloeiende ekstensiewe verwysings, benewens na gemeenregtelike en Suid-Afrikaanse gesag, veral na Anglo-Amerikaanse literatuur en beslissings" (553); "Die publikasie van hierdie boek word van harte verwelkom. Soos reeds die geval was met die eerste uitgawe, is die boek onder bespreking 'n *sine qua non* vir elkeen wat met probleme op die gebied van die internasionale privaatreg te make kry" (556)); and Neels (2013) ("The highlight on any local private international law calendar is beyond doubt the publication of a new edition of Christopher Forsyth's standard textbook on the Roman-Dutch conflict of laws as applicable in South Africa and most of its neighbouring countries (Botswana, Lesotho, Namibia, Swaziland [Eswatini] and Zimbabwe), as well as in Sri Lanka" (642); "Professor Forsyth and Juta & Co must be congratulated on the publication of this leading text, which enters its 33rd year of continuous existence during 2013; it is unhesitatingly recommended to academics, judicial officers, practitioners and students of private international law" (643)).

57 J L Neels "*Via Media* Classification in Private International Law" 1994 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg/Journal of Contemporary Roman Dutch Law* 687, a discussion of *Laurens v von Höhne* 1993 2 SA 104 (W).

58 3 of 1992.

59 J L Neels "Die Gedeeltelike Uitsluiting van *Renvoi* in Resente Wetgewing" 1992 *Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law* 739.

60 Letter on file with the editors (quotation with the permission of Prof Forsyth).

61 (1994).

62 J L Neels "Die Voorlopige Regsoordeel in die Internasionale Privaatreg" 1994 *Stellenbosch Law Review* 288.

63 F R Malan, J L Neels, P H O'Brien and A Boshoff "Transnational Litigation in South African Law" (part 2) 1995 *Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law* 282.

64 Fax on file with the editors (quotation with the permission of Prof Forsyth).

Forsyth delivered various keynote addresses at conferences held at the University of Johannesburg. At the first international private international law conference arranged by the Research Centre on 28–30 March 2001, Dr Forsyth delivered the keynote address on *The Provenance and Future of Private International Law in Southern Africa*.[65] The other speakers were from Austria, Botswana, Germany, Israel, Malaysia, the Netherlands, and South Africa. On 26 August 2008, Professor Forsyth delivered a paper titled *A Modest Defence of Renvoi* at the Research Centre.[66]

On 9 September 2014, a symposium named *Building a Global Framework to Facilitate Trade and Investment*, arranged by the Research Centre, in cooperation with the Hague Conference on Private International Law, the Permanent Court of Arbitration, and the International Court of Justice, was held at the University of Johannesburg. The draft Hague Principles on Choice of Law in International Commercial Contracts and the Research Centre's project on the African Principles of Commercial Private International Law were introduced. Professor Forsyth contributed by providing an appreciative and critical discussion of the Hague Principles.

Professor Forsyth delivered the first keynote address on *Jurisdictional Barriers to the Enforcement of a Kenyan Judgement in South Africa and vice versa* at a conference named *Commercial Private International Law in East and Southern Africa*, held at the University of Johannesburg on 14–15 September 2015. Professor Marta Pertegás Sender, then first secretary of the Hague Conference on Private International Law, was the second keynote speaker. Judge Redson Kapindu of the High Court of Malawi opened the conference. Papers were delivered by academics and practitioners from the Democratic Republic of the Congo, Germany, Kenya, Malawi, Mauritius, Portugal, and South Africa.

The Research Centre arranged the first Pan-African Conference on Party Autonomy in Commercial Private International Law on 4 October 2017. The conference was referred to in the Vice-Chancellor's weekly e-message to staff, students and other stakeholders of 6 October 2017 as follows:

> The Research Centre for Private International Law in Emerging Countries at the Faculty of Law hosted the Pan-African Conference on Party Autonomy in Commercial Private International Law this week. Party autonomy in private international law is highly topical in contemporary conflict of laws discourse. The conference supported the endeavours of the Faculty to decolonise the academic project at UJ through the diversification and Africanisation of legal epistemologies. It provided a platform for ideas concerning party autonomy in private international law from the perspectives of a wide variety of African legal systems. The conference was well attended by attorneys, advocates, other stakeholders in the legal industry and academics from neighbouring universities. What made

65 Forsyth (2002).
66 C F Forsyth "A Modest Defence of *Renvoi*" 2009 *Tydskrif vir die Suid-Afrikaanse Reg/ Journal of South African Law* 135.

> this conference particularly special was that the guest speakers included Professor Marta Pertegás from the University of Antwerp, the former First Secretary of the Hague Conference on Private International Law, the driving force behind the Hague Principles of Choice of Law in International Commercial Contracts (2015); Professor Christopher Forsyth, from Cambridge University, the doyen of South African private international law; and, Professor John Kiggundu from the University of Botswana, renowned African specialist in the field of private international law. Other speakers included renowned scholars and practitioners from Belgium, Botswana, the Democratic Republic of Congo, Germany, Egypt, Ethiopia, South Africa, Tunisia, Japan and the United Kingdom. By all accounts, the conference was a resounding success.[67]

The Research Centre arranged a conference on 21 November 2018 on *Commercial Private International Law in India and South Africa – A Shared Future in BRICS*. HE Dr K J Srinivasa, the Consul General of India in Johannesburg, presented the opening address. Professor Forsyth delivered the keynote address on *Enforcing an Indian Judgment in South Africa: Too Easy in Some Ways, Too Difficult in Others.* Papers were delivered by Mr D Malcomson, Chief Director: Regional Organisations at the Department of International Relations and Cooperation and by academics from Brazil, India, New Zealand, and South Africa. An exhibition on Indian law was simultaneously arranged by Ms Lizette van Zyl and Ms Catrin VerLoren van Themaat in the Law Library.[68]

It may be added that, on 13 September 2005, Professor Forsyth delivered the keynote address at a commercial private international law conference arranged by Professor Eesa A Fredericks, then at UNISA. The topic was *The Impact of the Domestic on the International: Some Crucial Deficiencies in the South African Law of Jurisdiction with their Regional and International Consequences.*[69]

67 The text was prepared by Prof Letlhokwa G Mpedi (then dean of the Faculty of Law) with the assistance of Prof Eesa A Fredericks, based on materials provided by the Research Centre.

68 Later conferences include the Pan-African Conference on the African Principles on the Law Applicable to International Commercial Contracts on 31 May–2 June 2023. Many important role players in African private international law (from the Democratic Republic of Congo, Ethiopia, Ghana, Malawi, Nigeria, South Africa, and Tunisia) attended and made proposals for the further improvement of the African Principles. A representative of the Department of International Relations and Cooperation, Adv André Stemmet, voiced the South African government's support for the project. The conference held on 30 September–2 October 2024, was titled Developments in African Private International Law, with a particular focus on the work of the HCCH and OHADA. Representatives of the Hague Conference on Private International Law and OHADA participated, together with academics from Brazil, Cameroon, the Democratic Republic of Congo, France, Ghana, Nigeria, Portugal, South Africa, Switzerland, and Tunisia.

69 Nine contributions at the conference were published as a special volume on commercial private international law in the 2006 (vol 18 part 1) edition of the *South African Mercantile Law Journal* (editor Professor C J Visser and editorial assistant Adv E A Fredericks). The keynote address by Professor Forsyth was published as C F Forsyth "The Impact of the Domestic on the International: Some Crucial Deficiencies in the South African Law of

15 The Eminent Scholars Archive

In 2022, Ms Lesley Dingle, librarian for foreign and international law at the Squire Law Library, conducted four extensive interviews with Professor Forsyth for the purposes of the Eminent Scholars Archive of the Faculty of Law at the University of Cambridge. Transcripts and videos of the interviews, together with a summary of the transcripts, a biography, photographs and other relevant videos, are available on the Faculty's website.[70] Mr Daniel Bates was responsible for the visual presentation, technical enhancement and audio editing of the videos made of the interviews.

The subtitle of this *laudatio* is based on Professor Forsyth's response to Ms Dingle's question 86: "Way back in my days in South Africa, when I started turning to law, it was quite a revelation to me that you could have a career in a world of influence rather than power." It seemed to him this "could be a reasonable way [to] spend your life. That's what I've ended up doing and being able to do that in two jurisdictions is quite pleasing to me."

Certain material used in this *laudatio* is based on the Dingle interviews and biography. Quotations from the interviews are referred to according to the number of the relevant question posed by Lesley. Much information derives from Professor Forsyth's official *curriculum vitae* and the archives of the Research Centre for Private International Law in Emerging Countries at the University of Johannesburg. One or two facts were confirmed by direct engagement with Professor Forsyth. All possible mistakes are for the account of the editors.

16 *Liber Amicorum*

The current *Festschrift* should be seen as a celebration of, and a token of appreciation for, Professor Forsyth's contribution to the development of the law in Southern Africa and beyond, particularly private international law. The book deals with commercial private international law in Southern Africa from a comparative and global perspective, although some topics outside this scope were included.

The idea for a *liber amicorum* was long ago mentioned, in passing, by Professor Christian (H C A W) Schulze. Unfortunately, he did not live long enough to see the project completed, and an *in memoriam* is included in this volume with the warm support of Professor Forsyth. Indeed, the commemoration includes a short *laudatio* by Christopher himself.

The editors started with this project as far back as 2017/2018, and contributions were expected to be received during 2019. However, the COVID-19 pandemic and its long consequences intervened, and the project was substantially delayed. Nevertheless, the authors updated almost all academic contributions at the end of 2023 and the first half of 2024.

Jurisdiction with their Regional and International Consequences" 2006 *South African Mercantile Law Journal* 1.

70 (n 8).

The editors would like to thank all contributors to this publication, as well as Dr Solomon Okorley (assistant editor), Dr Craig MacKenzie (language editor for most of the contributions), Mr Wikus van Zyl (UJ Press), Mrs Hester Roets (UJ Graphic Design Studio) and Mr Achmad A Fredericks (B Com (Hons)). They also acknowledge the financial contributions of the Faculty of Law (via the Research Centre for Private International Law in Emerging Countries) under the leadership of Professor Letlhokwa G Mpedi, Professor Wesahl Domingo, Professor Kathleen van der Linde and Professor Charles Maimela.

17 Concluding Remarks

The editors wish to thank Professor Forsyth for his lifelong contribution to private international law in Southern Africa. His name will irrevocably be linked to the field of private international law in (Southern) Africa (and beyond) for future generations. The recently published first version of the proposed African Principles on the Law Applicable to International Commercial Contracts[71] was therefore dedicated by the first editor to Professor Christopher F Forsyth KC and Professor Eesa A Fredericks "for their continuing friendship and inspiration".

In the last paragraph of the preface to the fifth edition of *Private International Law*, Christopher thanks one *Charles*, "whose immense unseen contribution to these pages earns the gratitude of a contented husband".[72] "Charles", of course, refers to Mrs Gillian Charles. According to reliable sources,[73] "Charles", again, uses Christopher's middle name "Forbes". At the time of the publication of this *Festschrift*, they had been married for more than 42 years (since 4 February 1983). We wish Christopher and Gillian (now in Croxton, Cambridgeshire) all the best for the days still to come.

"And so to end",[74] the conflicts author whispers reluctantly. An ancient Hebrew poet foretold: "The LORD will write a list of the peoples, and include them all as citizens of Jerusalem."[75] The ultimate fulfilment of private international law by uniformity of decision?[76] The original adds: *selah*, a moment of silent reflection;[77] but soon enough the prophet continues: "They dance and sing."[78]

71 J L Neels *African Principles on the Law Applicable to International Commercial Contracts* (UJ Press, 2023).
72 Forsyth (2012) vii.
73 See the contribution by I Hare KC in this volume: "'Our England is a Garden': Some Reflections on Christopher Forbes Forsyth in Cambridge."
74 Forsyth (2002) 74.
75 Psalm 87:6 (TEV). See T Keller (with K Keller) *The Songs of Jesus* (Viking, 2016) 213: "Here is a vision of the new world city of the future, its citizens coming from every tongue, tribe, people, and nation." *Cf* St Augustine *De Civitate Dei* (1467).
76 See Forsyth (2002) 74; and Forsyth (2012) 70–73.
77 Psalm 87:6.
78 Psalm 87:7 (TEV).

Part II

Personal Reflections

Tribute to Christopher Forsyth

Tom Bennett*

Private international law is nowadays a Cinderella subject waiting, somewhat forlornly in the wings of the law curriculum, to be chosen by final-year law students needing to round off their degrees. In a global world of proliferating international transactions, however, conflicts of law are matters of key importance – as practitioners who have had to grapple with the subject will testify. The measured steps that must be taken to solve a conflict problem, not to mention the puzzles of characterisation, the alarming appearances of "gaps", the mysteries of single or double *renvoi*, cannot be understood without a thorough grounding in the subject beforehand. Hence, one of the great dangers of leaving a law school without having studied private international law is being unaware of the problems it poses – but the great majority of students do just that.

It's sad to reflect then that, when the University of Cape Town was founded in 1873, private international law was a compulsory course for the law degree. At that time, the Cape – and the other three territories of what was to become the Union of South Africa – had no local textbooks on the subject. As a result, the UCT Law Faculty prescribed Joseph Story's *Conflict of Laws* as the required reading. This was an odd choice, given Story's readership (American) and the wealth of literature on private international law in the basic law of the land, which was, of course, Roman-Dutch law.

Dutch jurists of the seventeenth and eighteenth centuries produced many texts and solved many cases on conflict problems, as could be expected, for the United Provinces of the Netherlands was then a federation of semi-autonomous jurisdictions plying a burgeoning trade with various European and overseas nations. The first academic text to appear in the Netherlands was Ulrik Huber's *Conflictu Legum Diversarum in Diversis Imperiis* (1641), followed by a more comprehensive book written by Paulus Voet, *De Statutis Eorumque Concursu Liber Singularis* (1661). These two works later proved to be highly influential in the development of private international law elsewhere in Europe, and even in America.

The further growth of Roman-Dutch law in the Netherlands, however, was then superseded by the *Code Napoléon*, which in turn gave place in 1838 to an indigenous Dutch code based on the Napoleonic model. As a result, for well over a hundred years, neither the South African courts nor the teachers of law had any local, contemporary texts on one of the critical subjects of a legal system. In 1981, this lacuna was eventually filled by Chris Forsyth's *Private International Law: The*

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Modern Roman-Dutch Law including the Jurisdiction of the Supreme Court.[2] This book marked the start of his reputation for adventurous scholarship, sound reasoning and eminently readable texts.

Chris set himself a tough challenge. The book had to reconcile a diverse collection of sources, including the Roman-Dutch heritage and the weighty mass of English precedents, which in South Africa had long been an essential reserve for persuasive authority. It had, what is more, to take account of a century of case law emanating from the Southern African courts, not to mention occasional legislative interventions (sometimes disastrously misguided, as for instance, the Protection of Businesses Act)[3] and, of course, the contributions of South African authors, notably, Dr Erwin Spiro (whose various articles were gathered together in *Conflict of Laws*)[4] and Professor Ellison Kahn (on marriage in Hahlo's *South African Law of Husband and Wife*;[5] on succession in Corbett *et al The Law of Succession in South Africa*).[6]

Forsyth's *Private International Law* immediately became the standard text, not only in South Africa but also in its neighbouring states, where the legal system was based on Roman-Dutch law – and even further afield in Sri Lanka. One of the acid tests of the success of any text is the number of editions it manages to generate, and, in the case of Forsyth the result has been five – more or less one every five years. Accordingly, we have a 5th edition of 2012.[7]

As all students of the conflict of laws will readily concede, the subject is one of considerable complexity. It is a set of second-order rules designed to operate not directly on the facts of any given case but rather on the rules governing those facts. In consequence, the conflict of laws is a highly abstract discipline, made even less accessible by its disparate sources of authority. In this modern era of globalisation, the student constantly needs to be aware of developments abroad, notably the Hague Conventions governing marriage, children, succession and legal process, the United Nations Convention on the International Sale of Goods[8] and the European Union's Rome II Convention on the Law Applicable to Non-Contractual Obligations,[9] together of course with the improvements in foreign jurisdictions on what was, in origin, a medieval system of choice of law rules (*vide* the American doctrine of the proper law of the tort).[10]

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2 C F Forsyth (assisted by T W Bennett) *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the Supreme Court* (1981).

3 99 of 1978.

4 E Spiro *Conflict of Laws* (1973).

5 H R Hahlo *South African Law of Husband and Wife* (1975).

6 M M Corbett *et al The Law of Succession in South Africa* (1980).

7 C F Forsyth *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012).

8 (1980).

9 (2007).

10 which was adopted by the Eastern Cape High Court in *Burchell v Anglin* 2010 3 SA 48 (ECG).

Notwithstanding these complexities, Chris wrote his books with a sympathetic eye for the reader. To quote from a review of the 4th edition of *Private International Law*,

> [o]ne would expect a book of such high regard to be dense and filled with complex discussions of byzantine constructions (and private international law definitely has more than enough material to fill a book with such analyses!). This book, however, has none of that. It is a model of clear and understandable writing. ... [I]t is quite remarkable that Forsyth has managed to find and maintain the balance between creating a work of indisputable authority and one that is at the same time simple enough to serve as introduction to private international law.[11]

Chris's clear, readable style was no doubt the product of his working method. As he told me when he was busy writing the first edition, the goal of each day was to fill four pages of an exercise book in his neat, quasi-italic script. The text had been so carefully thought out in advance that minimal revision was necessary.

Although Chris's distinguished reputation in South Africa is firmly tied to private international law, his other works have spanned quite different fields. One such field was the law of suretyship: Chris took on the authorship of a long outdated book, *Caney's Law of Suretyship*, and has seen it through to its 6th edition,[12] ensuring that it remains the leading text on the subject, the go-to book for students and practitioners, regularly referred to in all the Roman-Dutch jurisdictions.

Chris also had an abiding interest in jurisprudence (witness his thought-provoking article (with J E Schiller) on "The *Sein*, the *Sollen* and the *Nichtsein*" in the 1979 *Archiv* für *Rechts- und Sozialphilosophie*),[13] as well as constitutional law and human rights. In fact, one of the great achievements of his career was the convening of a large international conference on human rights in Cape Town in 1978, the papers of which were published under his and Schiller's editorship in the 1979 issue of *Acta Juridica*. The conference was a first, and on many counts, a controversial event: not only was South Africa subject to an international academic boycott, but the classical liberal human rights were anathema to the apartheid regime.

In 1983, Chris left South Africa to take up a position at Robinson College in Cambridge, where he had gained his doctoral degree. There he later became the Sir David Williams Professor of Public Law. Shortly after arriving at his *alma mater*, Chris began a highly productive collaboration with the late Sir William Wade on

11 G Guinot "*Private International Law – The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* by C F Forsyth" 2005 *Stellenbosch Law Review* 169 at 170 and 172.

12 C F Forsyth and J T Pretorius *Caney's The Law of Suretyship in South Africa* (2010).

13 C F Forsyth and J E Schiller "The *Sein*, the *Sollen* and the *Nichtsein*" 1979 *Archiv für Rechts- und Sozialphilosophie* 475.

a new edition of Wade's well-established text: *Administrative Law* (now in its 12th edition, 2022).[14] This work is a standard book in England and other common-law jurisdictions, where it is widely read by students, and regularly referred to by practitioners and judges throughout the Commonwealth.

Chris was called to the bar of the South African High Court and, during his tenure at Cambridge, he became a barrister of England and Wales at Gray's Inn, where was made a QC and is now a King's Counsel. He accepted instructions on all areas of constitutional and administrative law, especially when difficult issues of principle were in question, and of course issues of private international law when South African or English laws were concerned. In addition, he has acted as a part-time judge in England, sitting as Recorder in the Crown Court and as a Deputy High Court Judge in the Administrative Court.

Chris's interests reached even further than England and South Africa, leading to his work in various, mostly Commonwealth, countries. This work involved: advising governments (as in Malawi, where he acted as Technical Adviser on Constitutional Reform to the Law Commission and drafted the Constitutional Report of the Law Commission as well as two Constitutional Amendment Bills); training civil servants in good decision-making practices; teaching administrative law and giving evidence to Law Commissions.

A remarkable polymath, Chris has received due recognition for his outstanding scholarship, not only at the University of Cambridge but also at the University of Stellenbosch (where he is an Honorary Professor) and the Chinese University of Hong Kong (where he was an Honorary Member of the Advisory Board of the Faculty of Law). It can only be hoped that his retirement from a full and rich academic career as Professor *Emeritus* will not preclude further publication. Thirteen years have passed since the 5th edition of *Private International Law* appeared: a 6th would be very much appreciated.

14 C F Forsyth and I J Gosh *Wade and Forsyth's Administrative Law* (2022).

Gulliver's (Conflicts of Law) Travels

The Act of State Doctrine as a Source of Private International Law in Canada and South Africa

George Douvelos*

In his epic book *Gulliver's Travels*,[1] first published in 1726, Jonathan Swift tells the story of Gulliver's travels. On his first voyage, Gulliver is washed ashore after a shipwreck and finds himself a prisoner of a race of tiny people, who are inhabitants of the island country of Lilliput. He is given residence in Lilliput and becomes a favourite of the Lilliputian royal house and writes of Lilliput's laws, customs and learning. Gulliver assists the Lilliputians to subdue their neighbours, the Blefuscudians, by stealing their fleet. However, he refuses to reduce the island nation of Blefuscu to a province of Lilliput, displeasing the King and the royal house. So, Gulliver is charged with treason, among other crimes. He is convicted, but escapes to Blefuscu.

Putting aside for the moment the fact that *Gulliver's Travels* is of course a work of fiction, one wonders which choice of law would apply and in which forum the Blefuscudians would file a lawsuit against the King of Lilliput for the island of Blefuscu, which the King claims as his own province?

As Prof Forsyth, in whose honour this short article is penned, reminds us, "prior to the question of choice of law is a question of choice of court".[2] Once the dispute between the Blefuscudians and the King in relation to the land of Blefuscu is framed in terms of territory, a choice-of-law rule readily presents itself, namely, the *lex situs*.[3]

* Barrister of the British Columbia Bar. My first introduction to private international law at the Rand Afrikaans University (now the University of Johannesburg) was through a previous edition of Prof Forsyth's *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012) (see n 2), prescribed as essential reading by Prof J L Neels and which remains part of my library collection. What a privilege it was for me as naïve conflicts lawyer to have first met Prof Forsyth KC in person at a conference of the then Institute of Private International Law in Southern Africa in March 2001 (now the Research Centre for Private International Law in Emerging Countries, based at the University of Johannesburg).

1 J Swift *Gulliver's Travel* in M J Adler (ed) *Great Books of the Western World* (1994) 28.

2 C F Forsyth *Private International Law. The Modern Roman-Dutch Law Including the Jurisdiction of the Supreme Court* (1995) 3.

3 Forsyth (1995) 296. See also T W Bennet "The Quest for Justice" in E Kahn (ed) *Essays in Honour of Michael McGregor Corbett, Chief Justice of the Supreme Court of South Africa*

Pursuant to South African private international law, the *situs* of the land dictates the forum for the hearing of the dispute and the law to be applied.[4] The *forum rei sitae* has exclusive jurisdiction in respect of claims involving title to immovable property.[5] In principle, the courts will apply the conflict-of-law principles and rules of the legal unit in which they sit, except in the case of *renvoi*.[6]

In *Morguard Investments Ltd v De Savoye*,[7] the Supreme Court of Canada, per La Forest J, gave guidance on the constitutional imperatives underlying key principles of Canadian private international law, which includes the principle of "comity".[8] However, only the courts of the place where the immovable is located may determine a dispute over title to it.[9]

As a result, in the fictitious scenario regarding the dispute of the lands between the King of Lilliput and the Blefuscudians, the law of the land of Blefuscu would apply – that is, if South African private international law or Canadian[10] private international rules were applied.[11]

Prof Falconbridge is of the view that

> the characterization of the rule of internal law should be preceded by a characterization of the question which is before the Court, with a view of selecting the connecting factor or factors appropriate to the question or two different aspects of the question in accordance with the conflict rules of the forum. This characterization of question – which may be provisional and subject to revision – lays the foundation for the Court's consideration of concrete provisions of the laws of various countries which are or may be applicable in the light of characterization of the main question or different aspects of the question.[12]

(1995) 123 126.

4 *British South Africa Company v Companhia de Mocambique* [1893] AC 602 (HL).

5 Forsyth (1995) 190.

6 See J Walker *Castel & Walker: Canadian Conflicts of Law* (2005) §1-2.

7 [1990] SCJ No 135 p 1077, 75 DLR (4th) 256.

8 *Morguard Investments Ltd v De Savoye* (n 7) 1096 *f-g.*

9 J Walker "Conflict of Laws" in *Halsbury's Law of Canada* (2016) 434 HCF 50.

10 In the province of Québec, for the most part private international law rules are codified. See Walker (2005) §1-6.

11 C F Forsyth "Characterisation Revisited: An Essay in the Theory and Practice of English Conflict of Laws" 1998 *Law Quarterly Review* 141 146-150.

12 J D Falconbridge "Characterization in the Conflict of Law" (part 1) 1937 *Law Quarterly Review* 235 246. See further J D Falconbridge "Conflict Rule and Characterization of Question" (part 1) 1952 *Canadian Bar Review* 103 106 where he says that reference to the "question" should be read as "the legal question or problem arising from the factual situation". For a thought-provoking discussion of Falconbridge's *via media* application, see J L Neels "Falconbridge in Africa. *Via media* Classification (Characterisation) and Liberative (Extinctive) Prescription (Limitation of Actions) in Private International Law – A Canadian Doctrine on Safari in Southern Africa (*hic sunt leones!*); or: *semper aliquid novi Africam adferre*" 2008 *Journal of Private International Law* 167-200.

In accepting Prof Falconbridge's logic, the questions would be: what exactly is the subject-matter of the process of characterization? What is it that is characterized? The subject of characterization is legal and not factual. So, we would characterize the question of title to the land in relation to a particular rule of law – namely, that of Lilliput or the foreign law. However, in the final analysis, there will be no right answer to the fictitional question. Private international law is "simply a particular branch of each national legal system regulating the legal relations between individuals".[13]

There is, however, also a trend, as Prof Forsyth writes, "to grant individuals rights and to impose duties to individuals at international law".[14] This trend is being developed through the Act of State doctrine by the courts.[15] The Supreme Court of Canada decision in *Nevsun Resources Ltd v* Araya[16] will be used to discuss this trend. However, some writers argue that the Act of State doctrine should more appropriately be a branch of public international law.[17] The genesis of the Act of State doctrine was formulated by the United States Supreme Court in *Underhill v Hernandez*,[18] when Fuller CJ in his opinion wrote: "The Courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[19]

The Supreme Court of Canada in *Nevsun* came to the decision that there is no single definition that captures the unwieldy collection of principles, limitations and exceptions that has been given the name of the doctrine of Act of State in English law.[20]

Briefly, the facts are that Nevsun Resources Ltd ("NR") operated a mine in Bisha, Eritrea. The mine was owned by a corporation, which NR in turn owned. NR exercised effective control over the Bisha mine corporation and held the power to appoint the majority of board members, including the chair of the Bisha mining corporation, who was also the CEO of NR. The Bisha mine corporation used

13 Forsyth (1995) 3. See also J H C Morris "Falconbridge's Contribution to the Conflict of Laws" 1957 *Canadian Bar Review* 610-627. A Mills "The Private History of International Law" 2006 *International and Comparative Law Quarterly* 1-49 argues that it is a myth that private international law is not actually international, as it is necessarily a part of the domestic law of States.

14 Forsyth (1995) 4 n 10.

15 E E Cheathab and G H Harold "Private International Law and its Sources" 1968 *Vanderbilt Law Review* 27-102. See also F Madl "Struggle with Reality in Private International Law" 1969 *Acta Juridica* 153-186.

16 2020 SCC 5.

17 Forsyth (1995) 3 n 9 writes that historically the subjects were linked; he refers to Khan-Freud for his discussion of public international law as a source of private international law. Also see Mills (2006) 1.

18 168 US 250 (1897). See also *Banco Nacional de Cuba v Sabbatino* 376 US 398.

19 *Underhill v Hernandez* (n 18) 252. See also S Weisberg "International Law and the Act of State Doctrine" 1962 *UCLA Law Review* 406-621.

20 *Nevsun Resources Ltd v* Araya (n 16) par 29.

Eritrean subcontractors to build the mine, including two for-profit entities run by high-ranking members of the Eritrean military and ruling political party.

The plaintiffs were a group of Eritrean nationals conscripted into Eritrea's mandatory national military service who worked for the two Eritrean subcontractors. They claimed that they were forced to work on the construction of the Bisha mine long after their military service term was supposed to end. They also claimed they were subject to degrading and inhumane treatment, including deprivation, physical assault, threats, and torture, in order to control them and force them to continue working on the mine's construction.

The plaintiffs brought a motion to strike out the claims of the Eritrean plaintiffs based on two legal theories: first, that the plaintiffs' claim was barred by the Act of State doctrine, which precludes domestic courts from assessing sovereign acts of a foreign government; and, second, that the plaintiffs' claims based on customary international law had no reasonable prospect of success because breach of customary international law is not a cause of action in Canadian common law.

Justice Abella delivered the majority decision in *Nevsun* (Wagner CJ, Karakatsanis, Gascon and Martin JJ concurred but Brown, Rowe, Côté and Moldaver JJ dissented) on the Act of State doctrine. In doing so, she considered the historical development of English[21] and Canadian law and concluded that:

> While the English common law, including some of the cases which are now recognized as forming the basis of the Act of State doctrine, was generally received into Canadian law at various times in our legal history, as the preceding analysis shows, Canadian jurisprudence has addressed the principles underlying the doctrine within our conflict of laws and judicial restraint jurisprudence, with no attempt to have them united as a single doctrine. The Act of State doctrine in Canada has been completely absorbed by this jurisprudence.[22]

In the result, the Supreme Court of Canada in *Nevsun* has now clarified that Canadian law has "completely subsumed"[23] the Act of State doctrine within the domain of private international law and judicial restraint law.

In the South African decision of *Saharawi Arab Democratic Republic v Owner and Charterers of the MV "NM Cherry Blossom"*,[24] the court stated that "the doctrine of a foreign act of state is a municipal law rule which derives from common law principles as developed in Anglo-American courts. It is founded upon the principle

21 *Nevsun Resources Ltd v Araya* (n 16) par 27-42. See also *Blad v Bamfield* (1674) 3 Swans 604; *Duke of Brunswick v King of Hanover* (1848) 2 HLC 1; *Belhaj v Straw* [2017] UKSC 3; and *Oppenheimer v Cattermole* [1976] AC 249.

22 *Nevsun Resources Ltd v* Araya (n 16) par 57.

23 *Nevsun Resources Ltd v* Araya (n 16) par 44.

24 [2017] ZAECPEHC 31.

of mutual respect for equality of sovereign states, the principle of comity."[25] The court missed the opportunity to reaffirm the Act of State doctrine as part of South African law and left this matter for another court to determine.[26] However, in the course of considering the issue, the court quoted *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*:[27] "The basis of the application of the Act of State doctrine or that of judicial restraint is just as applicable to South Africa as it is to the USA and England. The comity of nations is just as applicable to South Africa as it is to other sovereign States."[28]

In conclusion, considering that the Act of State doctrine is a municipal law rule, which derives from common law principles as developed in Anglo-American courts and applied in public international law (as is the position in South Africa) or completely subsumed (as is the position Canadian jurisprudence), then logically it follows that the Act of State doctrine is a source of private international law. Should my logic be flawed, then perhaps the following by Jonathan Swift, writing about the Lilliputians, their learning, laws, and customs, is apt: "There are some laws and customs in this empire very peculiar; and if they were not so directly contrary to those of my own dear country, I should be tempted to say a little in their justification."[29]

25 *Saharawi Arab Democratic Republic v Owner and Charterers of the MV "NM Cherry Blossom"* (n 24) par 86.

26 *Saharawi Arab Democratic Republic v Owner and Charterers of the MV "NM Cherry Blossom"* (n 24) par 101.

27 1999 2 SA 279 (T).

28 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* (n 27) 334 D-F.

29 Swift (1994) 28.

A Time to Remember

Rajendra Parsad Gunputh*

Professor Jan Neels had clearly explained to me that during my stay at the University of Johannesburg I would be accommodated in one of the university's rooms, and that a professor would give me a lift to get to the university. Who could it be?

While I was having my breakfast a man in his sixties approached me in a straw hat, and in a very elegant British accent invited me to go to the University of Johannesburg to attend one of the many conferences that are regularly organised by Professor Jan Neels, another eminent professor of International Commercial Law. Overjoyed, I got the opportunity to meet them both on the same day. I followed him, six feet tall, and he led me to the Faculty of Law. I took the opportunity to invite him as one of the external examiners to the University of Mauritius so that he could advise us on the quality of our exam papers reserved especially for LLB (Hons) students in their third and final year before graduating.

This was an invitation that he willingly accepted, and he was able to come to the University of Mauritius over a period of two years to advise us on how our students could improve in terms of getting their LLB dissertations to the requisite level in content and structure. The University of Mauritius and the Faculty of Law and Management then had the honour and privilege of welcoming this eminent jurist whose works in law are carefully catalogued and listed on the shelves of the main library of the University of Mauritius as "Reserved Books", as well as on the shelves of the main library of the Supreme Court of the Republic of Mauritius for consultation by judges and lawyers.

Such important legal aid and knowledge sharing for both jurists and the Supreme Court of the small Republic of Mauritius cannot be overlooked. Thus, decisions emanating from the Supreme Court of Mauritius, the highest court on the island, shed light on disputes relating to Administrative Law thanks to the scholarship of Professor *Emeritus* C F Forsyth of the University of Cambridge, doctrine which is frequently quoted in decisions of the Lords of the Mauritian courts, and other Commonwealth countries.

Readily available in the public domain is the information that Professor Christopher Forsyth is *Emeritus* Sir David Williams Professor of Public Law at the University of Cambridge and Cheng Yu Tung Visiting Professor of Law at the University of Hong Kong. He is an Honorary Professor of Law at the University of Stellenbosch. He is an Honorary Member of the Advisory Board of the Faculty of Law of the Chinese University of Hong Kong, an Academic Bencher of the Inner

* Personal Chair in International Comparative Law, University of Mauritius, novelist, humanitarian and philosopher.

Temple, a barrister (practising from 4-5 Gray's Inn Square) and an external examiner of the University of Mauritius.

In addition, Professor Forsyth is regularly invited worldwide to share his profound knowledge of law, and to assist and participate actively in debates, international conferences, and workshops to share his precious legal advice on Public Law. On a couple of occasions, I had the opportunity and privilege to listen to his presentations, and those were times to remember!

He is the author with the late Sir William Wade QC of *Administrative Law* (OUP, 11th ed, 2014), a standard work to rely on that is regularly cited as authoritative by students, scholars and judges across the common-law jurisdictions.[1] He was also for many years an Independent Member of the Cambridgeshire Police Authority.

He has contributed enormously to the law with numerous articles on International Private Law, which have attracted more than 3 500 citations. The topics and titles of his research include the following: "Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, the Sovereignty of Parliament and Judicial Review";[2] "The Provenance and Protection of Legitimate Expectations";[3] *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*;[4] *Judicial Review and the Constitution*;[5] *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC*;[6] *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950 to 1980*;[7] "The Impact of the Applicable Law of Contract on the Law of Jurisdiction under the European Conventions";[8] and "The Eclipse of Private International Law Principle? The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era".[9] These are merely some in the extensive list of themes his scholarly work addresses.

1 For today, see C F Forsyth and I J Ghosh *Wade and Forsyth's Administrative Law* (2022).

2 C F Forsyth "Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, the Sovereignty of Parliament and Judicial Review" 1996 *Cambridge Law Journal* 122.

3 C F Forsyth "The Provenance and Protection of Legitimate Expectations" 1988 *Cambridge Law Journal* 238.

4 S Shetreet and C F Forsyth (eds) *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (2011).

5 C F Forsyth (ed) *Judicial Review and the Constitution* (2000).

6 C F Forsyth and I Hare (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (1998).

7 C F Forsyth *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950-80* (1985).

8 C F Forsyth and P Moser "The Impact of the Applicable Law of Contract on the Law of Jurisdiction under the European Conventions" 1995 *International and Comparative Law Quarterly* 238.

9 C F Forsyth "The Eclipse of Private International Law Principle? The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era" 2005 *Journal of Private International Law* 93.

He has written with such authority on such a range of legal topics that a mere listing of them here does not do him justice. Suffice it however to mention the following broad areas of law in which he has made a major contribution: Administrative Law, Public Law, Constitutional Law, Private International Law and Private International Commercial Law. It is also important to note that his writing is so lucid and clear that it is accessible to any class or court of law and by any student or legal representative.

Professor Forsyth has set a pedagogical model for future generations to emulate.

Such an illustrious career had unfortunately to come to an end, but his legacy includes numerous manuals, articles and doctrines of legal thought reflecting his wisdom in the field of law. His standing is such that he will certainly leave a huge vacuum among students and people who have been close to him.

This *Festschrift* devoted to Professor Forsyth is an excellent way to thank him for his dedication to the promotion of the law in, *inter alia*, England, South Africa, Hong Kong, Asia, Mauritius, all Commonwealth countries and beyond.

Conclusion: thank you!

"Our England is a Garden"

Some Reflections on Christopher Forbes Forsyth in Cambridge

Ivan Hare KC[*]

As any advocate will tell you, there is nothing better than a clear set of instructions. In this case, Jan could not have been more pellucid in his invitation: "Do not write about public law, but tell us something about Christopher in Cambridge." That directive was as welcome in substance as it was in form, since I confess to having spent most of my academic and professional career actively avoiding legal problems in which any issue of the conflict of laws might arise. On the other hand, Christopher was a pivotal part of public law in Cambridge during the twelve years I was able to call him a colleague as well as a friend.

Christopher and I began to collaborate as teachers on the optional undergraduate course in administrative law for those reading for the degree of Bachelor of Arts in Cambridge. The subject of administrative law in England (and much of the common law world) at the time still bore the unmistakeable imprint of two of our Cambridge antecedents: Sir William (Bill) Wade and Stanley de Smith. Bill's *Administrative Law* (of which more later) and Stanley's *Judicial Review of Administrative Action* had provided the first systematic accounts of the (slowly) growing field.[1] Both books were united by characteristics of Christopher's own contributions to public law: a profound and nuanced engagement with the doctrine and the constant quest for principle which might guide law student, practitioner

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1 H W R Wade *Administrative Law* (1961) and S A de Smith *Judicial Review of Administrative Action* (1959). For a more detailed account of Bill's life and career, see D G T Williams "Sir William Wade QC" in C F Forsyth and I Hare (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (1998). Accounts of Stanley de Smith's career are contained in the 1974 *Cambridge Law Journal* 177 and the 1974 *Modern Law Review* 241.

and judge towards a more coherent answer to the problems posed by judicial control of the powers of government.

In the mid-1990s when Christopher and I lectured on administrative law, the course was coordinated by Dr Yvonne Cripps. Yvonne sustained us through curriculum discussions in her rooms in the front court at Emmanuel College with great good humour and bottomless glasses of New Zealand sauvignon blanc. Teaching in Cambridge at the time followed the traditional mode of delivery of two lectures a week, delivered in the Old Schools[2] in the centre of Cambridge by a university lecturer or professor and reinforced (or undermined, depending on the supervisor) by a fortnightly supervision in a group of three or four students delivered in college.[3] Christopher was an outstanding lecturer and (as I understand it) supervisor.[4] I can speak more knowledgably about his lectures,

2 The Old Schools were constructed between the mid-fourteenth and mid-fifteenth centuries to house the Divinity School, lecture halls and a library. By our time, the lawyers had taken over from the divines and had also secured the old university library building (1842) next to the Senate House for its Faculty library. The building was designed by C R Cockerell and was described by Pevsner as "earnest, weighty and impressive" (*The Buildings of England – Cambridgeshire* (1954) 166). In a further link with Christopher's own progress through the university, it now houses the library of his old graduate college: Gonville and Caius. Christopher joined Caius as a PhD student under the supervision of Colin Turpin, Fellow of Clare College. Christopher's thesis was submitted in 1983 under the title *In Danger for Their Talents – A Study of the Appellate Division of the Supreme Court of South Africa from 1950 to 1980*.

3 Clive Parry (who supervised law at Downing College from 1946 until 1982) wrote a revealing paper about supervisions and their relationship to lectures for an American audience: "The Cambridge Supervision System" 1954-1955 *J Legal Educ* 1. Clive also had some very good advice for law students sitting their examinations: "If you know the name of a relevant case, write it down; if you know the name of a case which is not relevant, write it down and explain why it is not relevant; if you don't know the names of any cases, explain that the answer is plain as a matter of principle and does not require reference to authority." The relationship between the university and colleges in Cambridge is not straightforward and adds a further layer of complexity to the definition of a university provided by Robert Maynard Hutchens (Chicago): "a group of schools and departments united by a central heating system"; and by Clark Kerr (California): "a series of individual faculty entrepreneurs held together by a common grievance over parking" (both quoted by S Collini *What Are Universities For?* (2012) 41). Professor Dr Dr Reinhard Zimmermann (a familiar name to a South African audience) was surprised to be told during his tenure of the Arthur Goodhart visiting chair of Legal Science in Cambridge that the parking spaces outside the Law Faculty which he walked past every day were for the secretaries and not the professors.

4 I am not well placed to comment on Christopher's life in Robinson College, where he became a Fellow in 1983. However, I was much struck by Christopher's diligence in using the inter-collegiate pool of candidates who had not gained entry to their first choice college to improve the entry level of Robinson undergraduates and his introduction of a residential revision week which enhance their performance in the Tripos and hence their exit velocity upon graduation. As a result of Christopher's

since we occasionally held a joint lecture as Christopher's stint came to an end and I was about to take over. We would identify a topic which provided a natural transition from Christopher's part of the course to mine and one upon which our views diverged in order to introduce an element of the dialectic. I enjoyed these sessions immensely, although that was a view not universally shared by some of the less able members of our audience. The end-of-year student satisfaction surveys (which had by then been introduced)[5] did not reveal whether the source of this dissatisfaction was that our students considered the subject-matter to be complicated enough without getting two conflicting views of it or arose from a puritanical concern about the profligate use of the Faculty's limited teaching resources.[6] Christopher applied a characteristically subversive approach to some other attempts to introduce pedagogic innovations. I recall he told of a seminar he attended at which university teachers from a number of disciplines were being encouraged to introduce more visual aids into their classes. Christopher illustrated his topic on the law of homicide by showing successive drawings of a stick man approaching another stick man, of one stick man stabbing the other stick man and finally one stick man lying on the ground. Apparently without a hint of irony, Dr Forsyth was commended on his use of visual aids by the trainer.

Returning to the founders of our shared subject, it is sad to repeat (even now) that Stanley de Smith died in 1974 only three years after taking up the Rouse Ball chair on his return to Cambridge from the London School of Economics, where he had taught for over 20 years.[7] Bill Wade on the other hand remained a very active presence in Cambridge throughout the 1990s, even after he had retired from his own tenure of the Rouse Ball chair and his period as Master of Gonville and Caius College. As is well known, Christopher was invited by Bill to join him in

efforts (and those of Dr Martin Dixon), Robinson's performance in the law tripos was impressive. Christopher's commitment to teaching both in College and in the Faculty of Law was unstinting.

5 I was fortunate enough to have left teaching for the Bar before the introduction in British universities of the office of Pro Vice-Chancellor, Student Experience. Stefan Collini is characteristically uncompromising (and correct) to state of student satisfaction surveys: "I would hope the students I teach come away with a certain kind of dissatisfaction (… a "satisfied" student is nigh-on uneducable). … It may be that the most appropriate way to decide whether the atmosphere in the student bar is right is whether students say, when asked in a questionnaire, that they 'like' it or not. But this is obviously not the best way to decide whether a philosophy degree should have a compulsory course on Kant" (Collini (2012) 185 and ch 6 of the same author's *Speaking of Universities* (2017)).

6 It should also be said that the majority of our audience expressed enthusiasm for the joint sessions.

7 In addition to his very great academic distinction, Stanley was awarded the Order of Leopold II and the *Croix de Guerre* (1940) with palms for his distinguished service during the Second World War. What Wilfred Owen described in another war as "the monstrous anger of the guns" affected Stanley's hearing for the rest of his life (W Owen *Anthem for Doomed Youth* (1917)).

drafting the seventh edition of *Administrative Law*, which appeared in 1994. That warm and fruitful collaboration continued through the eighth and (preparation of the) ninth edition and was ended only by Bill's death on 12 March 2004. Since then, Christopher has ploughed on through the tenth and eleventh editions like Britain after the fall of France in the well-known war-time cartoon: "Very well, alone."[8]

Christopher had a great ability to engage Bill on his own terms and to bring the more humorous side of Bill's character to the fore. For many, though, Bill could appear somewhat austere on first meeting. A flavour of that is perhaps given by his evidence at the 1985 criminal trial of Clive Ponting, a senior civil servant in the Ministry of Defence. Mr Ponting was accused of breaking section 2 of the Official Secrets Act 1911 by leaking documents to a Member of Parliament concerning the Royal Navy's sinking of the Argentine warship, the *General Belgrano*, in May 1982 during the conflict over the Falkland Islands.[9] Bill was called by the defence to give expert evidence on the nature and scope of the constitutional convention that Ministers of the Crown have a responsibility to provide accurate information to Parliament (subject to the limited exigencies of national security). In order to establish the credentials of his client's expert, Bruce Laughland QC (Counsel for Mr Ponting)[10] asked Sir William if he was the leading expert on constitutional law in the United Kingdom. Bill replied simply (and truthfully) in the affirmative. It is, of course, impossible to know what effect Bill's evidence had on the jury, but given that Clive Ponting was acquitted in the face of a clear direction from the trial Judge, McCowan J, in favour of conviction, it is perhaps reasonable to assume that it was influential.[11]

A memorable example of Christopher's capacity to draw out the lighter side of Bill's character occurred when Christopher spoke at the launch of our jointly edited collection of essays in Bill's honour, *The Golden Metwand and the Crooked Cord*. This book came as a complete surprise to Bill. Christopher had liaised clandestinely with Bill's wife, Marjorie, to lay his hands on some photographs of Bill that the publishers were able to print on the dustjacket and frontispiece of

8 The cartoon was drawn by David Low and appeared in the London *Evening Standard* on 18 June 1940, the day after Pétain sought terms for the surrender of France.

9 *R v Ponting* [1985] Crim LR 318. For Clive Ponting's own account of the prosecution, see "*R. v. Ponting*" 1987 *J Law and Soc* 366 and *The Right to Know: The Inside Story of the Belgrano Affair* (1985).

10 Bruce Laughland took an enlightened approach to MI5's attempts to discover his forensic strategy by bugging his telephone: whenever the Director of Public Prosecutions would call him to discuss the case, Laughland would greet the Director and then add: "and good morning Sergeant Bloggs". When he was admitted as a Bencher of the Inner Temple, the Treasurer of the Inn was also the current Attorney General (Sir Michael Havers). Sir Michael welcomed Bruce by thanking him for "being so decent about the bugging". See Bruce Laughland's obituary in *The Guardian*, 9 May 2002. Christopher also became a Bencher of the Inner Temple in 2003.

11 The *Ponting* case is also discussed by Yvonne Cripps in her chapter "The Consequences of Disclosure in the Public Interest" in Forsyth and Hare (n 1) 299-305.

the volume. They captured some of Bill's extra-curricular interests: mountain climbing and gardening, including one depicting Bill feeding a pheasant he had tamed in his garden in Oxfordshire.[12]

The title for the volume was entirely Christopher's idea. Readers with a keen sense of seventeenth-century English constitutional law will, of course, immediately recognise it as the contrast drawn by Sir Edward Coke, Chief Justice of the Court of Common Pleas from 1606 to 1613, between the "golden and straight metwand of the law" and the "crooked cord of private opinion, which the vulgar call discretion".[13] Coke was not against the concept of discretion itself; without discretion, public administration would be impossible. Coke's concern was not to eliminate discretion altogether, but to ensure that it should be "limited and bound with the rule of reason and law".[14] This was the central concern of Bill's scholarship and the title could not have been more appropriate. However, it is fair to say that we encountered some resistance from our publishers, who felt that the nature and contents of the volume might be misunderstood by potential

12 Characteristically, Bill not only took the photograph, but also developed and printed it himself.

13 Coke was Chief Justice of the Common Pleas between 1606 and 1613 and then Chief Justice of the Court of King's Bench, where his old rival Sir Francis Bacon thought he could inflict less damage on the exercise of royal power. Coke's influence on the common law can hardly be overstated. Not only did he argue and later decide many of the leading cases on nascent constitutional doctrines such as the separation of powers, the limits of the Royal Prerogative and the scope of review of primary legislation, he also ensured that his arguments and decisions could not be misrepresented by writing his own law reports (see J H Baker "Coke's Note-Books and the Sources of his Reports" 1972 *Cambridge Law Journal* 59). His writing was not confined to reporting and his *Institutes of the Lawes of England* (1628-1644) remain of immense importance to the development of the common law. Many of Coke's cases are discussed in Chapters 6 and 7 of S Sedley's *Lions under the Throne: Essays on the History of English Public Law* (2015). Sir Stephen Sedley also contributed a chapter to *The Golden Metwand* (Forsyth and Hare (n 1)) on "The Crown in its Own Courts". Coke's links with Cambridge were also extensive: he studied at Trinity College between 1567 and 1570 and returned there as High Steward from 1614 after his fall from royal favour. Coke remained a great supporter of the university in his parliamentary work: always referring to Cambridge before Oxford, despite the prevailing convention that it should be the other way round. When criticised for this in Parliament by Sir Thomas Edmondes, Coke is said to have replied that Edmondes should not trouble himself too much on the precedence of the two universities since he had attended neither.

14 *Keighley's Case* (1609) 10 Co Rep 139a. Further references are contained in the Preface to the *Golden Metwand* (Forsyth and Hare (n 1)) vii. Robin Cooke, the former President of the New Zealand Court of Appeal and Law Lord (and a contributor to the volume), made gentle fun of Christopher's choice of title by suggesting that a metwand was the name for the pointer used by television weather forecasters. Robin and Christopher remained good friends. Robin's affection for Cambridge (where he had also taken a PhD from Caius) was revealed by his choice of title when he entered the House of Lords: Lord Cooke of Thorndon and Cambridge.

purchasers. Christopher was able to reassure them when we presented the volume to Bill in the Old Combination Room at Trinity that any confusion would be unlikely to affect sales: if someone bought the book thinking it was an account of the goldsmith's art or even a volume of poetry, the royalties would still flow into OUP's coffers (subject to a minor disbursement to the editors). Bill was delighted by the sentiments in Christopher's speech and with the elegantly leather-bound version of the book which OUP had especially printed for the occasion.[15]

The launch of the *Golden Metwand* took place at the inaugural conference of the Centre for Public Law in Cambridge in 1998, which happily coincided with Bill's eightieth birthday. Christopher and I were the founding Assistant Directors of the Centre, with Christopher later becoming its Director. The founding Director was another academic who practised law and, like Christopher, also managed to bestride the narrow worlds of public and private law: Jack Beatson.[16] Jack had recently been appointed Rouse Ball Professor of English Law and was keen to coordinate the activities of a growing number of public lawyers in Cambridge. In addition to Christopher, they included Sir David Williams, Tony Smith, Yvonne Cripps, Trevor Allen, Stephanie Palmer and John Allison.

It was an auspicious time to found the Centre for Public Law. The Labour government, which was returned at the general election on 1 May 1997, had committed itself to an extensive programme of constitutional reform. This included giving domestic effect to the European Convention on Human Rights, devolution for Scotland and Wales and the introduction of a Freedom of Information Bill.[17] All of these topics were debated extensively over a January weekend in 1998 in Cambridge. Jack succeeded in persuading the then Lord

15 Christopher's own chapter in the collection: "'The Metaphysic of Nullity' – Invalidity, Conceptual Reasoning and the Rule of Law" was found to be "of great assistance" to the House of Lords shortly after it was published (*Boddington v British Transport Police* [1999] 2 AC 143 at 169, *per* Lord Steyn). The case was the last in which Lord Irvine sat as a judge and I discuss it in "Collateral Challenge Defended or No Smoke without Fine" 1998 *Cambridge Law Journal* 429.

16 Jack had previously been a Fellow of Merton College in Oxford and then a Law Commissioner. He became a Fellow of St John's College in Cambridge upon taking up his chair in Cambridge in 1994. Jack's influence on public law and on the law of restitution has been very substantial. Jack left Cambridge in 2003 to become a Judge of the High Court and later (in 2014) the Court of Appeal. Jack's principal published works include editions of *Anson's Law of Contract* (1998 and 2002) and *Human Rights: The 1998 Act and the European Convention* (2000) (with Stephen Grosz, Peter Duffy, Tom Hickman and Stephanie Palmer).

17 Lord Irvine modestly described the proposals as "the most ambitious and extensive programme of constitutional reform … undertaken by any Government this century – arguably the most radical programme of constitutional change since the Great Reform Bill of 1832" (keynote address in J Beatson, C F Forsyth and I Hare *Constitutional Reform in the United Kingdom: Practice and Principles* (1998) 1). Other aspects of the reform programme included inquiring into the electoral system of the House of Commons and possible reform of the House of Lords.

Chancellor, Lord Irvine of Lairg, to deliver the keynote address at the conference and officially to kick open the door of the Centre for Public Law. Lord Irvine was known as Derry to his friends and The Hippopotamus to a rather larger group of the public. He was the successor to, among others, Sir Thomas More, Sir Francis Bacon and, later, to Halsbury, Haldane and the Hailshams. As Assistant Directors of the Centre preparing for its first major conference with over 200 delegates, there was much for Christopher and me to do. Christopher drew one of the shorter straws in having to collect Lord Irvine from Cambridge railway station. Christopher's taste in motor cars was catholic: for a time he concurrently owned a Citroen 2CV and a Mercedes saloon. Although designed to permit a French farmer to carry a basket of eggs across a ploughed field, the famously flexible suspension of the 2CV was probably inadequate to accommodate a Lord Chancellor of the stature of Lord Irvine of Lairg. Christopher sensibly took the Mercedes.[18]

Lord Irvine attracted a good deal of controversy during his time on the Woolsack. Much of this related to matters aesthetic. At the time of the conference, he had recently completed an extravagant refurbishment of the Speaker's lodgings in the Palace of Westminster for which the wallpaper was alleged to have cost £400 a roll. Christopher skilfully kept off the topic of interior design as he showed him around the Senior Common Room of the Law Faculty. Lord Irvine also departed from the traditional Court dress worn by the Lord Chancellor when sitting in the House of Lords: as if there were something peculiar about a man wearing tights, breeches, buckle shoes and a full-bottomed wig in public. He therefore also started the process that saw English judges move from wearing a costume appropriate to the mourning of their seventeenth-century king to one more suitable to a Star Trek convention.[19]

At Jack and Christopher's invitation, many of our most distinguished judges agreed to act as chair to the conference sessions: Lord Bingham of Cornhill, Lord Woolf of Barnes, Lord Browne-Wilkinson and Messrs Justice Laws and Sedley (as they then were).[20] Having such distinguished and authoritative figures in

18 The Lord Chancellor records his gratitude for the lift in his Keynote Address (Beatson, Forsyth and Hare (1998) 1).

19 J H Baker "History of the Gowns Worn at the English Bar" 1975 *Costume* 15.

20 Sir John Laws and Sir Stephen Sedley had enjoyed many a clash while Sir John was First Treasury Junior (the Government's principal independent legal adviser and advocate) and Sir Stephen was challenging various aspects of public administration on behalf of the disadvantaged. The relationship remains one of great mutual respect for each other's integrity and legal brilliance: they are an excellent contemporary illustration of former "adversaries in law" who respect Shakespeare's injunction to "strive mightily, but eat and drink as friends" (*The Taming of the Shrew*, Act I, Scene 2). Sir Stephen describes some of their encounters in Sedley (n 13) 14-17. That mutual respect exists alongside the inability of the former advocate to resist some retrospective tail-tweaking. Apropos of very little, Sir Stephen introduced the session he was chairing at the conference by drawing the delegates' attention to the natty Christmas jumper (with a large and festive reindeer emblazoned upon it) that Sir John was wearing

the chair and with a keen judicial eye on the clock ensured that the speakers kept pretty closely to time. This strictness was generally welcome as it ensured that the sessions did not intrude into the time allotted for drinks, but did have some unfortunate side-effects. Professor Mike Taggart was a great friend to the Centre over the years and travelled from New Zealand to give us the benefit of his scholarship on the New Zealand Bill of Rights Act 1990. As he rose to deliver his meticulously structured paper, Lord Browne-Wilkinson stage-whispered: "Ten minutes, Taggart." If Mike considered that having less than a minute in the limelight for every thousand miles he had travelled from Auckland was rather thin gruel, he didn't show it: he delivered an effervescent and memorable paper.[21] The real merit of Jack and Christopher's innovation, though, was that our judicial chairs were simply unable to resist giving us the benefit of their wisdom and experience in response to matters raised by the speakers. As a result, our delegates enjoyed an unusual and invaluable insight into the likely reception of the reforms from the senior judiciary. The success of the conference can further be gauged from the fact that the published volume of its proceedings had to be re-printed twice and that it was seen under the arm of a number of parliamentarians as they entered the House for debates on the reform programme over the following months.[22]

What Lord Irvine cannot have known then (and indeed didn't even know for some time after it had been decided) was that his friend Tony Blair, the Prime Minister, was planning to abolish the role of Lord Chancellor altogether by means of a cabinet reshuffle in June 2003. As most readers will know, it is unwise to come between a hippopotamus and its watering hole. When he became aware of the proposal, Lord Irvine made it very plain to his former pupil that Mr Blair had failed not only as a matter of courtesy to consult with those most affected, but had also demonstrated a poor grasp of basic legal principles, since it was impossible to abolish the role of the Lord Chancellor without primary legislation. In due course (and after Lord Irvine's departure from the office), the Lord Chancellor quite properly lost his role as Speaker of the House of Lords and his ability to sit as a

on the Sunday morning. Sir Stephen referred to what he had always perceived as a Mephistophelean element to Sir John's character which, combined with undiagnosed dyslexia, had led him to "sell his soul to Santa". Christopher did his pupillage (a period of apprenticeship) with Sir John while the latter was still Treasury Junior and the two became firm friends. Sir John was in due course elected an Honorary Fellow of Robinson and delivered the Sir David Williams Lecture in the Centre for Public Law in May 2012 on the topic of "The Good Constitution", subsequently published under the same title at 2012 *Cambridge Law Journal* 567. Sir John also held the Goodhart chair in 2016-2017.

21 "Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990" in Beatson, Forsyth and Hare (1998) ch 9.

22 Christopher and I enjoyed a very fruitful relationship with Richard Hart, who had enthusiastically welcomed the proposal for the *Golden Metwand* while at OUP and who produced the centre's sets of conference proceedings with great speed and accuracy under his own name at Hart Publishing. A number of further conferences followed under the auspices of the Centre for Public Law (including one the following year, which led to *The Human Rights Act and the Criminal Justice and Regulatory Process* (1999)).

judge of the highest court and gained the title Secretary of State for Justice. The subsequent decline in the prestige and significance of the role is clear from the fact that five ministers have held the title of Lord Chancellor in the past six years and that only one of them had any legal qualification at all.[23]

By this time, the Law Faculty had moved its library and lecture halls to a new building on the Sidgwick site in Cambridge. The architect could scarcely have been more distinguished in Baron Foster of Thames Bank (as he later became). Norman Foster had previously designed the main building at Stansted Airport, the HSBC building in Hong Kong and the rejuvenated *Reichstag* in Berlin.[24] Construction of the Law Faculty required changes to the site which did not escape Christopher's eye on his walk to work from Robinson.[25] Christopher had recently moved house from his idyllic cottage in the Cambridgeshire village of Bassingbourn to an idyllic house on a ridge of cretaceous chalk in the north-east corner of Hertfordshire in the village of Kelshall. Gillian was busy landscaping the gardens to include a carp lake and was planting a succession of green rooms walled with box and Wilson's honeysuckle. An avenue of lime trees on the West Road site were in the way of Lord Foster's development and were to be uprooted and discarded. Christopher's Scottish roots would not tolerate such a waste of English roots. Gillian promptly deputised a local farmer and dispatched a convoy of agricultural vehicles to the site to collect the trees (along with box and Portuguese laurel). The limes duly arrived in Kelshall where, despite an inevitable loss or two, the remainder continue to thrive and to provide shade and structure to the magnificent garden.[26]

23 Instead the recent incumbents have prepared for the role with careers in journalism, sales and public relations. Perhaps the intention (in a variation on a theme by Andy Warhol) is that in the future, everyone will be Lord Chancellor for fifteen minutes.

24 The latter must count as one of the longer restoration projects in European history: having been set on fire (probably) at Adolf Hitler's request in 1933, it re-opened in 1999.

25 The site was a delicate one on Sidgwick Avenue in western Cambridge. To the south-west was the History Faculty Building (1968) designed by Sir James Stirling which was so hot when the sun shone and leaked so badly when it rained that the university seriously contemplated pulling it down in 1984. To the east lay the Sir Hugh Casson's Raised Faculty Building (housing English, Philosophy and Modern Languages) (1961) with "its extraordinarily arbitrary and illogical fenestration … and a half-gale blowing through these menacing black piers" of concrete on which the edifice stands (P Booth and N Taylor *Cambridge New Architecture* (1970) 178). Mr Foster's solution was to produce a building in the shape of a bread bin with what would be the sliding door formed of an immense curved wall of glass. As the Duke of Edinburgh said when accompanying his wife to its opening: "Marvellous, I would think, for growing tomatoes."

26 The story provides a further link with their old village, because the barracks in Bassingbourn had provided the location for the Marine Corps recruit depot in Stanley Kubrick's 1987 film *Full Metal Jacket*. The Becton Gasworks on the eastern reaches of the Thames stood in for the Vietnamese city of Hue in the second part of the film. Mr Kubrick imported a few hundred Spanish palm trees, which were planted on the set and which were then variously shot at and blown up in the course of filming. Those

This finally brings me to the title of my contribution to this volume and the significance of gardens to Christopher's time in Cambridge. Christopher's room in Robinson gave onto the very pleasant college gardens. Rather than just build all over what were previously the private gardens of ten large houses on Adams and Herschel Roads, the designers of the college grounds incorporated much of the mature planting and trees into their plans, enhancing it with a raised walkway over Bin Brook, which flows through it into an ornamental lake.[27] The greatest horticultural delights of Christopher's many years in Cambridge, though, must be his wonderful domestic gardens. His cottage in Bassingbourn sat in a delightful garden in which various items of African sculpture were revealed along with implied but clear mandatory orders in beautiful lettering directed to the gardeners. Principal among these was the central section from Kipling's "The Glory of the Garden",[28] which Christopher would sometimes quote from memory:

> Our England is a garden, and such gardens are not made,
> By singing 'Oh, how beautiful,' and sitting in the shade,
> While better men than we go out and start their working lives,
> At grubbing weeds from gravel paths with broken dinner knives.

This garden was the setting for many memorable lunches in which academics from the Law Faculty and Robinson would meet some of Gillian's colleagues from the College of Fashion at Middlesex University. Christopher presided genially over these gatherings, tossing empty wine bottles over his shoulder and into the borders to ensure that sufficient space remained on the table for fresh supplies.[29] These lunches remain among my happiest memories of Cambridge. The setting, food and company were always exceptional, but the greatest joy was to witness the profound affection and serene calm of Christopher's relationship with Gillian.[30] At

who have spent a winter in the east of England might consider the film's tagline to be equally transferrable: "IN VIETNAM THE WIND DOESN'T BLOW IT SUCKS."

27 Such is the importance of Bin Brook to the college that Robinson has named its alumni magazine after it.

28 The full poem is often anthologised and was voted number 46 in the nation's favourite poems in a poll carried out by the BBC – some way behind Kipling's own "If –". By the gardeners, I mean of course Christopher and Gillian themselves.

29 A cloud passed over the cottage in Bassingbourn when Christopher and Gillian were the victims of a burglary. However, the sun re-appeared when the police recounted to them the interview they had conducted with their neighbour. The neighbour was the agent for the Labour Party in the South Cambridgeshire parliamentary seat in which Bassingbourn sits. When asked if he had any idea who might have committed the crime, he replied that he couldn't be certain but that he thought it was the Young Conservatives.

30 So harmonious is Christopher and Gillian's relationship that it may have prejudiced his appointment as a part-time judge of the Crown Court. Such judges are called Recorders. During his interview, Christopher was asked how he dealt with conflict

this point, I should dispel one potential source of confusion about Christopher's domestic life. Christopher refers to Gillian as "Charles": her surname. In return, she calls him "Forbes": his middle name. It is not clear how many of Christopher's readers may have been misled by the dedication of his published works to "his beloved Charles". If this paper achieves only one purpose, it may avoid some misguided student dedicating several years of their youth to writing about the influence of the homo-erotic on the scholarship of Professor Forsyth.[31]

As hinted above, Christopher's garden in Kelshall is on a larger canvas, but has retained the intimacy of its predecessor through precise planning and planting to create discrete rooms with delightful water features. The extra space has permitted Gillian to engage in still-more ambitious sowing and planting. The latest addition to the garden was a present from Christopher: a beautiful and bespoke greenhouse which Gillian has understandably named "Heaven". To return to Kipling in closing:

> But the Glory of the Garden lies in more than meets the eye.
> For where the old thick laurels grow, along the thin red wall,
> You'll find the tool- and potting-sheds which are the heart of all
> The cold-frames and the hot-houses....

at home. He replied that since he and Gillian never argued about anything, there was no conflict at home. However implausible this may have sounded to those who have not spent time in Christopher and Gillian's company, he was appointed. Historically, appointments as Recorders were made by the corporation of a city or borough to "record" its proceedings. From 1971, the term was also applied to part-time judges exercising criminal and civil jurisdiction. Christopher was very familiar with the role of prosecutor, since for many years he acted as University Advocate: responsible for pursuing disciplinary proceedings against junior members of the university for the full range of misdemeanours of which students are capable. This gave Christopher the opportunity to exercise his forensic skills before the Court of Discipline and (on appeal) the Septimviri. I had the pleasure of acting as Christopher's junior in one such case in which a medical student had swapped her examination script for that of a more industrious candidate. Christopher secured a conviction – as I believe he did in all the cases he prosecuted. Christopher subsequently sat as a Deputy Judge of the High Court. Christopher was one of the very first academics to be appointed as a Deputy High Court Judge. A flavour of Christopher's clear and balanced judicial style emerges from the (unsuccessful) appeal against one of his judgments in *R (on the application of Joshi) v Secretary of State for the Home Department* [2018] EWCA Civ 1108. Another example of Christopher's public service was his lengthy period on the Police Authority for the Cambridgeshire Constabulary, brought to an end when he was "abolished" – as he liked to put it – by Parliament in the Police Reform and Social Responsibility Act 2011.

31 Christopher was awarded a personal chair in public law and private international law in 2005 and, shortly before his retirement, he was appointed to the chair named in honour of his old friend Sir David Williams.

Christopher Forsyth's Links to an African University

*Letlhokwa George Mpedi**

Professor Christopher Forsyth and I first met in 1997 when I was pursuing a course, during my LLB studies, on the conflict of laws. Just like many of my peers, this meeting was not in person. It was through his foremost textbook, *Private International Law*,[1] which was prescribed for the course. So, I am proud to say that it was Professor Forsyth who introduced me to Friedrich Karl von Savigny and the choice of law.

Christopher Forsyth is a son of Africa. As they say in Setswana, one of the eleven official languages in South Africa,[2] *gaabo motho go thebe phatswa.* Loosely translated into English, this means "home is best". Christopher, despite plying his trade in the United Kingdom, never forgot his African home and roots. He maintained strong links with Africa, South Africa and her universities (particularly the University of Johannesburg and its legacy institution, the Rand Afrikaans University (RAU)), academics and students. It is through this enduring relationship with the continent and South Africa that our paths crossed again later in life. This time, in person. I remember it like yesterday. Christopher gave a public lecture at the Faculty of Law of RAU. Although he might not have noticed me, I was in awe and happy to meet the doyen of private international law in common law Southern Africa. This, as time would tell, proved to be the first of many of our engagements and an enduring collaborative relationship characterised by mutual respect and appreciation.

I am, at best, an imposter when it comes to private international law, let alone commercial private international law. However, that has never prevented me from rubbing shoulders and articulating my views in the presence of the best in this fascinating field of the law, including Christopher. This was easy because I never felt like the odd one out among the private international law scholars. Being a social security and labour law expert, I mainly gave talks from that perspective at various conferences on African commercial private international law, which were addressed and/or organised by Christopher.[3] Following encouragement

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1 The current edition of the book is C F Forsyth *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012).

2 Namely, Sepedi, Sesotho, Setswana, Siswati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

3 These conferences include the 2017 African Commercial Law Foundation conference, 27–28 July 2017, University of Cambridge; the 2016 African Commercial Law Foundation conference, 15 July 2016, University of Cambridge; the conference on Commercial Private International Law in East and Southern Africa, Research Centre for Private International Law in Emerging Countries, Faculty of Law, University of Johannesburg, 14–15 December 2015; and the Comparative Private International Law conference, University of Johannesburg, 8–11 September 2009.

by Christopher, Professor Jan Neels,[4] Professor Michael Martinek[5] and other conference participants, I published an article based on one of my presentations.[6] I was most elated by the fact that not only was the article well received, but it was cited in a later edition of the abovementioned textbook by Christopher. This, to me, is special, for I have never, even in my wildest dreams, fantasised about my article or any of my work being cited in Christopher Forsyth's *Private International Law* textbook.

Apart from the abovementioned interaction between Christopher and myself, he works closely with the Research Centre for Private International Law in Emerging Countries,[7] where he presents guest lectures and mentors several junior colleagues at the faculty associated with that research centre. In a way, the research centre serves as a bridge between Christopher and the Faculty of Law at UJ. This makes sense due to the common interest of the research centre and Christopher in private international law, particularly commercial private international law. However, this does not mean that Christopher's relationship with UJ was restricted to the Faculty of Law. In 2015, Christopher chaired, at the request of the University, a Faculty of Law peer review panel.[8] This was an international review to determine the Faculty's current status and seek guidance in determining steps it should take to contribute to UJ's mission.[9] The feedback and, in particular, key recommendations of the review panel[10] were instrumental in enhancing the international stature of the Faculty. I, as incoming executive dean

4 Professor Jan Neels is distinguished professor and director of the Research Centre for Private international Law in Emerging Countries, Faculty of Law, University of Johannesburg.

5 Professor Michael Martinek is distinguished visiting professor, Faculty of Law, University of Johannesburg.

6 L G Mpedi "The Proper Law of the Individual Labour Contract – Proposals for Southern African Private International Law" 2010 *International Journal of Comparative Labour Law and Industrial Relations* 321–329.

7 Further information about the Research Centre for Private International Law in Emerging Countries can be obtained at https://www.uj.ac.za/faculties/law/Pages/Institute-for-Private-International-Law-in-Africa.aspx.

8 The panel consisted of the following persons: Prof Christopher Forsyth (chair) (Professor of Public Law and Private International Law, University of Cambridge, United Kingdom); Prof Daniel Girsberger (Professor of Swiss and International Private Law, Business Law, Procedural and Comparative Law, Chairman of the University's Centre for Conflict Resolution, University of Lucerne, Switzerland); Prof Obeng Mireku (formerly dean, Faculty of Law, University of Fort Hare, South Africa); Prof Marta Pertegás (First Secretary, Permanent Bureau of the Hague Conference on Private International Law and University of Antwerp, Belgium); Prof Geneviève Saumier (Professor of Law, McGill University, Montreal, Canada); and Adv Henrietta Brits, report writer, Unit for Quality Promotion, University of Johannesburg.

9 UJ's mission is to be an international university of choice, anchored in Africa and dynamically shaping the future.

10 *Report on the Peer Review of the Faculty of Law* (19 October 2015).

of the Faculty of Law at that time, benefited immensely from the feedback, as it clearly stated many of the crucial steps to be taken by myself and the Faculty.

As is apparent from the preceding discussion, Christopher is indeed a friend, colleague and mentor of many academics, myself included, at the UJ's Faculty of Law. He is loved and revered by both fledgling and established academics. To me, Christopher is *monna gare ga banna* (a man among men). In a professional context, I would refer to him as a scholar among scholars. He is in a league of his own. Talented and selfless academics of his calibre are scarce, particularly these days. I have benefited immensely from and continue to count on Christopher's intellect and mentorship, starting from when we first met through his leading textbook and when we met in person during research conferences. I feel blessed, beyond measure, that my colleagues and I have come to be acquainted and collaborate with Christopher, and for that I say to him:

> May God bless and keep you always,
> May your wishes all come true,
> May you always do for others
> And let others do for you.
> May you build a ladder to the stars
> And climb on every rung,
> May you stay forever young,
> Forever young, forever young,
> May you stay forever young.[11]

11 This is an excerpt of the lyrics from "Forever Young" by Bob Dylan.

Personal Tribute to Christopher Forsyth

Nicola Peart*

It is an honour and a pleasure to contribute to this *liber amicorum* in honour of Professor Christopher Forsyth. My contribution is in the nature of a personal tribute, as I have no expertise in commercial private international law. My association with Christopher is as his former colleague at the University of Cape Town between 1978 and 1983 and since then as his friend.

In 1976, Professor Wouter de Vos, then head of the Department of Roman-Dutch Law, wrote to Christopher offering him a senior lectureship at the University of Cape Town. The offer came out of the blue. Christopher had just completed his LLB at Cambridge University and had accepted an academic post at the University of Canterbury in New Zealand, intending to make his career there. As that position started only in early 1977, he accepted a temporary senior lectureship at UCT for the second half of 1976. He greatly enjoyed his time at UCT and made several good friends, in particular Johann Schiller and the late Jerold Taitz. But he saw no long-term future in South Africa for a "dyed in the wool liberal"[1] and turned down the Dean's offer of a permanent position at UCT.

His move to New Zealand did not turn out quite as anticipated. He enjoyed the teaching and his colleagues, but he felt isolated. Too many sheep, perhaps. Even the wine had an aftertaste of lamb! So he told me in 1985 when my husband and I moved to New Zealand. Another offer from UCT of a senior lectureship and the role of convenor of the First International Conference on Human Rights in South Africa persuaded Christopher to return. It was then that I met him. I had arrived at UCT in 1977 as a recent graduate from Leiden University on an exchange scholarship, and in 1978 I was appointed as one of the first four tutors in the Law Faculty. As a very junior colleague, I got to know Christopher as an inspiring teacher, an excellent researcher, an insightful critic, and above all a very good friend.

This book of essays focuses on Christopher's research in private international law, in which he established an enviable reputation in the United Kingdom and South Africa, as well as in other common-law jurisdictions, including New Zealand. While my former colleague Tom Bennett is no doubt correct to describe private international law as a "Cinderella" subject in the academic law curriculum,[2] I am pleased to say that it continues to be taught at the University of Otago in New Zealand, where I work, and that our library holds a copy

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1 Christopher's words.

2 T Bennett "Tribute to Christopher Forsyth" in this volume.

of Christopher's well-known treatise on the subject, despite its limited relevance to New Zealand.[3]

Private international law is not Christopher's only area of expertise. He has a remarkably broad portfolio of research that covers both public law and private law as well as jurisprudence. Academic purists might argue that such a broad range of research does not allow for in-depth scholarly activity. If so, then Christopher is the exception. His research across all fields of endeavour has been deep, conceptual, critical and relevant. It has made and continues to make a significant contribution to knowledge in the various areas. His work is quoted and relied on by scholars, practitioners, and judges throughout the common-law world.

His work on administrative law has been particularly influential in the Commonwealth. His book *Administrative Law*, in collaboration with Sir William Wade QC,[4] is frequently cited by the courts in Australia and New Zealand, including their top appellate courts, the High Court of Australia and the Supreme Court of New Zealand.[5] It is the leading work on administrative law in common-law jurisdictions. Then there is *Caney's Law of Suretyship*, now co-authored with J T Pretorius, and several articles on jurisprudence. The latter were written while Christopher was at UCT. One in particular brings back clear memories of lengthy and deeply philosophical discussions in the Law Faculty tearoom between Johann Schiller and Christopher on Kelsen's Pure Theory of Law. They eventually concluded that it did not accommodate instances of normative non-existence, which they called the *Nichtsein*.[6] Much of their discussion was beyond my level of understanding, but it was fascinating to witness their excitement as they developed the *Nichtsein* argument.

My lack of understanding of this philosophical debate was no reflection on Christopher's ability to explain complex concepts simply. I learned that when Christopher encouraged me to attend his lectures on Hohfeld's theory of rights. The clarity of his lectures and his passion for the subject left a lasting impression. I remember the core content of those lectures to this day, which in itself is a mark of a good teacher. More importantly, perhaps, I learned a great deal about how to teach and how to engage a class. As a young academic, that experience was invaluable and has always remained with me.

During our first year as colleagues, I had the good fortune to assist Christopher to organise South Africa's first International Human Rights Conference in 1979. This was no ordinary conference, as Christopher and

3 C F Forsyth *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012).

4 C F Forsyth and I J Ghosh *Wade and Forsyth's Administrative Law* (2022).

5 For example, *Hossain v Minister of Immigration and Border Protection* [2018] HCA 34; *Searle v Commonwealth of Australia* [2019] NSWCA 127; and *New Health New Zealand v South Taranaki District Council* [2018] NZSC 59.

6 See J Schiller "Reflections on the Conceptual Reasoning of Christopher Forsyth" in this volume.

Johann Schiller explained in their "Introduction" to the published papers of the conference.[7] Its aim was to have an open and frank discussion about the problem of human rights in South Africa, a highly contentious and pressing issue at the time. It was intended to stimulate the awakening awareness among South Africans of the "intrinsic value of human life and dignity and of the need to restrain legislative and governmental powers so as to secure the unconditional preservation of certain basic values of fundamental human rights".[8] With such aims, the conference organisers expected opposition from the government.

The initiative for the conference came from Professor Johan van der Vyver, then Professor of Law at the University of Witwatersrand. He persuaded the Society of University Teachers of Law and the Law Societies of Natal and Cape of Good Hope to associate themselves with the conference.[9] The University of Cape Town would host the conference as part of its 150th anniversary celebrations. That fitted with UCT's longstanding opposition to the government's apartheid policies and the limitations on free speech, freedom of the press and academic freedom. Given the apartheid system and government controls on entry to the country, the steering committee anticipated problems obtaining visas for some of its overseas speakers. They included speakers who had been outspoken in their criticism of South Africa's policies and disregard for human rights. The steering committee started its discussions with the Minister of the Interior in mid-1977, but got nowhere. It was not until November 1978, a mere two months before the conference, that the Minister of the Interior finally gave approval in principle to the conference and visas were issued to all foreigners wanting to participate. I vividly recall the enormous sense of relief among the organisers, and especially Christopher, who had put his heart and soul into organising this conference.

The conference was "a remarkable occasion", with over 300 delegates from sixteen countries espousing a wide range of viewpoints.[10] As Mr Justice Corbett, then a Judge of the Appellate Division of the Supreme Court of South Africa, said in his opening address: the conference brought together a very distinguished panel of experts to deliver papers and participate in panel discussions at a time when world opinion was becoming increasingly critical of South Africa's policies and domestic political unrest was becoming part of daily life.[11] Unsurprisingly, the conference attracted a great deal of media attention, both nationally and internationally.

The conference papers and reports of the panel discussions were published as a book[12] and in the 1979 edition of *Acta Juridica*. However, some of the papers

7 C F Forsyth and J E Schiller "Introduction: The First International Conference on Human Rights in South Africa" 1979 *Acta Juridica* xii.

8 J D van der Vyver "The Concept of Human Rights: its History, Contents and Meaning" 1979 *Acta Juridica* 10.

9 *Ibid*.

10 Forsyth and Schiller (1979) xii.

11 M M Corbett "Human Rights: The Road Ahead" 1979 *Acta Juridica* 1.

12 C F Forsyth and J E Schiller (eds) *Human Rights: The Cape Town Conference* (1979).

had to be redacted to remove mention of the use of torture in South Africa.[13] An amendment in 1979 to the Police Act of 1958 made it an offence to publish any untrue matter in relation to actions by the police force without reasonable grounds for believing the statement to be true, the onus being on the person claiming to have reasonable grounds. While there was no suggestion that any of the authors had included material they did not believe to be true, the editors decided to delete certain passages to avoid the risk of a prosecution. That was the reality of life in South Africa in 1979.

The conference was an outstanding success. That was in large measure due to Christopher's commitment to the aim of the conference and the enormous work he put into its planning and organisation. Challenging as it was, it gave him the opportunity to play a constructive role in changing South Africa into a country where there was freedom for all and where human rights were respected. Sadly, that change did not come fast enough and in 1983 Christopher returned to Cambridge, this time for good.

His research interest in South Africa did not wane. In Cambridge he pursued a PhD on the Appellate Division of the Supreme Court of South Africa from 1950, which he then published as a book, entitled *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa 1950–1980.*[14] The title was apt, as it dealt with a particularly controversial period in the history of the South African judiciary in which judges portrayed their political decisions on security legislation and race as neutral expositions of the law. In his review of the book, Professor John Dugard described it as the most thorough study of the judiciary in that period and a major addition to the growing body of literature on the judiciary of South Africa.[15]

Christopher's South African research continued thereafter, with publications in leading English and South African journals on issues relating to the judiciary and human rights. He did so from Cambridge, where he built a successful career as Professor of Public Law and Private International Law and where he is now *Emeritus* Sir David Williams Professor of Public Law.

While Christopher spent most of his working life at the University of Cambridge, his six years at UCT were formative to his career and to his personal life. It was where he discovered his love of teaching and research, the stimulation of academic debate, and the thrill of discovering new knowledge. It was where he made life-long friends and, most importantly, it was where he met and married his beloved Gillian. Her love and support have undoubtedly been a major factor in Christopher's success.

This book of essays is testimony to the high regard in which Christopher's research is held, both in South Africa and beyond. More importantly, it is a

13 "Editors' Preface" 1979 *Acta Juridica* vii.

14 C F Forsyth *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa 1950–1980* (1985).

15 J Dugard "*In Danger for Their Talents*" 1986 *South African Law Journal* 303-305.

celebration of friendship, a *liber amicorum,* in which we are able to acknowledge his generous friendship over many years.

Christopher Forsyth

A Good Friend and a Man of Many Talents

J T Pretorius*

This is a personal tribute to my good friend and co-author Professor Christopher Forsyth.

Christopher and I met in 1974 when we were both LLB students at the then University of Natal (Pietermaritzburg). It was my first year at Natal after I had completed the BIuris degree at the University of Pretoria. At undergraduate level, Christopher completed a BSc in mathematics and mathematical statistics. He started his studies with the intention of becoming a maths teacher but later decided to follow a career in law. We were in the same negotiable instrument class that was lectured by the great Dr Peter Hunt, a brilliant lawyer.[1] After completing his LLB in 1975, Christopher completed another LLB in 1977 at Gonville and Caius College, University of Cambridge. He returned to South Africa and after a short stint in New Zealand he was appointed as senior lecturer at the University of Cape Town in 1978. At the time, I was doing my LLM at the same university and we occasionally saw one another. We also kept contact through a mutual friend, Jennifer Orford.

I am aware of and admire Christopher's numerous achievements. He wrote on many subjects and has deservedly received many accolades. But I know another side of him: In 1982 I was senior lecturer at the University of the Witwatersrand and was teaching (amongst other subjects) the law of suretyship.[2] I bumped into Christopher in the Wits Law Library. Much to my surprise, he told me he was busy writing the third edition of *Caney on the Law of Suretyship*.[3] He told me that he

* Professor *emeritus*, University of South Africa.

1 See Ellison Kahn "*In Memoriam*: Peter Hunt SC" 1976 *SALJ* 81.

2 As Forsyth correctly points out: "Suretyship has a tenuous hold in many law curricula. I am unaware of an LLB course offering suretyship or security as a standalone option. Mostly the study of suretyship survives as part of a broader commercial or business law course" (C F Forsyth "Striking a Balance between Creditor and Surety" in C Hugo and M Kelly-Louw (eds) *Jopie: Jurist, Mentor, Supervisor and Friend. Essays on the Law of Banking, Companies and Suretyship* (2017) 185 n 4). See also J Pretorius "The Future of Suretyship?" in M Kidd and S Hector (eds) *Stella Iuris: Celebrating 100 Years of Teaching Law in Pietermaritzburg* (2010) 154*ff*.

3 The first edition of *Law of Suretyship* was published in 1936 and was authored by the late Mr Justice L R Caney. It was ground-breaking. The second edition was published in 1970 and was authored by R O Donnellan.

was on his way to Cambridge to do his PhD. It was the first time we talked about suretyship and I soon realised he was a master of the subject and that I had a lot to learn from him. With his mathematical background he was able to dissect the triangle of relationships that comes into play in the law of suretyship. I referred him to two case notes I had written on the topic, although it was too late to include them in the third edition of his book. Ever the gentleman, Christopher was kind enough to draw attention to them in the Preface.[4] I reviewed the book and concluded that it was an "excellent" edition.[5]

During 1991 Christopher approached me to be co-author of the fourth edition of *Caney*. Christopher was then resident in the United Kingdom, where he was Fellow and Director of Studies in Law of Robinson College, University of Cambridge. I was overjoyed and jumped at the opportunity to work with him. It was a challenging task. The publishers had scanned the third edition in electronic format so that we could do the update the book on computer. The only problem was that we were required to use a computer program that both of us were quite unfamiliar with. In those days the scanning process was "primitive", and the electronic manuscript contained many errors. Computers were also not very sophisticated, and spell checkers were very unreliable. Despite these challenges we soldiered on. During 1992 I took the time off to visit Christopher at his lovely home, Abby Farm Cottage in Bassingbourn, Cambridge, to work on this book. His charming wife Gillian was kind and very generous. What I remember most was the time Christopher and I spent debating certain principles of law at length, then to reach some sort of compromise in the end. It was a wonderful time to devote your full attention to one subject only. Christopher has a way of putting his views across in a very gentle and polite manner, asking penetrating questions along the way. He is indeed a very gifted person. These discussions shaped our thoughts and I look back on them with great fondness. (It was also during this time that Gillian unlocked the secrets of dating Hallmark silver to me.) And then disaster struck. The day before I had to leave for South Africa the computer crashed. Fortunately, Christopher persuaded one of his colleagues, who was very knowledgeable in computers, to resurrect the crashed computer on which the work depended, and we managed to finalise the book without further mishaps. We were both very relieved when the fourth edition of *Caney* was published in 1992.

Then came the fifth edition of *Caney* in 2002. By now we had written quite a few articles together. Christopher was always so kind as to "review" everything I wrote on my own on suretyship, and always made sensible and insightful comments. The fifth edition was difficult to write because the full effect of the decision in *Bank of Lisbon and South Africa v De Ornelas*[6] had now become clear. This (infamous) decision is known best for the fact that the majority of the Appellate Division held that the *exceptio doli generalis* never formed part of Roman-Dutch

4 C F Forsyth *Caney's The Law of Suretyship* (1982) v.

5 Book review 1983 *SALJ* 350 354.

6 1988 3 SA 580 (A).

law.[7] The majority judgment in *Bank of Lisbon* has been much criticised. Since this decision many sureties have relied on public policy as a defence but most of them have failed. Yet many of the uncertainties remain.

The sixth edition of Caney was published in 2010. By that time, it had become clear that the concept of public policy was itself in the process of being transformed because of the influence of constitutional values. Again, Christopher and I had long discussions during my visit to Cambridge to finalise the book. It had become clear that over the preceding thirty years or so there had been a significant shift in the balance of interest between surety and creditor. And the effect was that sureties were in a less favourable position today.

I must thank Christopher for his support and friendship over many years. He is a good friend and a true academic. Despite his long absence from the country, he is probably the most knowledgeable academic on the law of suretyship in South Africa. It has been a real privilege to work with such a gifted and exceptional academic. His command of the English language is something to envy. We have shared a fascination with the triangular consequences of the contract of suretyship: the principal debt between the debtor and the creditor; the accessory obligation between the creditor and the surety; and then back to the debtor with the surety's right of recourse against the debtor which he, as discussed above, could so lucidly understand and explain due to his outstanding intellect and mathematical training and expertise.

7 At 607A. This defence was raised by a surety when a creditor sought to rely upon a clause in the suretyship perceived by the surety as being harsh and unconscionable or for a debt that was not intended to be covered by the suretyship. There is, however, some hope that the Constitutional Court may revisit this issue (*Barkhuizen v Napier* 2007 4 SA 323 (CC); and see G Glover "Lazarus in the Constitutional Court: An Exhumation of the *exceptio doli generalis*" 2007 *SALJ* 449).

A Diceyan Contribution to Scholarship across Fields and Continents

A Personal Tribute to the Work of Christopher Forsyth

Geo Quinot*

As a law student, I of course came across the works of C F Forsyth in a number of different areas of law. His name appeared on the cover of a couple of books that I consulted during my studies, such as *Caney's Law of Suretyship*,[1] *Administrative Law*,[2] *Private International Law*,[3] the enticingly titled *The Golden Metwand and the Crooked Cord*[4] and *In Danger for their Talents.*[5]

It was, however, only when I joined the Law Faculty at Stellenbosch University as a lecturer responsible for teaching administrative law and private international law that I really got to know Christopher Forsyth as the formidable scholar that he is. I have no qualms in admitting that I never would have survived my first year (and a good couple after that) of teaching private international law to the final-year LLBs without Christopher's direct assistance. Not only was I a novice teacher of law in general, but my knowledge of and experience in private international law were limited (to put it mildly). The fact that I could guide a group of senior students through this enigmatic field of law (with a fair measure of success) had a lot to do with Christopher.

Firstly, his authoritative book on private international law in South Africa provided (and continues to provide) scholars, students and practitioners alike with

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1 Then in its 4th edition: C F Forsyth and J T Pretorius *Caney's The Law of Suretyship in South Africa* (1992); now in its 6th edition: C F Forsyth and J T Pretorius *Caney's The Law of Suretyship in South Africa* (2010).

2 Then in its 7th edition: H W R Wade and C F Forsyth *Administrative Law* (1994); now in its 12th edition: C F Forsyth and IJ Ghosh *Wade and Forsyth's Administrative Law* (2022).

3 Then in its 3rd edition: C F Forsyth *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the Supreme Court* (1996); now in its 5th edition: C F Forsyth *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012).

4 C F Forsyth and I Hare (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (1998).

5 C F Forsyth *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950-1980* (1985).

a highly accessible and extremely well-structured source on the subject. As I said in my review of the fourth edition:

> While, given enough time (and new editions), any good textbook will find its way into the law reports, few come to enjoy such esteem as this book. One would expect a book of such high regard to be dense and filled with complex discussions of byzantine constructions (and private international law definitely has more than enough material to fill a book with such analyses!) This book, however, has none of that. It is a model of clear and understandable writing. The discussions are to the point and well structured. Simple, concrete examples are given throughout to illustrate more abstract principles. These are often drawn from local or international case law, thus serving a double purpose in incorporating the relevant authority into discussions. These strengths of the book open the field up to students and other first time readers. In my opinion it is quite remarkable that Forsyth has managed to find and maintain the balance between creating a work of indisputable authority and one that is at the same time simple enough to serve as introduction to private international law.[6]

I was certainly also not alone in my high regard of the book. None less than Professor Ellison Kahn stated in his review of the fourth edition: "Its attaining its majority … of 21 is a remarkable achievement and mute testimony to its excellence."[7] This was after Kahn called the first edition an "excellent treatise". He commended Christopher for writing in "an engaging way, with verve and flashes of quiet humour and dry wit" and noted that Christopher "explains concepts and theories lucidly, and enjoys expressing his views".[8] Of the fifth edition, Professor Jan Neels stated: "The highlight on any local private international law calendar is beyond doubt the publication of a new edition of Christopher Forsyth's standard textbook on the Roman-Dutch conflict of laws as applicable in South Africa and most of its neighbouring countries."[9] Armed with Christopher's book, I thus already had a good fighting chance in getting my students interested in private international law.

But, secondly, I also had the great fortune that Christopher was an extraordinary professor in the Department of Public Law at Stellenbosch University, and, moreover (as my luck would have it), he planned a visit to Stellenbosch during my first year of teaching private international law. I

6 G Quinot "*Private International Law – The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* by CF Forsyth" 2005 *Stellenbosch Law Review* 169 170.

7 E Kahn "*Private International Law.* 4th edition. By Christopher Forsyth" 2004 *South African Law Journal* 262.

8 E Kahn "*Private International Law (The Modern Roman-Dutch Law including the Jurisdiction of the Supreme Court)*. By C F Forsyth" 1982 *South African Law Journal* 313 314.

9 J L Neels "*Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts*. By C F Forsyth" 2013 *South African Law Journal* 642.

remember well how I structured the course that semester (with no small amount of contortion) so that the topics of characterisation and *renvoi* would be dealt with only later on to coincide with Christopher's visit – as much for the students' benefit as mine! (This was of course prior to the enlightening Supreme Court of Appeal judgment in *Society of Lloyd's v Price; Society of Lloyd's v Lee*[10] on the *via media* approach to characterisation, which itself was to no small extent influenced by Christopher's work.)[11] During that two-hour lecture and many more since, I had the pleasure of experiencing first hand Christopher's clarity of thought and expression on some of the most complicated conceptual legal issues.

Since that first encounter, I have had the privilege to host Christopher on many occasions at Stellenbosch in his capacity as extraordinary and later honorary professor at our university. Whenever he travelled from Cambridge to South Africa, invariably on visits of a personal nature, he would make time to visit us in Stellenbosch and present a lecture to our students. Consistent with the impressive range of his scholarship, these lectures were in a number of fields: private international law, administrative law, constitutional law. And also consistent with that first encounter, he always dealt with some of the most puzzling issues in the relevant field with great clarity of thought and conviction. I recall sessions focusing on the judicial review of errors of fact, how to deal with invalid administrative action and the theory of the second actor, the challenges raised by party autonomy and choice of law clauses in contracts, tension between international and domestic conceptions of jurisdiction, remedial discretion in administrative law, and the rule of law versus the rule of courts.

In reflecting on Christopher's influence on my own thinking, not only in distinct fields such as administrative law and private international law, but also more generally on my engagement with the proper role of conceptual reasoning in law, I am constantly fascinated by the breadth of his influence across wide-ranging areas of law. Apart from the high praise for his work in private international law, noted above, scholars in other areas of law have likewise applauded his work. In a review of *In Danger for their Talents*,[12] (now retired Constitutional Court Justice) Edwin Cameron said:

> Forsyth's work unfolds with a keen sense of the political and social effects of the rulings he criticizes.... The book is strongest on historical anecdote on the one hand and on legal exposition and analysis on the other. Chapter 1, on the history and functioning of the AD between 1950 and 1980, makes fascinating reading.... Forsyth's book is a useful and important study.[13]

10 2006 5 SA 393 (SCA).

11 See the references to his work in the judgment at paras 20, 22 and 28, and in particular n 16.

12 Forsyth (1985).

13 E Cameron "C F Forsyth *In Danger for their Talents – A Study of the Appellate Division of the Supreme Court of South Africa from 1950-1980*" 1988 *Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law* 157 158-159.

In respect of Wade and Forsyth's *Administrative Law,*[14] Professor Bernard Schwartz stated in the American journal, *Administrative Law Review,* that "*Administrative Law* ... remains *the* work to consult on the subject, particularly for American administrative lawyers".[15] And of *Caney's Law of Suretyship,*[16] Professor Tjakie Naude said: "[T]he authors should be commended once again for their effort. As in previous editions, the law is set out clearly and succinctly and any criticism thereof is well-substantiated. Practitioners and academics interested in suretyship should buy this book."[17]

There is also no shortage of judgments from both South Africa and the United Kingdom that testify to Christopher's influence on legal development. Judgments on private international law in South Africa are probably the prime example, for, as Neels notes: "[T]here are hardly any reported decisions of the Southern African courts on private international law which do not refer to this textbook. It is therefore obvious that Professor Forsyth has made an enormous contribution to the development of Southern African private international law."[18]

Christopher's work has also been highly influential in administrative-law jurisprudence. The adoption of his views on invalidity of administrative actions and the theory of the second actor in both South Africa, in the highly influential Supreme Court of Appeal judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town*,[19] and in the United Kingdom, in *Boddington v British Transport Police*,[20] are important examples. In the latter case, Lord Steyn stated in the House of Lords (with reference to Woolf LJ's judgment in *Bugg v Director of Public Prosecutions*):[21]

> I accept the reality that an unlawful byelaw is a fact and that it may in certain circumstances have legal consequences. The best explanation that I have seen is by Dr. Forsyth .... That seems to me a more accurate summary of the law as it has developed than the sweeping proposition in *Bugg's* case.

The acclaim set out above is not to suggest that Christopher's work has not attracted its fair share of criticism. A number of scholars have challenged his views. Cameron, in the review quoted above, takes Christopher to task for "theoretical flaws", stating, "the book is not without blemishes. It is far weaker

14 Wade and Forsyth (1994).

15 B Schwartz "Wade's Seventh Edition and Recent English Administrative Law" 1996 *Administrative Law Review* 175 (emphasis in original).

16 C F Forsyth and J T Pretorius *Caney's The Law of Suretyship in South Africa* (2002).

17 T Naude "*Caney's The Law of Suretyship in South Africa* by CF Forsyth & JT Pretorius" 2003 *Stellenbosch Law Review* 150 151.

18 Neels (2013).

19 2004 6 SA 222 (SCA).

20 [1998] UKHL 13; [1999] 2 AC 143; [1998] 2 All ER 203; [1998] 2 WLR 639 (2nd April, 1998).

21 [1993] QB 473.

on theory than on history and legal analysis".[22] Naude takes issue with the treatment of the *Pangbourne*[23] judgment regarding revocation of suretyships in *Caney's Law of Suretyship.*[24] And Kahn challenges the views on the appropriate law to determine the legitimacy of a child in the first edition of *Private International Law*.[25] But perhaps the most stringent of critical engagements with Christopher's work have focused on the foundations for judicial review in the United Kingdom, where Christopher has been a leading proponent of the view that the *ultra vires* doctrine provides such foundation against those advocating a common-law foundation.[26] To my mind, these critiques are just further proof of the high quality of Christopher's work and his influence on scholarship across a range of fields of law. For an academic, there can probably be no greater compliment than serious engagement with your work by peers.

The range of Christopher's work and his impact both in field and system stand in the venerable scholarly tradition of Dicey,[27] in more ways than one. Most importantly, Christopher's scholarship challenges the currently fashionable approach to research (in South Africa, at least – largely driven by research policy and management) that emphasises and rewards high and narrow specialisation. The Diceyan approach, as exemplified by Christopher's work, is to my mind much more in tune with the realisation that the complex social world that we study in law does not submit itself to atomised study in exceedingly (and increasingly) narrow focus. It also shows that excellence and a broad focus are not incompatible: in fact, it may be said that the one leads to the other. In this manner, Christopher's work is a continuation of the Diceyan tradition of studying law from a broader, multi-field perspective.

22 Cameron (1988) 159.

23 *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* 1993 4 SA 206 (W).

24 Naude (2003) 151.

25 Kahn (1982).

26 Leading contributions to this debate are contained in C F Forsyth (ed) *Judicial Review and the Constitution* (2000). Also see P A Joseph "The Demise of *Ultra Vires*" 2001 *Public Law* 354; P A Joseph "The Demise of *Ultra Vires* – A Reply to Christopher Forsyth and Linda Whittle" 2002 *Canterbury Law Review* 463; Wade and Forsyth (2014) 30-31; C F Forsyth "Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, the Sovereignty of Parliament and Judicial Review" 1996 *The Cambridge Law Journal* 122; C F Forsyth and M Elliott "The Legitimacy of Judicial Review" 2003 *Public Law* 286; J Laws "Concluding Comments: Judicial Review's Constitutional Home" in C F Forsyth *et al* (eds) *Effective Judicial Review* (2010) 436.

27 Albert Venn Dicey was Vinerian Professor of English Law at Oxford University from 1882 to 1909 and continues, even a century after his death, to be an authoritative voice in constitutional law and conflict of laws. His leading publications, *Introduction to the Study of the Law of the Constitution,* first published in 1885, and *Dicey's Conflict of Laws,* first published in 1896, are still leading texts in these areas today.

Reflections on the Conceptual Reasoning of Christopher Forsyth

*Johann Schiller**

1 Introduction

In the 1970s Christopher and I were colleagues on the academic staff of the University of Cape Town's Faculty of Law. During that time, I had the privilege of working with him on a number of projects, including the organisation of the Cape Town Conference on Human Rights,[1] for which Christopher was the convener, and the debate on legal positivism and natural law, which had gained some prominence among academics in South Africa in the light of the universally rejected apartheid laws.[2]

The university lies on the slopes of Table Mountain where Christopher and I often walked and climbed and where the magnificent scenery and the exercise stimulated our conversations. It is a time I look back on with fondness and great satisfaction. On one of these climbs we became deeply involved in discussions about Hans Kelsen's Pure Theory of Law. What troubled us in particular was the question of how to apply Kelsen's central and rigid division between phenomena of the physical world – the realm of the *Sein* – and phenomena of the normative world – the realm of *Sollen* – to instances of normative non-existence, i.e. the nullity of legal acts. We came to the conclusion that nullity belongs to a category different from both *Sein* and *Sollen*, viz. the category of *Nichtsein*. The result of these discussions was a short article entitled "The *Sein*, the *Sollen* and the *Nichtsein*".[3]

In 1998 Christopher published the essay "'The Metaphysic of Nullity': Invalidity, Conceptual Reasoning and the Rule of Law" in *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC*.[4] This work will be referred to here as "the essay".

At the outset of the essay, Christopher identifies the central conundrum of voidness and voidability. How can a void administrative act be voidable? Christopher proposes to answer this question with the aid of conceptual reasoning, i.e. by a method which is appropriate for the explanation of legal phenomena.

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1 *Human Rights: The Cape Town Conference*. Proceedings of the First International Conference on Human Rights in South Africa, 22–26 January 1979 (1979).

2 Christopher Forsyth and Johann Schiller "The Judicial Process, Positivism and Civil Liberty II" 1981 *South African Law Journal* 218.

3 C F Forsyth and J E Schiller "The *Sein*, the *Sollen* and the *Nichtsein*" 1979 *Archiv für Rechts- und Sozialphilosophie* 475.

4 Edited by Christopher Forsyth and Ivan Hare (1998).

On first reading, I came to the conclusion that the origins of Christopher's conceptual reasoning, as explained and applied by him in the essay, must go back to his research on legal theory as a young academic at the University of Cape Town. Believing that I may then have added some ideas to this endeavour, albeit in small measure, I hope not to be presumptuous in choosing to contribute to this *Festschrift* by reflecting on Christopher's conceptual reasoning.

2 The Concepts of Reasoning

2.1 The Basis, Kelsen Revived

Christopher describes the theoretical basis of his conceptual reasoning as follows:

> The theoretical basis is, it is submitted, to be found in Hans Kelsen's Pure Theory of Law. This theory, it will be recalled, is built upon the distinction between the *Sein* (the Is) and the *Sollen* (the Ought), between the realm of things that are, i.e. facts or natural phenomena, and the realm of norms, including therein law. Now an administrative act, the writing of a decision letter in a planning appeal, say, is a fact. The piece of paper on which the letter is written coupled with the mental process of the decision-maker that led up to it, are events from the realm of things that are the *Sein*. But the meaning of that act – that certain development is permitted – is an element of the realm of norms, the *Sollen*.[5]

In this dense paragraph the cornerstones of conceptual legal thinking are laid down. I would like to elaborate on its significance in the reflections which follow.

2.2 The Fundamental Concept

Norm, i.e. *Sollen* (ought), is the meaning of an act of the will (addressed to another person). This proposition defines the essence of norm.

One has to appreciate that this is an axiom, as it is self-evident and does not require a further explanation of its source. It is an *a priori* notion in the Kantian sense. Without having to be acquired it exists in the human mind as a category of thinking, or as Kelsen says, "the difference between *Sein* and *Sollen* cannot be explained more precisely. It is directly part of our consciousness."[6]

To understand fully the concept of norm the following two points are to be borne in mind:

Firstly, *Sollen* (*ought*) (= meaning of the notion of an order) always implies *may*/*can* (= meaning of the notions of permission/authorisation) because *ought* and *may*/*can* are correlative notions.

5 (1998) 147.
6 H Kelsen *Reine Rechtslehre* (1960) 5.

Secondly, a norm consists of two elements: its essence and its substrates. The essence of norm is norm without content; it is the *Sollen* as such. Norm in this pure and abstract form is the link between its substrates (the normative link).

The substrates of a norm are, firstly, the act of the will (as physical phenomenon) of the norm maker and, secondly, the conscious, future behaviour of the addressee. The substrates are phenomena of the *Sein*. They give the norm its content.

Moreover, it is to be noted that this fundamental concept is universal. It applies to all legal systems and their branches. Christopher, starting from this axiom, thus shows that his method does not apply only to administrative law.

2.3 The Principles of Imputation and Causality

The principle of normative conceptual reasoning which explains how the substrates are linked has been named *imputation* (*Zurechnung*) by Kelsen.[7] One can thus say that in a norm the regulated behaviour is imputed to the act of the will. Analogically to imputation, the sciences in their conceptual reasoning employ the principle of causality, which explains the link of phenomena in terms of cause and effect.

The essential differences between causality and imputation are the following. Firstly, causal propositions are true or false. If in a scientific proposition about phenomena of the physical world the predicted effect does not occur, the proposition (the scientific theory concerned) is false or incomplete and needs to be discarded or at least modified. In contradistinction to the workings of causality, the failure of a norm to achieve the desired behaviour (the second substrate) does not mean that the norm has to be discarded or modified. The reason for this is that normative propositions are not true or false. They are valid or invalid. They remain valid even if the desired human behaviour does not take place.

Secondly, imputation always and only pertains to conscious human behaviour, while causality can pertain to human behaviour (e.g. when used as a method of social sciences) and to phenomema other than human behaviour (e.g. as a method of physics).

2.4 Legal Relationship

Legal relationship denotes individual, concrete norm.

Individual, concrete signifies that the persons linked and the specific behaviour regulated by the legal relationship are identified. Administrative acts addressed to individuals or officials are examples of such relationships.

General, abstract norms, e.g. statutes, provide the frame for individual, concrete norms (legal relationships) by identifying, firstly, generally, the persons that may become parties to the relationship and secondly, abstractly, the

7 H Kelsen (1960) 78; J E Schiller "Stammler and Kelsen: Theories of Legal Science" in *Festschrift Beinart* 1977 *Acta Juridica* 347 365.

behaviour which, once defined for the particular situation, becomes the second substrate of the legal relationship.

In a legal relationship (e.g. made by a decision of an administrative authority) in which the addressee is ordered to do or not to do a thing (regulated behaviour), the addressee is linked to the administrative authority by a duty (a *Sollen*) and the administrative authority in respect to the selfsame behaviour is linked to the addressee by a right (may/can). To say the addressee has a duty to perform the regulated act (behaviour) means exactly the same as to say the administrative authority has a right that this act be performed. Right and duty are correlative notions. To mention only the one is sufficient, as it implies the other. Norms (including a sum of norms, e.g. contracts) which are styled only as duties of the parties are complete since the correlative rights (pertaining to the selfsame behaviour) are implied.[8]

2.5 Validity

2.5.1 Definition of Validity

Validity is a normative, not a factual, concept which can be defined as follows: A norm is valid if it belongs to that normative sphere to which it is designated by the norm maker.

An invalid norm, e.g. an invalid administrative act, does not become part of the legal system to which it was designated; it is literally unlawful. For administrative acts the boundary of validity ultimately follows from the *ultra vires* doctrine and the rule of law.

2.5.2 Validity of Behaviour and Things

Often particular things or behaviour are described as valid, as for instance in the statement "the passport was valid, therefore the holder entered the country lawfully". In this statement it is not the conduct or the thing that is valid. The issuance of the passport is an administrative act giving the holder a licence to travel (travelling being the second substrate of the norm). The document is simply the thing embodying the act of the will of the authority (the first substrate of the norm), the meaning of which is the may, the licence, which, when issued in accordance with the law (the higher norm), will be valid.

8 A good example for this are the provisions of § 433 of the German Civil Code (BGB) regulating the contract of purchase and sale where rights are not mentioned and yet the provisions are complete: "(1) In a contract of purchase and sale the seller of a thing has the duty to hand over the thing to the buyer and to transfer ownership .... (2) The buyer has the duty to pay the agreed price and to take over the thing." The correlative rights of the seller and buyer respectively are implied. See also the famous analysis of legal rights and duties by W N Hohfeld in his *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919). As will be recalled, Hohfeld proposed the tablets of jural opposites and jural correlatives. To the category of right (in a wide sense) belongs the notion of power.

2.6 The Absence of Metaphysics

Christopher's conceptional reasoning does not resort to metaphysics when explaining nullity and validity. Neither concept is derived from transcendental values. Yet, differing from Kelsen's famous *Grundnorm* (which is neutral as to its content), Christopher claims the rule of law to be the ultimate yardstick for nullity and validity. The rule of law for him, it is submitted, is a general principle and does not apply only to the legal system he examines.

Metaphysics, however, can be a factor determining the validity or nullity of a particular norm in a particular system. This will be the case, for instance, when the norm concerned is designated to theocratic legal systems, such as Islamic law (the *Sharia*) or the ecclesiastical law of the *Codex Iuris Canonici*. Then the failure of a norm to comply with defined transcendental values will render it invalid.

3 Voidability

3.1 Voidability of Void Acts

Logically, a void administrative act cannot be voided; nevertheless, this appears to be done by courts. How can this be explained?

To void an administrative act can only mean, firstly, to examine the administrative act in accordance with the higher (substantive and procedural) rules from which its validity is derived and, secondly, to conclude that the act does not fulfil the conditions prescribed by these norms. The court therefore identifies only that the administrative act is void. It does not void the act. By this thought process the administrative act is not excommunicated from the law, it is established only that it never was part of the law. The act of voiding is thus an intellectual exercise, but in itself not normative. It is, however, the precondition for the making of a new norm (in the form of an administrative act, e.g. pursuant to a collateral challenge or as court decision following judicial review).

3.2 Validity of Unlawful Administrative Acts

An administrative act which has been established as void (null or unlawful) was defective in its making. These defects can be of different degrees. Some defects seem to be of such minor importance that the invalidity of the administrative act appears to be too severe a consequence. Take for instance a substantively valid act which suffers from a minor formal or procedural defect. Such an administrative act should possibly be sustained, which then logically would mean that it is not void. This is only then not a contradiction if the law provides that certain types of *prima facie* unlawful acts are indeed lawful.

German administrative law, for instance, provides a list of defects in administrative acts which result in nullity and a list of minor defects which, under certain conditions, do not affect the validity.[9] It appears from the essay that the

9 See the German Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) §§ 43-46.

same result can be achieved by case law. The discretionary nature of such decisions and the aversion of the decision makers to applying conceptual reasoning, however, is Christopher's concern.

4 The Two Meanings of the Terms Effect/Effectivity

4.1 Introduction

Christopher observes: "The conceptual difficulties over the concepts of voidness and voidability are compounded by uncertainties over terminology...."[10]

The same can be said about the terms effect/effectivity. It is submitted that effectivity has two meanings. Firstly, it can mean the same as validity and hence is used as a normative term (*Sollen*). Secondly, it can mean that the ordered or permitted conduct in fact takes place or is likely to take place. In this sense effectivity denotes legal reality (*Sein*).

4.2 Effectivity as Validity

In chapter II of the essay Christopher examines Sir William Wade's thoughts on voidness and voidability, known as the Theory of Legal Relativity. In the relevant passage (quoted by Christopher), Sir William uses the term "effective" in the sense of "valid" when he says:

> [E]very unlawful administrative act, however invalid, is merely voidable.... The order may be hypothetically a nullity, but the court may refuse to quash it ... (for whatever) reason. In any such case the 'void' order remains effective and is in reality valid. It follows that an order may be void for one purpose and valid for another....[11]

4.3 Effectivity as Legal Reality

As opposed to the normative use of the term, "effect" in the following statement describes legal reality: "Manifestly in daily life the [*ultra vires* and void] enactment will have had an effect in the sense that people have regulated their conduct in the light of it."[12]

This statement illustrates the causal link between an (unlawful) administrative act and the corresponding behaviour of the addressee of this act. Effect in this example belongs to the physical world (*Sein*).

10 (1998) 142 n 12.
11 (1998) 144.
12 (1998) 147.

4.4 Conclusion

The meaning of the terms "effect/effectivity" depends, firstly, on the context in which these words are used and, secondly, on the method (conceptual reasoning) used for their interpretation.

Depending on the context, the statement that a valid administrative act is effective may simply mean that it ought to be obeyed. Validity and effectivity are then used as normative synonyms. Alternatively, it may mean that the valid administrative act will function in the physical world as intended.

Both valid and invalid administrative acts can also be examined by methods of disciplines which are concerned with phenomena of the physical world and their causal connection. Such disciplines can answer questions concerning the working of lawful as well as unlawful administrative acts. For instance, are administrative acts regularly observed? What is the probability that their envisaged purpose will be achieved? What motivates people to obey a lawful administrative act or not? To what extent do people exercise licences granted to them by administrative authorities?

The statement that a void administrative act is effective (i.e. describing its functioning in the physical world) has no normative meaning because "effective" here does not signify that the intended behaviour ought to take place. It rather expresses the assessment that in the real world it happens that void administrative acts are obeyed. As one of the central points in the essay Christopher explains how compliance with void administrative acts has legally relevant consequences.[13]

> A simple, almost trivial, example of this is the case where the Inland Revenue decides unlawfully that certain moneys are due as tax by X. If X pays the money in response to the unlawful demand, there is no doubt that the legal ownership in the money passes to the Revenue (although once the truth is known the Revenue will be obliged to restore the funds).[14]

5 Typology of Administrative Acts

5.1 Four Types

For the understanding of the nature of administrative acts,[15] Christopher identifies the following four types of administrative acts:

- Type 1: An administrative act which permits an individual (other than an official) to do something which would otherwise be unlawful.
- Type 2: An administrative act which permits an official to do something which would otherwise be unlawful.

13 (1998) ch IV.
14 (1998) 148.
15 (1998) ch VII.

- Type 3: An administrative act which orders an official to do or not to do something.
- Type 4: An administrative act which orders an individual to do or not to do a certain thing.

There are two groups: firstly, administrative acts according to the regulation of conduct (order, permission/authorisation) and, secondly, administrative acts according to addressees (individuals and officials).

5.2 Are There Only Four Types?

Christopher maintains that there are no more than the above four types of administrative acts.[16] The four types can be subdivided as follows:

5.2.1 *Administrative Acts According to Regulation of Conduct*

Administrative acts regulate a multitude of human activities. It is therefore perfectly feasible to categorise administrative acts according to types or groups of activities. Naturally, one would arrive at many more types of administrative acts than proposed in the essay.

What is intended by the essay, however, is to define the *nature* of administrative acts. This means finding the essence of administrative acts. Probably this can be done inductively by analysing a representative number of administrative acts, which ultimately will lead to the conclusion that all administrative acts either regulate (by an order) what ought to happen or (by a permission/authorisation) what may/can happen.

Christopher, however, arrives at this conclusion not inductively but deductively, and this is consistent with his conceptual reasoning: It is the essence of norm which directly determines the administrative acts of this sub-division.

5.2.2 *Administrative Acts According to Addressees*

To distinguish between an administrative act addressed to an official, on the one hand, and to an individual, on the other hand, has its basis also in the essence of norm, because norm always regulates (future) human behaviour. The axiom of norm, thus, includes the human being. This alone, however, is not sufficient for defining human beings as actors of administrative acts. For this one has to resort to the concept of administrative law. The understanding of what administrative law is, it is submitted, has developed over time (and is not *a priori*). In any event, it includes the idea of administrative authorities addressing individuals directly or through officials in the form of administrative acts.

Christopher deduces the administrative acts of this subdivision from the essence of norm in combination with basic elements of administrative law.

16 (1998) 154.

5.2.3 *Conclusion*

To consider the nature of the administrative act involves the finding of the common denominator of all administrative acts, i.e. the finding of the most general criteria by which they can be grouped together and distinguished from other norms. The first subdivision of administrative acts (according to regulation of conduct) determines the common denominator of all norms but not only of administrative acts. This subdivision therefore is necessary but not sufficient for determining the nature of administrative acts.

The second subdivision determines the addressees of administrative acts as the common denominator. This alone is also insufficient for determining the nature of the administrative act because it says nothing, not even implicitly, about the content of the administrative act. Yet, together, the types of administrative acts proposed, on the highest possible level of generality, differentiate administrative acts from other norms and simultaneously encompass any and all administrative acts. The four types of administrative acts, indeed, provide a conceptually sound and complete framework for the understanding of the nature of administrative acts.

6 Final reflections

Christopher's conceptual reasoning shows how the distinction between the world of norms (*Sollen*) and the world governed by causality (*Sein*) is the key to understanding legal phenomena, including the elusive nature of nullity. The method, moreover, is of a general nature. Any branch of any legal system can be studied by it. It can also help to structure the discourse of legal aspects of phenomena which we are only beginning to examine normatively, such as artificial intelligence.

Conceptual reasoning marks the study of law as a distinct discipline. Yet the method does not exclude other approaches to law. Law is also the subject of study by other disciplines which use different methods for describing and analysing what happens with and in normative systems. All disciplines contribute to the solving of the puzzle of law. Clarity in this endeavour, however, demands that we are aware of the different methods used and that we avoid mixing them. The essay is a fine example of this clarity.

In the essay the rule of law is introduced as the ultimate custodian of the validity of legal norms. It is to be remembered that the rule of law is not only a formal concept, for it includes fundamental values recognised by international law and embodied in national constitutions. The rule of law, therefore, makes these values criteria of validity of all norms of a legal system. In this sense Christopher's conceptual reasoning is a deviation from but also a further development of Kelsen's Pure Theory of Law.

Christopher Forsyth

An Outsider's View

*James Weinstein**

This volume is a fitting tribute to Christopher Forsyth, one of the world's leading experts on administrative and private international law. These are important and interesting subjects, but ones on which I lack the expertise to contribute anything of substance in these pages. I will similarly have to leave it to others, such as my good friend Ivan Hare, to write about Christopher as a Cambridge colleague. I am able, though, to say a few words about Christopher from the perspective of a visitor to Cambridge. This outsider's view will, I hope, provide an informative glimpse of both Christopher Forsyth the academic and the man.

During the academic year 2006–07, I had the good fortune to be able to spend my sabbatical in Cambridge as a visitor to the University of Cambridge's Faculty of Law. My principal project during that visit was to organize a major conference on Extreme Speech and Democracy to be held in Cambridge in the spring of 2007. This conference was jointly sponsored by my home institution, the Sandra Day O'Connor College of Law at Arizona State University (ASU Law), and Cambridge University's Centre for Public Law (CPL). Ivan and I had conceived the idea for the conference when he was a Fellow of Trinity College and an assistant director of the CPL. By the time I started my visit in Cambridge, however, Ivan had left Cambridge for London to start what would be an illustrious career at the Bar. Rather than backing out of the project in light of the demands of his new career, which would have been entirely understandable, Ivan magnanimously continued as a co-organizer of the conference.

Still, even with Ivan's many essential contributions from his chambers in London, I was "the boots on the ground" back in Cambridge. But as a visitor to Cambridge, with no administrative assistant or an office in the Law Faculty building, it was more like "the boots (or in my case Birkenstocks) in the air". This problem was exacerbated when a member of the Faculty of Law who had earlier expressed an interest in helping organize this conference was now unable to do so. To be sure, this was a quintessential First World problem, but mine own.

To the rescue came Christopher. Without the slightest hesitation or demurrer, he stepped into the breach by becoming a full-fledged conference co-organizer with Ivan and me. True, as the CPL's director, he had *some* obligation

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to support a conference the CPL had agreed to co-sponsor, such as securing its share of the funding. This Christopher and Ivan promptly did, raising funds from the CPL's patron, a prominent British law firm. In addition, and crucially, Christopher provided me with administrative support by asking the immensely capable and good-natured Felicity (Flick) Eves, administrative assistant assigned to the CPL, to work with me on the conference. But by no stretch of the imagination was Christopher under any obligation to *personally* participate in organizing the conference, especially one whose subject matter was outside his wheelhouse, and very few academics in his position would have done so. But despite being enormously busy with his academic duties as well as a part-time judge, Christopher undertook such important matters as arranging for the UK's Attorney-General to give the keynote address, and securing several of the UK's "great and good" to chair conference sessions. He also helped with more mundane yet vital details, including figuring out how best to advertise the event; setting the fee for conference delegates; editing the letter inviting delegates; proofreading the flyer advertising the conference; and helping to obtain rooms for speakers in Cambridge Colleges.

I have in my email archives over 100 emails from Christopher responding to queries from me about the conference. Remarkably, not once is there a record of an unanswered email requiring a second "prompt" from me. Nor is there among them even a hint of annoyance about my plethora of requests for his help or advice. To the contrary, frequently among the responses are invitations to call him at home, including on the weekend, to discuss matters further.

In a project of any magnitude, glitches inevitably occur. But when they arose on this project, Christopher was always calm and reassuring. Equally as important, unlike too many people when things go wrong, he never sought to place blame. Indeed, in my numerous interactions with Christopher on this project, he was never critical of Ivan or Flick, and with one possible exception, of me. The closest I ever got to what might be considered a reprimand from Christopher was when I sent him a press release drafted by the Cambridge University Communications Office, which I had edited, highlighting the participation of the Attorney-General: "Looks fine to me", he responded, but adding this typically Forsythian comment: "... except that it is Lord Goldsmith, not Lord Peter Goldsmith! His name is Peter Goldsmith, his title is Lord Goldsmith. While we still have titles we might as well get it right!"

While Christopher was a remarkably easy-going collaborator (and, in some sense, supervisor), he was also one not prone to praise. But much more important than praise, he befriended me. My yearlong visit to Cambridge was a marvellous experience, but it was also in its early days a somewhat lonely one. So I was very grateful to Christopher for having me out to his home for a small luncheon party; kindly seating me across from his charming wife Gillian at the dinner after the inaugural Sir David Williams Lecture; and inviting me to the dinner after his lecture marking his appointment as Cambridge's Professor of Public Law and

Private International Law. The true character of a person is, I think, revealed by how they treat "the stranger that is within thy gates".[1]

The conference was held at the Law Faculty on April 21–22, 2007.[2] In no small part because of Christopher's efforts, it was by all accounts a success, with 30 speakers and chairs and an audience of approximately 100. Shortly thereafter, Christopher helped Ivan and me to secure research assistance, for which he authorized CPL funding, to help with producing an edited volume based on the presentations at that conference.[3]

During the next several years, Christopher and I would work together on other CPL/ASU Law conferences. In March 2009, Christopher came to ASU to chair a key session of a conference on Unchallengeable Orthodoxy in Academia and Science, which the CPL was co-sponsoring. Soon after the conference ended, Christopher changed out of his suit and tie into a climate-appropriate short-sleeved shirt and Bermuda shorts. Back in Cambridge, I occasionally had gotten a glimpse of colourful striped socks peeking out from under the cuffs of Christopher's crisply pressed trousers. But this was the first time that I had seen these calf-length socks on full display in all their multihued glory! Soon thereafter, I bought a similar pair of colourfully striped socks, which I don on days that I need cheering up.

In the spring of 2011, I was back in Cambridge to organize, with philosophers Simon Blackburn and John Marenbon, a conference on Threats to the University and Humanities, of which the CPL was a co-sponsor.[4] Christopher had kindly arranged for me to have access to the CPL office in the Law Faculty building to use to organize this conference. One Saturday evening after the Law Faculty building had closed for the rest of the weekend and a Monday bank holiday, I discovered to my dismay that I had left my mobile phone in the CPL office. Though I had a key to the CPL office, I did not have a key to the Law Faculty building. I telephoned Christopher at home from the Porters' Lodge in the College in which I was staying to ask him if there was a code by which I could gain access to the building. He said that there was not, but over my objection insisted on driving the approximately 20 miles from his home to let me into the building to retrieve my phone.

In the many times I have returned to Cambridge during the following decade, one of the people I most look forward to spending time with is Christopher Forsyth. This is partly because he is an excellent conversationalist with a keen mind and wide-ranging interests. But it is also because under his occasionally gruff exterior lives one of the kindest people I have ever known.

1 Exodus 20:8-10.

2 See https://www.cpl.law.cam.ac.uk/extreme-speech-and-democracy-2122-april-2007.

3 I Hare and J Weinstein (eds) *Extreme Speech and Democracy* (2009).

4 See https://www.cpl.law.cam.ac.uk/past-activities2011/threats-university-humanities-and-science-conference-2011-programme.

An Unforgettable and Beautiful Memory of Professor Forsyth

Weidong Zhu*

Prof Jan Neels asked me to write a personal tribute to Prof Forsyth for the *Festschrift* in his honour, and this has prompted me to write about an unforgettable and beautiful memory of him.

Time flies like an arrow! It is already nearly 20 years that I have been in contact with Prof Forsyth. When I began my PhD study in 2002 at Wuhan University, I showed great interest in private international law in Africa, especially South Africa, due to the need to solve the cross-border civil and commercial disputes between China and African countries. I had acquired only a little knowledge about private international law in Africa before 2002 when I was reading for an LLM at the Institute for African Laws, Xiangtan University. As there were not enough materials in China about private international law in Africa, I wrote to Prof Forsyth via email to enquire whether he could send me a copy of his book *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Courts*, as I had learned from the literature that he is one of the most authoritative experts in private international law in Southern Africa and his book is frequently relied upon by the judges in the Southern African countries in dealing with conflict of laws issues. To my great surprise and pleasure, I got his reply very soon. He asked me about my interest in private international law in Africa and the research that I had carried out, and then arranged for the publisher to send me a copy of his book. It was really a great encouragement for me to pursue my career in the private international law of Africa.

Since then, I have received constant support and help from Prof Forsyth, and he sent me some of his articles on private international law in Africa, in particular South Africa, from time to time, which has kept me updated about the latest developments in the subject in Africa. I have also asked him many questions on private international law in Africa via email and every time he replied promptly with great patience and kindness, and in great depth. In October 2005, he paid a visit to the Law Faculty, Xiangtan University, where I worked then, after a stay in Hong Kong. This was the first time that we met each other. He is such a very nice, warm and kind person and is very easy to get acquainted with. During his visit to our Law Faculty, he gave a lecture on the history of the legal system in Southern Africa and its private international law to over 300 students and teachers. His lecture aroused intense discussion among the participants relating to the topic and beyond. Many participants put forward various questions to Prof Forsyth, ranging from the legal history in Southern Africa, the private international law in Southern

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Africa, to the judicial review in administrative law in the United Kingdom, and so on.

After his return from Xiangtan University to the UK, Prof Forsyth sent me an email in which he talked about his impression of the lecture at Xiangtan University:

> I wish to thank you in particular, as well as the rest of the staff of the Centre and the Faculty at Xiangtan University, and, also, the students who attended my lecture during my recent visit most sincerely. You all made me feel most welcome and gave so much to me – not only tangible gifts but intellectual stimulation as well – and for all that I am most grateful. But best of all was the enchanting enthusiasm and openness of the students. I relished my time with them.

In 2008 I was awarded a scholarship to study abroad for one year and I expressed my intention to do post-doctoral research under his supervision at Cambridge. He replied promptly that he would like to supervise my research during my stay at Cambridge and made relevant arrangements for my stay at Cambridge in a very short time. He even asked the Law Faculty Board at Cambridge to waive my bench fee of 1 000 pounds, which released a great financial burden for me. His kindness and support to me at Cambridge made my stay there very enjoyable and fruitful. He introduced many scholars in African studies to me, and I still keep in contact with some of them. For example, I met Dr Richard Frimpong Oppong when I was studying at Cambridge and we have kept in contact since then, even after he left Lancaster University to join Thompson Rivers University. With the help of Prof Forsyth, I also spent a lot of wonderful time at the Centre of African Studies, Cambridge.

The insightful and generous supervision work from Prof Forsyth benefited me a lot. For example, he made incisive comments on, and careful amendments to, my paper "Determining the Validity of Arbitration Agreements in China: Towards a New Approach", which was published in the *Asian International Arbitration Journal* (vol 6, no 1, 2010). In fact, before I came to Cambridge, he had given me invaluable and selfless supervision. I wrote an article on the codification of the Chinese conflict of laws in 2007 and the editor of the *Journal of Private International Law* asked me to arrange for a review of the article by a native English writer. So I at once thought of Prof Forsyth and sent the article to him. He amended the article carefully and clarified some ambiguities in it and the article finally appeared in the journal (vol 3, no 2, October 2007).

More than ten years have passed since I left Cambridge in May 2009 and I have not met Prof Forsyth since then. However, the experience of spending time with Prof Forsyth often comes back vividly to me as if it happened just yesterday. I still remember clearly the lunches that we had together at a Chinese restaurant, at Robinson College, and at his home with many friends. It is such an unforgettable and beautiful memory that I cherish so much, and I am always looking forward to meeting him again somewhere in China or in the UK. I once invited Prof Forsyth to

attend a conference in Beijing in 2019 so that we could meet each other again but, unfortunately, he was unable to make it in the end because of his health at that time. I had also planned to visit him in 2020 but due to the Covid-19 pandemic the plan was disrupted. In this tribute to him, I just want to express my best wishes to him in the traditional Chinese style:

"Professor Forsyth, I wish you a very happy family, good health and a long life!（恭祝福赛斯教授阖家幸福、安康长寿！）"

Part III

Academic Essays

Party Autonomy in South African Private International Law

A Comparison with Article 2 of the Hague Principles on Choice of Law in International Commercial Contracts

*Faadhil Adams**

1 Introduction

The choice that parties exercise in determining the governing law of the contract stems from the principle of party of autonomy, in which the concept of consensus plays a central role.[1] In almost all jurisdictions around the world, an express choice will be respected.[2] Most jurisdictions also provide for a tacit choice.[3] The widespread appeal of the principle of party autonomy lies in the notions of contractual freedom and the bolstering of certainty and efficiency.[4] Permitting

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1 For an exposition on the concept of consensus in South African law, see C J Nagel *Commercial Law* (2011) 48.

2 See J Basedow *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws* (2015) 120–121, J A M Rodriguez and M M Albornoz "Reflections on the Mexico Convention in the Context of the Preparation of the Future Hague Instrument on International Contracts" 2011 *Journal of Private International Law* 491 500 and I Schwenzer, P Hachem and C Kee *Global Sales and Contract Law* (2012) 52-53 for jurisdictions that, at the time of writing, did not allow for party autonomy.

3 For the difference between an express choice of law and a tacit choice of law, see C F Forsyth *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012) 325-327.

4 Forsyth (2012) 320; and P Nygh *Autonomy in International Contracts* (1999) 2. The theoretical justifications for party autonomy are not clear, despite its long history. The process of exploring and justifying party autonomy is currently taking place in an *ex post facto* manner. It is, however, clear that one of the underlying justifications is that party autonomy by virtue of its simplicity is the easiest means of determining the governing law of the contract, and in this manner upholds legal certainty. See further F Adams and T Kruger "Private International and Choice of Law Clauses" in Hutchison

the parties to freely select the law that governs their contract can, in some instances (especially when the selection concerns the choice of rules of law that are non-State law), be viewed as an extension of the terms and conditions of their agreement itself. It provides for legal certainty.[5] It is more efficient to provide the choice to the parties rather than leaving it to judges or arbitrators to determine the applicable law. Although guided by conflicts rules,[6] they are still able to exercise discretion in the interpretation thereof.[7]

In some jurisdictions, the scope of the law that parties could select to govern the contract was initially restricted to the law that had a substantial connection with the contract. This requirement is no longer a necessity and where it was once required has largely been removed.[8] Also, in many jurisdictions, the parties to the contract were initially not allowed to select a different law for different parts of the contract.[9] This restriction has also gradually been eroded and, in many

and Myburgh (eds) *International Commercial Contracts – Autonomy and Regulation in a Dynamic System of* Lex Mercatoria (2020). See also Basedow (2015) 139–149; and A Mills *Party Autonomy in Private International Law* (2018) 67.

5 Nygh (1999) 2.

6 Nygh (1999) 2. See also Forsyth (2012) 320, where he states that "[party autonomy] promotes certainty – the parties and the courts know which law applies – and avoids the onerous and expensive chore of determining the law applicable by reference to the factors localizing the contract".

7 Nygh (1999) 3.

8 For example, Australia no longer requires a connection for a choice to be made. See *Re Bulong Nickel Pty Ltd* 2002 42 ACSR 52 66. The United States previously required that there be a "reasonable relation" between the chosen law and the contract in terms of the Uniform Commercial Code (UCC) Sec 1-105(1). This has been revised in what is now UCC Sec 1-103, which states that "an agreement by parties to a domestic transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State is effective, whether or not the transaction bears a relation to the State designated". See, further, the decision in *Vita Food Products v Unus Shipping Corporation* (1939) AC 277, 290-291 and 294-295. For South Africa, see J P Van Niekerk and W G Schulze *The South African Law of International Trade: Selected Topics* (2016) 60; and E Schoeman, C Roodt and M M Wethmar-Lemmer *Private International Law in South Africa* (2014) 50. In general, see M Zhang "Party Autonomy and Beyond: An International Perspective on Contractual Choice of Law" 2006 *Emory International Law Review* 511 514 527 and 548, where she discusses the requirement of a reasonable connection as a limitation on party autonomy and demonstrates how, in the international sphere, this requirement has largely been removed. This can be seen in various regional and international instruments. See for instance, Art 3(3) of the Rome I Regulation on the Law Applicable to Contractual Obligations (2008) (hereafter Rome I Regulation). See further M Pertegás and B A Marshall "Harmonization through the Draft Hague Principles on Choice of Law in International Contracts" 2014 *Brooklyn Journal of International Law* 975 988-992. See, further, the decision in *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277, 290-291 and 294-295.

9 In Australian law this appears to still be the position. A court may designate different laws to different parts of the contract, as seen in *Wanganui-Rangitikei Electric Power*

jurisdictions around the world, the parties may now select a different law for different parts of the contract. It appears that party autonomy is in the midst of further extension, namely, allowing the selection of a body of rules not attached to any State, that is, non-State law.[10] This extension of party autonomy may prove far more contentious and falls beyond the scope of this more modest contribution to South African private international law.[11]

The impetus behind the latest scholarly interest in the topic is largely driven by the Hague Conference on Private International Law's adoption of the Hague Principles on Choice of Law in International Commercial Contracts ("the Hague Principles"). The Hague Principles provide a ringing endorsement of party autonomy. Party autonomy is accepted in all the manifestations stated above. The parties to an international commercial contract may select the law that governs their contract, even when there is no connection to that law;[12] and they may also modify that choice at a later time.[13] The Principles also allow the practice of the splitting of laws.[14]

This paper will now turn to exploring each of these manifestations through a comparison of Article 2(1)-(4) of the Hague Principles on Choice of Law in International Commercial Contracts with South African private international law of contract. The paper will deal with the scope of Article 2 and discuss whether

Board v Australian Mutual Provident Society 1934 50 CLR 581 604. Parties may, however, not choose different laws for different parts of the contract. In South African law, the possibility of the splitting of laws still remains an open question: see Edwards-Kahn "Conflicts of Laws" in W A Joubert (ed) *The Law of South Africa* (2003) par 281 329. Under the UCC, the provision mentioned above had a similar impact on the splitting of laws, allowing parties to select different laws for different parts of the contract. See sec 1-103(c), which states that the parties may select a law for any or all of their rights and obligations. In English law, however, it appears that the concept of the splitting of laws had been allowed as part of party autonomy from the very beginning of the acceptance of the doctrine of party autonomy. For the position with regard to member countries of the European Union, see Art 3(1) of the Rome I Regulation, which provides that parties may choose a law applicable to the whole contract or only to a part of it. See further Pertegás and Marshall (2014) 994-995; and Zhang (2006) 521.

10 Art 3 of the Hague Principles uses the term "rules of law", the use of which is synonymous with the term "non-State law".

11 Contrast G Saumier "The Hague Principles and the Choice of Non-State Rules of Law to Govern an International Commercial Contract" 2014 *Brooklyn Journal of International Law* 1, with R Michaels "Non-State Law in the Hague Principles on Choice of Law in International Contracts" in P Purnhagen and K Rott (eds) *Varieties of European Economic Law and Regulation:* Liber Amicorum *for Hans Micklitz* (2014) 43 and R Michaels "The True *Lex Mercatoria*: Law Beyond the State" 2007 *Indiana Journal of Global Legal Studies* 447.

12 Art 2(1).

13 Art 2(2)(i).

14 Art 2(2)(ii).

South African private international law is in conformity with the provisions of the Hague Principles.

2 Party Autonomy

2.1 Article 2(1) – A Contract is Governed by the Law Chosen by the Parties

Party autonomy, historically, did not develop in a linear fashion.[15] The root of its prominence today is often difficult to trace.[16] This notion of parties choosing the law or rules of law that would govern their contract appears to have always been alien to the prevailing theoretical basis at the time, and yet, from time to time, this idea or principle (as it was later to become) has made appearances, in differing forms, over periods stretching back to antiquity.[17]

Article 2(1) of the Hague Principles allows the parties to choose the proper law of the contract. That the principle of party autonomy is accepted in South African law today is beyond contestation. It is demonstrated by the plethora of South African case law on the topic.[18] It is also widely supported by leading South African academics in the field of private international law.[19]

15 Mills (2018) 44; and Adams and Kruger (2020) 114.

16 Schwenzer, Kee and Hachem (2012) 52-53.

17 See Adams and Kruger (2020) 114-117 for a discussion of the historical roots of party autonomy. One of the first recorded instances of private international law rules was found in a mummified crocodile during the Ptolemaic period (305–30 BC) of ancient Egypt. One of the royal decrees found in a scroll within the crocodile was a text that stipulated that in the colonies of Greece, if a contract was in Greek form, the laws of Greece would apply to the contract and if in Egyptian form, Egyptian laws would apply to the agreement. The parties, by choosing the form of the contract, could choose the law that they wished to govern their contract. See further H Yntema "The Historic Bases of Private International Law" 1953 *American Journal of Comparative Law* 300–301; and Forsyth (2012) 32.

18 *Society of Lloyds v Classic Sailing Adventures* 2010 ZASCA 89 par 4 and 20. In the case of *Guggenheim v Rosenbaum (2)* 1961 4 SA 21 (W) 16, Trollip J explicitly stated that in South African law the proper law of the contract is the law of the country which the parties have agreed or intended to govern their contract. The Supreme Court of Appeal decision in *Society of Lloyd's v Price*; *Society of Lloyd's v Lee* 2006 5 SA 393 (SCA) provides further evidence of the acceptance of this principle, where Van Heerden JA states that "by virtue of the provisions … referred to above the proper law of the contract entered into between Lloyd's and the defendants – the *lex causae* – is English law" (par 11). See further *Commissioner for Inland Revenue v Estate Greenacre* 1936 NPD 225 229; and *Premier Wire and Steel Co Ltd v Maersk Line* 1969 3 SA 488 (C).

19 This is in line with the view of the majority of authors writing on the concept of express choice: see Edwards-Kahn (2003) par 329; Forsyth (2012) 327; E A Fredericks and J L Neels "The Proper Law of a Documentary Letter of Credit (part 1)" 2003 *SA Mercantile Law Journal* 63; Van Niekerk and Schulze (2016) 60; and J C W Van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) 68.

2.2 Article 2(2) – The Parties may Choose: (a) The Law Applicable to the Whole Contract or to Only a Part of It; and (b) Different Laws for Different Parts of the Contract

Article 2(2) considers the *dépeçage* principle, which allows for the exercise of a choice of different laws for different parts of the contract. The meaning of different laws for different parts of the contract could refer to several elements. The parties may have concluded a complex contract which consists of different obligations that form part of one contract. For instance, a contract that regulates the rules of an on-going business relationship between the parties may within it also include a sales contract. Where the obligations are clearly severable, the parties may choose different laws for different parts of the contract. This point appears not to be contentious.[20] A more contentious aspect of *dépeçage* would be where, in a single sales contract, the parties elect that the buyer's obligations are made subject to the law of its domicile and the seller's obligations are made subject to the law of its domicile. The illustrations in the commentary to the Hague Principles clearly envision both aspects.[21] In addition to this, Article 2(2) contemplates the situation where the parties select a law for only a particular part of the contract and then leave the other part of the contract to be subject to the rules that would apply to the contract in the absence of choice of law in terms of Article 2(1). It would seem unlikely that where the parties have applied their minds to a part of the contract or to several parts of the contract, they would then leave certain parts of the contract to be determined on the basis of the rules of the forum court. However, it is understandable that the parties would elect to make provision for such a situation. In the case where non-State rules of law are chosen, one can begin to see the benefits of such a construction. When read in conjunction with Article 3 of the Hague Principles, this provision would make sense.[22] The specialised rules chosen may cover certain aspects of the contract in great detail (for instance the manner of payment made subject to the Uniform Customs and Practice for Documentary Credits 600) while not addressing other aspects of the contract.[23] In this way, the principles would maintain the validity of the choice at least as far as those aspects are concerned.[24]

Article 2(2)(b) allows the parties to choose different laws for different parts of the contract. The discussion above does not arise with regard to Article

20 See M Wolff *Private International Law* (1950) 423, where he states that it is not correct to speak about the proper law of the contract, but rather the proper law of the contractual obligation.

21 Commentary on the Hague Principles (2015) 37.

22 Art 3 of the Hague Principles allows the parties to choose rules of law to govern their contract.

23 See the discussion in Adams and Kruger (2020) 111.

24 This is the construction in the preamble of the UNIDROIT Principles on International Commercial Contracts (2016).

2(2)(b): if a choice is made, or several choices, as is allowed for, that choice will stand.

The Hague Principles are intended to deal only with the exercise of choice by the parties. In South African law, clear authority that allows for party choice of different laws for different parts of the contract does not exist, at least as far as binding precedent is concerned. There are, however, cases of the South African High Court and Supreme Court of Appeal that refer to the issue, albeit in *obiter dicta*, namely, *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd*, *Improvair (Cape) (Pty) Ltd v Establissements Neu* and *Standard Bank of South Africa v Efroiken*.[25] Persuasive authority also exists in the form of the opinions of leading academics.[26] The remarks by Grosskopf J in *Improvair*, as far as they can be considered in light of the principle of *dépeçage*, are *obiter.* They do not constitute a choice of law made by the parties but rather a situation where the court has assigned a law to the contract in the absence of choice of law. Grosskopf J, in assigning the proper law to the contract, seems to approach the matter from the viewpoint that a single law should apply to a contract, where he states that "[a]n *indivisible* contract laying down reciprocal rights and obligations can as a matter of logic not be governed by more than one law. I exclude contracts where parties *agreed* otherwise."[27] In referring to an *indivisible* contract that lays down reciprocal rights and obligations, the learned judge is clearly referring to a contract that does not consist of severable parts. The reference to *indivisible* could be construed as an acknowledgement that where a contract is severable and the parties have exercised their choice, different laws may apply to different parts of the contract. That the court refers to the ability of the parties to agree otherwise would also be a strong indicator of this. In *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (albeit once again *obiter*), Booysen J takes the opposite approach in reference to its application of the scission principle.[28] The court in this case, although noting the difficulty of the application of different laws, acknowledges that the scission principle forms part of South African law.[29] The illustration provided by the court demonstrates that it is not necessary for the contract to be indivisible in order for the rights and obligations of both the

25 *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 3 SA 509 (D); *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 2 SA 138 (C); and *Standard Bank of South Africa v Efroiken* 1924 AD 171.

26 Edwards-Kahn (2003) par 331; and Van Niekerk and Schulze (2016). These authors favour the choice of different laws for different parts of the contract when selected by the parties.

27 *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 2 SA 138 (C) 147 B-F (own emphasis).

28 The scission principle, as enunciated by the court, allows for the application by the court of different laws to different parts of the contract where the "centre of gravity" for the different obligations lies in different countries.

29 *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) 528-529.

buyer and seller in a sales contract to be made subject to different laws.[30] In the court's reasoning, it is also apparent that it is in essence not entire legal systems that are being applied to any contract but rather legal rules.[31] The application of these conflicting legal rules will always invite the possibility that a different rule would apply to a particular aspect of the contract. Forsyth criticises the comments made in *Laconian*, calling them "regrettable".[32] He rejects any notion that where there are several different places of performance, there should automatically be several different proper laws.[33] The comments are, however, directed at the assignment of law in the case where there is no clear choice. To read the comments as rejecting the notion that different laws could ever be applicable to a contract would in my view be stretching their interpretation. The court in *Laconian*, deciding the matter after *Improvair*, clearly departed from the rejection of the scission principle, relying on an older decision of the Appellate Division in *Standard Bank of South Africa v Efroiken*.[34] *Efroiken* may potentially demonstrate the strongest sense that the parties may choose different laws for different parts of the contract. Referring approvingly to English case law, the court stated:

> But the business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded *that the parties must have intended* that it should be carried out according to the law of that other country.[35]

The intention of the parties will be a determinative factor in the application of different laws to the contract. In all three of the cases discussed above the courts have made their comments on the law applicable to different parts of the contract subject to the intention of the parties. Seen in this light, it would appear unlikely that a court deciding the matter today would depart from a clear intention of the parties to have their contract governed by different laws.

2.3 Article 2(3) – The Choice May be Made or Modified at Any Time

Article 2(3) of the Hague Principles allows the parties to select a law for the contract after it is concluded, as well as for the modification of the choice of law if a choice was initially made. This is in keeping with the aim of the Principles, namely to give the parties the widest possible scope within which to exercise

30 *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) 528 - 529.

31 *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) 528 - 529.

32 C F Forsyth "Enforcement of Arbitral Awards, Choice of Law in Contract, Characterization and a New Attitude to Private International Law" 1987 *South African Law Journal* 4 16.

33 Forsyth (2012) 334.

34 1924 AD 171.

35 *Standard Bank of South Africa v Efroiken* (n 25) 188 (own emphasis).

their choice. The first aspect would depend on the law which first governed the contract. In South African law, this would be considered a variation or, possibly, novation, and would not be controversial.[36] The subsequent change in the choice of law may, however, have consequences for the pre-existing rights of third parties. The impact of any such modification on third parties is one of the most important factors that must be borne in mind and is a consideration in the private international law codes of several jurisdictions.[37] The Hague Principles guard against any detrimental impact on third parties by stipulating that any change shall not prejudice the rights of third parties to the contract.[38] A clear illustration of the manner in which third parties could be impacted is presented in the official commentary on the Hague Principles. Consider the scenario where A stands as surety in a sales agreement between X and Y. In South African law, the suretyship agreement is accessory in nature to the principal obligation.[39] Assume that the parties initially chose South African law as the governing law of the contract. They decide, at a later date, to amend this choice and choose the law of England as the governing law of the contract. Assume that the law of England does not provide the same defences to the surety as South African law does. Since the rights of the surety as a third party to the contract would be prejudiced by this, it would still be able to rely on any rights that it would have had under South African law. Thus, the effect of the provision is that while the choice may be modified even if it affects the rights of third parties, third parties would still be able to rely on all the defences that they would have had under the law originally chosen. Since the wording of the article specifically stipulates that it shall not *prejudice* the rights of third parties, if the modification allows for greater protection of third parties, it is likely that the greater protection afforded would be applicable to the third party.

In South African law, the position in respect of a post-contractual choice of law would be relatively straightforward. It is highly likely that a court would uphold a contract entered into by the parties selecting a governing law for the contract even after the initial contract had been concluded. A modification of the choice of law would perhaps be slightly more controversial where the rights of third parties are at stake. There is, however, no clear South African authority on this point. Edwards and Kahn refer to English law prior to the Rome Convention to provide persuasive authority.[40] Under English law of the period, it was indeed possible for parties to modify the law chosen at a later time.[41] In South African

36 R Sharrock *Business Transactions Law* (2016) 262-263.

37 For example, see Art 1210 (3) of the Civil Code of the Russian Federation; and Art 9 of the Code of Private International Law of Japan. This is also a relevant consideration in South Africa. See Van Rooyen (1972) 77.

38 See the Commentary on the Hague Principles (2015) 38.

39 Sharrock (2016) 805.

40 Edwards-Kahn (2003) par 329. "The Rome Convention" in the text refers to the Rome Convention on the Law Applicable to Contractual Obligations (1980).

41 Edwards-Kahn (2003) par 359; and *James Miller and Partners Ltd v Whitworth Streets* 1970 AC 583 603 615. See also Wolff (1950) 426.

law, *Dempster v Addington Football Club (Pty) Ltd*[42] provides authority for a post-contractual choice of law. The contract in *Dempster v Addington Football Club* was concluded in Scotland. At that time, the prevailing South African position, in the absence of choice of law, was that the *lex loci contractus* should apply to a contract unless the *lex loci contractus* and the *lex loci solutionis* differed, in which case the *lex loci solutionis* would prevail.[43] This essentially amounts to a rule that the *lex loci solutionis* applied in the absence of choice of law.[44] Scottish law in this case was the *lex loci contractus*; South African law was the law of the place of performance, as both payment and the rendering of the services took place in South Africa. In terms of *Efroiken*,[45] South African law was therefore the governing law of the contract.[46] It is not clear from the judgment whether it was clear to the parties that in the absence of choice it was indeed South African law that applied to the contract. Perhaps it was only for the sake of clarification, but at the pre-trial conference, the parties agreed that the contract should be interpreted in terms of South African law.[47] This would amount to post-contractual choice of law. The approval by the court of this choice may demonstrate that a post-contractual choice by the parties would be effective.

2.4 Article 2(4) – No Connection is Required between the Law Chosen and the Parties or their Transaction

Article 2(4) of the Hague Principles stipulates that no connection is required between the law chosen and the contract. One of the primary reasons for the addition of this provision was the historical reservation on the part of States to allow for a choice of law of countries which had no connection with the contract.[48] In line with the modern trend codified in instruments such as the Rome I Regulation, the Hague Principles sought to clearly enunciate that no such connection is required. The eradication of the connection requirement is viewed as beneficial to the development and interpretation of the choice of law rules of many countries.[49] In South African law, the question as to whether the parties may select a law to which the contract has no connection, again, remains unsettled,

42 *Dempster v Addington Football Club (Pty) Ltd* 1967 3 SA 262 (D).

43 Forsyth (2012) 331.

44 Forsyth (2012) 331. See, further, *Standard Bank of South Africa v Efroiken and Newman* (n 25) which set the precedent, as referred to. Forsyth is, however, of the opinion that a South African court making this determination should follow the closest and most real connection test in order to determine the proper law of the contract. See Forsyth (2012) 330 for a thorough exposition of the test.

45 *Standard Bank of South Africa v Efroiken* (n 25).

46 Schoeman, Roodt and Wethmar-Lemmer (2014) 53.

47 *Dempster v Addington Football Club (Pty) Ltd* (n 42) 262-263.

48 Commentary on the Hague Principles (2015) 39.

49 See J L Neels "The Nature, Objective and Purposes of the Hague Principles on Choice of Law in International Commercial Contracts" 2015 *Tydskrif vir die Suid-Afrikaanse Reg* 774 779, where he states that it could inform interpretation of the Canadian common-law conflict of laws as well as modern Roman-Dutch private international law.

despite strong academic opinion that it is, and should be possible.[50] Edwards and Kahn state that the South African courts would only limit a party's right to select a legal system if they chose that legal system in an attempt to circumvent the law to which the contract has the closest and most real connection,[51] and for no other reason. In all other instances, a choice with no connection would be a valid choice. Their opinion is based on the persuasive authority of the English decision in *Vita Food Products Inc v Unus Shipping Corporation Co Ltd*.[52] Van Niekerk and Schulze argue that the selection of an unconnected legal system is a necessary consequence of party autonomy.[53] In their opinion, there is no reason why a South African court, faced with a situation in which an unconnected legal system has been chosen, would not uphold that choice. Van Rooyen also favours upholding the selection of a law "wat glad nie met die kontrak verband gehou het nie",[54] subject to the application of the mandatory rules of the forum or any relevant third country having a bearing on the contract.[55] Likewise, Professor Forsyth favours the selection of a law that has no connection with the contract. He states that "the recognition of party autonomy recognises that there may be good reasons why the parties choose to select a law with which the contract has no factual link".[56] South African courts have not been called to rule on this matter yet, and it is therefore only the opinions of the vast majority of authoritative South African authors that can be relied upon. There is, however, a broad consensus among them that a connection with the contract or the parties to the contract is not required in order for there to be a valid choice of law.[57]

3 Conclusion

Party autonomy in South Africa has thus far shown itself to be robust. In many instances, South African courts have risen to international challenges in allowing the ever further development of party autonomy. Many of the issues referred to remain unanswered. There is, however, no reason to believe that the South African courts will not once again develop South African private international law in line with international best practice.

50 Schoeman, Roodt and Wethmar-Lemmer (2014) 50; and Spiro *Conflict of Laws* (1973) 150.

51 Edwards-Kahn (2003) par 329.

52 (1939) AC 277; Edwards-Kahn (2003) par 329. Lord Wright in *Vita Food Products Inc v Unus Shipping Co Ltd* (n 8) stated that the "connection (to the governing law) is not as a matter of principle essential". See Art 3(3) of the Rome I Regulation, which provides that parties can choose a law even where all the elements of that contract are situated in another State.

53 Van Niekerk and Schulze (2016) 61.

54 Van Rooyen (1972) 72.

55 Van Rooyen (1972) 72.

56 Forsyth (2012) 320.

57 See also J L Neels "The Role of the Hague Principles on Choice of Law in International Commercial Contracts in Indian and South African Private International Law" 2017 *Uniform Law Review* 443 445.

Expanding Jurisdiction for Fundamental Rights Violations by Businesses

South African Law and the Role of an International Treaty

David Bilchitz*

I am grateful to Professor Jan Neels for the opportunity to pay tribute to my former PhD supervisor, Prof Christopher Forsyth, through contributing an article to this *Festschrift*. I studied from a former edition of Christopher's authoritative text on *Private International Law* during my legal studies at Wits University: he was then one of those mythical academic stars one never expects to meet. Returning to the updated version of the text many years later as an academic indicated to me the remarkable clarity with which Prof Forsyth has outlined complex questions; yet, also, the manner in which the book moves beyond being a text-book to address some of the most cutting-edge questions in the field. I am not sure I fully appreciated these virtues as a student.

Yet, my first in-person meeting with Christopher was in 2001 when I was completing my MPhil in Philosophy at the University of Cambridge. I was considering changing to the Law Faculty to write my PhD, given that I was hoping to contribute to the advancement of legal doctrine in my work. I recall meeting him at his room near the university library and proposing my topic on the justification and enforcement of socio-economic rights. Christopher is a person who always is very considerate and rational in his responses: however, I saw his eyes light up at the prospects of engaging with a PhD dissertation that was deeply connected to the advancement of South Africa. I was fortunate that he very quickly agreed to supervise me in relation to the legal dimensions of my work (Prof Matthew Kramer agreed to give me direction in relation to the philosophical dimensions).

At our next meeting once I had commenced the project, Christopher began by mentioning one of his illustrious students, Mark Elliott, who had, at the time, just begun his stellar career as an academic (he is now a Professor at the University of Cambridge) and had published a monograph based on his doctoral

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thesis. Christopher sought to outline a role model, someone I could look to whose example would inspire me in my writing. I learnt, only recently and, very humbly, that my PhD (which was turned into a book, *Poverty and Fundamental Rights* published by Oxford University Press in 2007) was utilized in turn as a model for another distinguished PhD student of Christopher's, namely, Professor Po Jen Yap. Po Jen has now himself published an important book based on his doctoral thesis. Clearly, this technique works and has resulted in PhDs that do not simply sit in a university library but also have an impact on their disciplines. Indeed, Christopher has a remarkable record of nurturing and mentoring young academics and our respective publications attest to the success of Christopher's supervision. Indeed, a PhD is a lonely journey often causing much doubt along the way as to whether the twists and turns one takes are going to be fruitful. At our meetings, I always found Christopher highly supportive with an encouraging word, something that was psychologically necessary in achieving a successful outcome.

Ultimately, Christopher's academic record speaks for itself and covers a vast range of topics. His interests have spanned across the spectrum of law from constitutional and administrative law to private international law. Whilst based in the United Kingdom for most of his career, he has retained a lively interest in legal developments in South Africa. We celebrate in this volume his contribution to private international law. The subject of my chapter thus seeks to pay tribute to Christopher through straddling disciplinary boundaries – addressing a problem that has arisen in the sphere of fundamental rights law which requires an engagement with private international law. As I researched the subject, it became more interesting and involved and has sparked a desire to develop my knowledge and research in these fields. I am indebted to Christopher for this and for much more and look forward to his continuing contributions to multiple fields.

1 The Practical Problem: Gaining Access to Remedies for Violations of Rights by Businesses

KiK is a German clothing company that utilized the services of the Baldia textile factory in Karachi, Pakistan. A terrible fire occurred in the factory in September 2012 with 260 people being killed and 32 being injured. A court case was filed in 2015 by a survivor and three families of the victims against KiK at the Dortmund Regional court in Germany who claimed damages against the company for the fire safety deficiencies in the Baldia factory. In 2016, the German court agreed to hear the case and granted the plaintiffs legal aid. In the meantime, there was an out-of-court negotiation which resulted in the company agreeing to pay 5.15 million USD to the survivors and affected families as well as monthly pensions. The court, however, remained seized of the case and KiK formally denied responsibility for the fire and refused the claim for legal damages. A lawyer was commissioned by the court to determine whether the plaintiffs had a right to compensation under Pakistani law and whether the Statute of Limitations period had passed. In early 2019, the case was rejected by the court on the ground that the Statute of Limitations period had expired. The case was appealed but legal aid denied

to the Pakistani claimants and, at the time of writing, the case appears to have been dropped.[1]

Cases such as these have become increasingly common with the globalization of business.[2] Multinational corporations, by their nature, cross borders and, whilst this dimension provides opportunities for expanded markets, it can also result in impunity for serious violations of fundamental rights,[3] including in areas relating to health and safety, environmental pollution and much else. Victims of these fundamental rights violations often wish to claim damages for the harm caused to them – yet, they are prevented from doing so through a number of legal doctrines which have failed to develop with the changing global nature of business. Thus, in the KiK case above, the plaintiffs had a number of legal hurdles to overcome, which include those I list below. First, they had to satisfy the court in Germany that it had jurisdiction to hear the case given that the harm took place in Pakistan. Secondly, they had to show that they had a claim in terms of the applicable law which the German court decided was that of Pakistan. That, then, entailed an investigation into both procedural dimensions – the Statute of Limitations – as well as substantive questions – whether such a claim could be brought in Pakistani law and what the obligations of a corporation in Pakistan are towards its employees. Thirdly, if it reached the substantive questions, the court would also have had to deal with whether KiK could be held legally liable for the negligent behaviour of a sub-contractor. Finally, if a judgment was obtained and liability was apportioned, there would be a question of its enforceability against the contractor in Pakistan should a damages award be made against that company as well as KiK. These legal hurdles arise in addition to the difficulties – such as evidentiary challenges – of bringing a case in a foreign country where the actual harm did not take place.

To attempt to address these legal doctrinal shortfalls, and render remedies accessible to victims of fundamental rights violations, a special United Nations Intergovernmental Working Group has been formed to develop a treaty on business and human rights.[4] Two Global South countries – namely, Ecuador and South Africa – took an early leadership role in the process. Whilst fundamental rights are generally understood to be part of public international law, the claim for damages flowing from violations thereof is often framed in domestic courts

1 Reports on the case and the various stages of its development can be found online at https://www.business-humanrights.org/en/kik-lawsuit-re-pakistan.

2 Another famous case with similar facts is the collapse of the Rana Plaza factory building on workers – which supplied major international clothing manufacturers – in Bangladesh, which resulted in 1132 people being killed and over 2500 injured: see https://www.ilo.org/global/topics/geip/WCMS_ 614394/lang--en/index.htm.

3 I use the terms "fundamental" rights and "human" rights interchangeably in this article.

4 Human Rights Council *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights* A/HRC/RES/26/9 (14 July 2014).

as a tort or delict. Given that questions of jurisdiction, applicable law and the recognition of foreign judgments are involved, claiming remedies in these circumstances requires a consideration of private international law doctrines. To address these issues adequately thus requires breaking down the silos between private and public international law.

In this chapter, I will focus on the question of the possibility of courts in one country assuming jurisdiction over violations of fundamental rights that take place in another. Given South Africa's early leading role in the Treaty process, I will, firstly, outline the current state of the law in South Africa relating to the exercise of such extra-territorial jurisdiction. I shall seek to capture the existing legal position and also to analyse some of the uncertainties that have arisen as to whether victims of fundamental rights violations can gain access to South African courts. Whilst this discussion is particular to South Africa, some of the issues relating to the assumption of jurisdiction will be shared in various ways by other countries. I will then turn to considering proposals in the drafts of the Treaty released up to the date of this chapter's revision (January 2024) and how they attempt to address deficiencies in relation to the assumption by courts in one country of jurisdiction for fundamental rights violations committed in other countries. I will, in this section, also seek to evaluate the Treaty proposals, and highlight certain deficiencies in them. In this way, I shall seek to contribute towards removing obstacles in the way of victims of fundamental rights violations to finding an appropriate forum in which to hear their claims. Ultimately, I shall seek to defend the view that, given the seriousness thereof, where fundamental rights violations are involved, the law of jurisdiction should develop expansively and focus on enabling rather than restricting the rights of victims to have their cases heard in fora whose legal systems are favourable to respecting and protecting fundamental rights.

2 The South African Approach to Extra-Territorial Jurisdiction

It is useful to have in mind a similar set of facts to those that arose in the KiK case when examining South African law. It is important to specify that, in these circumstances, we will usually be dealing with plaintiffs who are themselves foreign (known in South Africa as peregrines) who wish to sue a corporation which has caused harm to their rights in a jurisdiction outside of South Africa. That corporation has a connection with a corporation that has a presence in South Africa: the nature of that presence – whether it is a headquarters, principal place of business or branch – will be a variable that requires discussion. The cause of action, importantly, takes place overseas. A complicating factor in this regard will be the fact that the South African company will usually not be the direct cause of the violation: instead, it will be either a subsidiary or sub-contractor which commits the violation given it is in another country. The nature of the remedy can also vary: in relation to a current violation, an interdict may be sought; in relation to a past violation, damages will usually be sought. In such instances, is it possible for a South African court to exercise jurisdiction?

In determining whether jurisdiction exists, in South African law, the foundational principles are that it is necessary to consider whether there are connecting factors which can found jurisdiction and whether the court can give an effective judgment.[5] Given that the magistrates' courts are limited in the amount of civil damages that can be claimed therein (a maximum of R400 000 in a Regional Court), and that cross-border human rights litigation will usually involve claims exceeding that amount by multiple claimants, the focus of this chapter will be on the jurisdiction of the High Courts.

2.1 South African Law on Jurisdiction over the Company Itself

The starting point is Section 21(1) of the Superior Courts Act, which states that "[a] Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction, and all other matters of which it may according to law take cognizance".[6] Clearly, the place of residence and the place of the cause of action are envisaged as founding jurisdiction. However, the provisions of the Act require reference to long-standing common law principles to elaborate upon their meaning.[7] I shall focus on those that are relevant to the question at hand.

First, in general, the rule is that if a defendant is an *incola* of the court's area of jurisdiction, it is prepared to hear the case.[8] To be regarded as an *incola*, the defendant must either be domiciled or resident in the area. The question then arises as to what constitutes residence or domicile for a corporation. Given that a corporation is an incorporeal entity, the question thus becomes how to render the notion of residence applicable to it. Going back 100 years, the Appellate Division in *TW Beckett & Co v H Kroomer Ltd*[9] wrote that "[t]he residence of a legal persona like a company, artificially created, must be a mere notional conception introduced for purposes of jurisdiction and law .... The only home which a corporation can be said to have is the place where the operations for which it was called into existence are carried on."[10]

A problem, however, arises in that there may be a division between the place at which the company conducts its main business and its registered office, where it keeps various documents and registers required by company law. In *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd*,[11] Hoexter JA adopted a more liberal approach to residence than was articulated before: he found that a company can

5 C F Forsyth *Private International Law* (2012) 175.

6 Act 10 of 2013.

7 See *Bid Industrial Holdings v Strang* 2008 3 SA 355 (SCA) which explains this approach at par 54. See also C Theophilopolous, C M Van Heerden and A Boraine *Fundamental Principles of Civil Procedure* (2016) 64.

8 Forsyth (2012) 221.

9 1912 AD 324.

10 *TW Beckett & Co v H Kroomer Ltd* (n 9) 334.

11 1991 1 SA 482 (A).

reside both at its registered office or its principal place of business.[12] The core reasoning behind his finding related to the utility (or convenience, as it is known in South African law) of doing so.[13] The case also addressed the question of the domicile of an artificial person. Hoexter JA found a pithy definition of domicile to be the following: "that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom".[14] Given the requirement for both a physical and intentional dimension in domicile, he found that a company could have only one domicile for purposes of jurisdiction, whereas it may be resident in more than one place.[15] The principle articulated in this case was that the domicile of a company that had no other presence within South Africa was where its registered office was found.[16]

However, there is now judicial authority that suggests that this position has been shifted somewhat by the new Companies Act.[17] In Section 23(3), it is stated that "[e]ach company or external company must – (a) continuously maintain at least one office in the Republic; and (b) register the address of its office, or its principal office if it has more than one office …". In *Sibakhulu Construction v Wedgewood Village Golf Country Estate (Pty) Ltd*,[18] Binns-Ward J considered the effect of the new provisions on the jurisdiction of courts over companies. He held that a construction of the Act now meant that "the registered office must be the company's only office, alternatively, if it has more than one office, its '*principal office*'".[19] For jurisdictional purposes, then, the registered office and the principal place of business must be one and the same address.[20] Consequently, Binns-Ward J's interpretation suggests a narrowing of how the residence of a company is to be determined. Clearly, this is of importance within South Africa in relation to which division of the High Court has jurisdiction over companies – however, the question arises as to how this applies to foreign companies?

Section 23 of the Companies Act requires an external company to register in South Africa within 20 days from when it begins to conduct business.[21] Conducting business is defined to involve a list of activities which include holding a meeting of shareholders or the board, establishing a bank account, acquiring any interest in any property, and entering contracts of employment.[22] It is not clear from the statute itself whether a company is regarded as an *incola* of a court simply by

12 *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* (n 11) 495C.
13 *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* (n 11) 499C.
14 *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* (n 11) 503B drawing on other sources.
15 *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* (n 11) 503E-F.
16 *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* (n 11) 503C-D.
17 Act 71 of 2008.
18 2011 ZAWCHC 439.
19 *Sibakhulu Construction v Wedgewood Villlage Golf Country Estate (Pty) Ltd* (n 18) par 19.
20 See C Theophilopolous *et al* (2015) 54.
21 Sec 23(1).
22 Sec 23(2).

virtue of its registration. If the approach in *Sibahkulu* is adopted, it is clear that the registered office (which must coincide with the principal place of doing business in South Africa) will determine the place in South Africa where a court may exercise jurisdiction over a foreign company. If that company does perform its main activities within South Africa, then it seems – in accordance with the above principles – that a foreign plaintiff is able to make a claim in South Africa for harm the company has caused elsewhere.

The problem, however, arises in relation to companies that wish to establish a presence in South Africa but do not have their principal place of business there. In *ISM v Maraldo*,[23] it was held that business activity of this kind can amount to residence but that it will only be recognized in relation to a dispute "which turns upon a cause of action arising out of local business activities".[24] For purposes of domestic causes of action, the company will be regarded as resident where its registered office is. The *Sibakhulu* judgment, if followed, suggests that the registered office and principal place of business must coincide. If this principle is adopted, it raises the question of what the legal position is where the harm is caused overseas and the company – whilst having a registered office in South Africa – has its principal place of business overseas. If simply having a registered office is sufficient to establish jurisdiction, then a foreign plaintiff will be able to sue in South Africa. If not, as appears to follow from *Sibakhulu*, then, if a company's principal place of business is outside South Africa, and the cause of action arose elsewhere, the company will be treated as a foreigner. What then are the possibilities of utilizing South African courts in circumstances where the company (defendant) is a foreigner?

Generally, only someone who is resident or domiciled within the court's jurisdiction (known as an *incola*) may institute an action against a foreigner. In *Cape Explosive Works v SA Oil & Fat Industries Ltd*, Kotze JP held the following: "[a] stranger would only arrest another stranger if there existed some ground justifying the granting of an arrest, as where, for instance, the claim or right of action was based on a contract made or to be performed within the jurisdiction of the place, where the arrest was applied for; whereas an *incola* could arrest a stranger or *peregrinus* on any cause of action arising anywhere beyond the jurisdiction".[25] The principle established then is that, "[i]f the plaintiff, as well as the defendant is a foreign peregrine, he may apply for an order of attachment only if the cause of action arose within the court's area".[26] The Supreme Court of Appeal summarized the position in *Siemens Ltd v Offshore Marine Engineering Ltd*, stating that "where the plaintiff and the defendant are both foreign peregrines … a recognized *ratio jurisdictionis* as well as the arrest of the defendant or attachment of his property

23 1983 4 SA 112 (T).

24 *ISM v Maraldo* (n 23) 117B.

25 1921 CPD 244 268.

26 Forsyth (2012) 224.

are essential to found jurisdiction".[27] The reason for this approach appears to have been the concern that any judgment made by a South African court is able to be effective against a foreign defendant.[28] Clearly, in light of these principles, foreign plaintiffs, in general, will not be able to hold a foreign company to account in South African courts for violations of their fundamental rights. As indicated above, there is some uncertainty concerning the position in relation to a multi-national company which conducts some business in South Africa but does not have its principal place of business here. If the plaintiff is local, then it will be necessary to attach property of the foreign company – which has a registered branch in South Africa - to confirm jurisdiction (as otherwise any order may not be effective).[29]

Two recent cases have developed the law in this regard and require some discussion. In *Cargill Cotton Ginners Ltd v FleetAfrica (Pty) Ltd*,[30] the court was faced with a cause of action that arose in Zambia against a company that claimed to have its registered office and principal place of business in Zambia. The plaintiff was South African and wished to sue in South Africa. A full bench found that jurisdiction could be asserted if the company had a branch office or place of business in the court's jurisdiction.[31] On the facts, however, it found that, even though an employee had worked at times from an office in Johannesburg, the company Cargill Ltd itself had not really established any presence in South Africa. A subsidiary, Cargill RSA, had an office in Johannesburg, but that was not sufficient to establish jurisdiction over a parent company where the claim was against the parent. The case raises the question, discussed further below, of the relationship between parent and subsidiary companies as well as what is sufficient to determine presence in the country for purposes of jurisdiction. It would appear from the case that if the corporation has a registered office – which could include a branch – in terms of the Companies Act, that would be sufficient to establish jurisdiction although the presence of a subsidiary is not sufficient for an action against the parent company.

Some doubt has been placed on this position by the recent case of *Apleni v African Process Solutions (Pty) Ltd*.[32] That case concerned a claim for damages by a South African building contractor arising out of injuries that he suffered for work he was contracted to do for a South African company in the Democratic Republic of the Congo. The Court stated that it "should follow a pragmatic approach in order to determine whether it would have jurisdiction over a matter when the delict was caused in a foreign country. The overwhelming wealth of authority seems to suggest that the court may deviate from the *lex loci delicti* rule in cases where there

27 1993 3 SA 913 (A) 928F-G. As Forsyth (2012) 225 points out, attachment or arrest do not found but confirm jurisdiction.

28 On the principle of effectiveness, see Forsyth (2012) 170.

29 See *Joseph v Air Tanzania Corporation* 1997 3 SA 34 (W) and *Cargill Cotton Ginners Ltd v FleetAfrica (Pty) Ltd* 2012 SAGPJHC 147 par 30.

30 *Cargill Cotton Ginners Ltd v FleetAfrica (Pty) Ltd* (n 29).

31 *Cargill Cotton Ginners Ltd v FleetAfrica (Pty) Ltd* (n 29) par 27.

32 2018 ZAWCHC 160.

is [a] common link between the parties, which links seems to be that the plaintiff and defendant have a common residence, domicile or nationality and some other link between them."[33] The Court here did not regard the fact that the defendant was a South African company as determinative but rather considered the fact that the employment contract arose in South Africa, as well as the fact that both the plaintiff and defendant were South Africans, as determinative. It also referenced the right of access to courts as an important factor in its consideration of the jurisdiction question. The Court here appears to suggest that the enquiry shifts from simply whether the defendant was South African to whether there is some common link between the parties in South Africa. This test could have the effect of the widening the possibility of holding corporations to account in South Africa.

In summary, then, a company with its principal place of business in South Africa could be sued by a foreign plaintiff in South Africa even if the cause of action arose overseas. Depending on how the law develops, the position is relatively unclear concerning a company that operates in South Africa but has a principal place of business in another jurisdiction where the violation of rights takes place in a further jurisdiction. Multinationals without a principal place of business in South Africa thus may not be subject to the jurisdiction of South African courts for harms caused elsewhere.

If we recognize the reality that South Africa has one of the most developed legal systems on the African continent and is well respected in relation to its jurisprudence in relation to fundamental rights, this seems like a missed opportunity. Many multinationals may have their principal place of business overseas and wish to establish significant operations in Africa. South Africa may be a jurisdiction of choice for the establishment of the headquarters of its African operations precisely because of its stronger respect for the rule of law and judicial system. Ironically, though, these very dimensions may not be able to help victims of fundamental rights claim against such companies if existing jurisdictional rules are applied restrictively. Particularly, in relation to fundamental rights, the focus of jurisdictional rules should be on enabling claims rather than restricting them. In *Kaunda v President of the Republic of South Africa*,[34] the Constitutional Court suggested that extraterritorial infringements of a constitutional right by persons bound by the South African Constitution may be justiciable in South Africa.[35] This seemed to be based on a person being tied to South Africa – the question, of course, concerns what is a sufficient tie. South Africa may also be a convenient location for, particularly, African plaintiffs given the relative proximity and relative affordability. This raises the question of the application of a doctrine of *forum non conveniens* in South Africa.

33 *Apleni v African Process Solutions (Pty) Ltd* (n 32) par 57.

34 2005 4 SA 235 (CC).

35 *Kaunda v President of the Republic of South Africa* (n 34) par 45.

2.2 The *Forum Non Conveniens* Principle

The doctrine of *forum non conveniens* has been formulated by English courts to allow a defendant to stop a claim against him or her "where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, that is, in which the case may be tried more suitably for the interests of all parties and the ends of justice".[36] The doctrine also exists in other jurisdictions such as the United States of America and Canada.[37] Until 2007, whether the doctrine existed in South African law was controversial. Forsyth, in a prior edition of his book, argued that there is good reason for the recognition of the doctrine, though it would always play less of a role in a Roman-Dutch system – that is based on a series of connecting factors – than the English system – which allows for jurisdiction on the basis of temporary presence.[38]

In *Bid Industrial Holdings (Pty) Ltd v Strang*,[39] the Supreme Court of Appeal found that the arrest of a person for purposes of establishing jurisdiction was unconstitutional. In considering what alternatives were available to establish jurisdiction, the court recognized that mere physical presence may suffice.[40] It also stated that, "if the plaintiff decides in favour of suing here it is open to the defendant to contest, among other things, whether the South African court is the *forum conveniens* and whether there are sufficient links between the suit and this country to render litigation appropriate here rather than in the court of the defendant's domicile".[41] The judgment goes on to say that the notions of appropriateness and convenience are "elastic concepts which can be developed case by case".[42] It thus appears that the Supreme Court of Appeal has recognized the application of the *forum non conveniens* principle in South Africa.

It is not entirely clear as yet how this principle will connect with the other longstanding principles articulated above in the context of multi-national companies. The key enquiry, as articulated by the Supreme Court of Appeal, will be whether there is an appropriate and sufficient link between South Africa and the suit. In developing an understanding of what would satisfy this test, the recent case of *Multi-links Telecommunications v Africa Prepaid Services Nigeria Ltd*[43] is helpful. It dealt with a challenge to jurisdiction relating to a claim against a subsidiary of a South African company operating in Nigeria. Relying on the *Strang* case, Judge

36 *Lubbe v Cape plc* [2000] UKHL 41.

37 See the discussion of its application in relation to multi-national corporations for harms caused overseas by S Joseph *Corporations and Transnational Human Rights Litigation* (2004) 87-99.

38 C F Forsyth *Private International law* (2007) 176.

39 *Bid Industrial Holdings (Pty) Ltd v Strang* (n 7) par 52.

40 *Bid Industrial Holdings (Pty) Ltd v Strang* (n 7) par 52.

41 *Bid Industrial Holdings (Pty) Ltd v Strang* (n 7) par 55.

42 *Bid Industrial Holdings (Pty) Ltd v Strang* (n 7) par 56.

43 2014 3 SA 265 (GP).

Fabricius found the doctrine of *forum non conveniens* to be of application in South African law. Utilizing prior case law, he interpreted "causes arising" in the Supreme Court Act 59 of 1959[44] to mean that

> one must determine the forum most suitable for the ends of justice and because pursuit of the litigation in that forum is most likely to secure those needs. The appropriate or natural forum is that with which the action has the most real and substantial connection. In that context then, the Court would look to all connecting factors including background facts, convenience, experts, the law governing the relevant transaction or action, the place where the parties reside or carry on business, etc.[45]

In many ways, this widening of jurisdictional rules is to be welcomed as moving beyond the prior relatively rigid approach of the courts, though, it must be said, that flexibility comes at the price of some uncertainty. There is a tension, however, in the above statement by Fabricius J between the forum that will be most suitable to achieve the ends of justice and that forum which has the most real and substantial connection to the parties or the dispute. The former idea involves seeking substantive justice, whereas the latter can be interpreted in a rather procedural and formalist manner. This is a concern, as the *forum non conveniens* rule has often been a stumbling block that has been used in some States to deny jurisdiction over companies that have been accused of committing human rights wrongs abroad either through their own actions or through their involvements with other companies.[46] If South Africa is fully to embrace this doctrine, as recent decisions suggest, then it will be necessary to interpret it in light of the constitutional commitment to fundamental rights as well as South Africa's international treaty obligations. As such, the rule should be understood to recognize that a strong and weighty factor in determining the appropriateness of a South African court's jurisdiction will be whether it enables a victim of a fundamental rights violation in another country to gain access to a remedy. A strong presumption should also exist in favour of the plaintiff's choice of forum unless there are very strong countervailing factors why another jurisdiction would be more appropriate. The rule should thus be interpreted in a manner that seeks

44 This Act was replaced by the Superior Courts Act 10 of 2013 that came into operation only after the hearing of this case. The new Act has a similar provision, in Sec 21(1), and uses similar language and, in particular, the term "causes arising".

45 *Multi-links Telecommunications v Africa Prepaid Services Nigeria Ltd* (n 43) par 23.

46 Joseph (2004) 98 explains how it has been pleaded by corporations in virtually all transnational human rights cases. She quotes an author who states that it has been an "insuperable obstacle" to successful cases in this regard. See also the report by Amnesty International and the Business and Human Rights Resource Centre "Creating a Paradigm Shift: Legal Solutions to Improve Access to Remedy For Corporate Human Rights Abuse" available at https://www.amnesty.org/ download/Documents/ POL3070372017ENGLISH.PDF.

substantive justice rather than simply searching for, often elusive, connections to a jurisdiction.[47]

2.3 Jurisdiction over Parent Company or Contract-Holder

One of the complications in the scenario under discussion in this chapter relates to the fact that I have assumed the plaintiff brings an action in South African courts against a corporation for its own actions that violate fundamental rights. Thus, in the *Air Tanzania* case, it was the company's own employees who defamed the plaintiff. Yet, often in cases concerning business and fundamental rights, it is not the South African company itself that violates rights but a subsidiary that operates in another country or a company with whom the South African company contracts. Can a parent company be liable for the actions of its subsidiaries or a multi-national in relation to companies with which it contracts? This question is an important one and will no doubt affect the outcome of the case. However, arguably, it is a matter of substantive applicable law rather than one of jurisdiction. Jurisdiction will usually involve a question concerning the identity of the plaintiffs, the identity of the defendants and the location of the cause of action. The plaintiff will have the choice whether to sue a parent company or multi-national contracting company. If the plaintiff chooses to sue a defendant that is resident in South Africa (taking into account all the complexities raised above), then the High Court will usually have jurisdiction. Jurisdiction should thus be decided on the basis of the parties to the litigation rather than the substantive nature of the claim. Once jurisdiction is assumed, it will, of course, need to be determined then whether the defendant is responsible for the activities of its subsidiary or sub-contractor.[48] That will in turn raise questions of which country's law should be applied to determine that question, a matter which lies outside the scope of this chapter.[49]

An interesting question that does arise in this context which relates to jurisdiction concerns the question of joining a foreign subsidiary or sub-contractor in an action lodged against the resident parent company or primary contractor. This raises the question of the *causa continentia* doctrine, which provides that "where one court has jurisdiction over a part of a cause, considerations of convenience, justice and good sense justify its exercising jurisdiction over the

47 English courts have become more attuned to such considerations over time: see, for example, *Lubbe v Cape plc* [2000] UKHL 41 and, more recently, *Vedanta Resources plc and Konkola Copper Mines plc v Lungowe* [2019] UKSC 20 and *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3. In Canada, see *Garcia v Tahoe Resources* 2017 BCCA 39.

48 The English cases of *Vedanta Resources plc and Konkola Copper Mines plc v Lungowe* and *Okpabi v Royal Dutch Shell plc* (n 47) provides an interesting international legal development in this regard.

49 The question of choice of law in delictual cases in South Africa has been the subject of the Supreme Court of Appeal decision in *East Asian Consortium BV v MTN Group Ltd* 2025 ZASCA 50. See also Forsyth (2012) 349-364 and J L Neels and E A Fredericks "Liability Arising from Traffic Accidents Involving Self-driving Cars in Private International Law" 2024 *TSAR* 510.

whole cause".[50] Justice Cameron utilized this doctrine in relation to assuming jurisdiction over a class action for disability grant payments which had been terminated by the government without good reason. Some members of the class were in the jurisdictional area of the Eastern Cape High Court, whilst others were in a different province. The Supreme Court of Appeal held, however, that the fact that the Eastern Cape Court had jurisdiction over some of the applicants provided a reason to extend its jurisdiction over other applicants. The doctrine attempts to "avoid a multiplicity of actions with all the inconvenience and expense that that involves".[51] Thus, we may wish to argue on this basis that if a claim is brought in a South African court against a parent company (or primary contractor) in which a subsidiary or sub-contractor is also implicated, the South African court should exercise jurisdiction over all the claims arising from that matter. There has, however, been a decision which doubts the applicability of the doctrine where the claims that are brought do not fall within the same legal system.[52] It appears that the underpinnings of this doctrine are similar to those of the *forum non conveniens* doctrine and that Forsyth is correct in his assessment that a more expansive approach should be adopted particularly in matters relating to wrongs flowing from fundamental rights violations. A further substantive factor in favour of utilizing the doctrine in this situation links to the reasoning in the *Ngxuza* case above: indeed, the goal in the South African dispensation must be to ensure that the fundamental rights of victims of violations are realized. Doing so will generally require consolidating the claims arising against technically different defendants in one cause of action.

3 Analysis of Proposed Draft Treaty Provisions on Extra-Territorial Jurisdiction

As we saw in the above attempt to capture the current state of South African law, there are various questions that arise concerning the jurisdiction of domestic courts where the cause of action happens overseas. The nature of multi-national corporations also raises questions about where the corporation itself can be said to be resident and which links to a jurisdiction are sufficient. The complex structures of those corporations as well as their supply chains cause difficulties for the law of jurisdiction. The *forum non conveniens* rule raises the possibility of courts in different jurisdictions considering other jurisdictions to be more appropriate, rendering it more difficult for victims of rights violations to gain access to remedies in countries which are favourable towards fundamental rights. These difficulties must be considered in light of the reality of the current global order, namely, that there are many jurisdictions in which there is a weak commitment to the rule of law and questionable judicial independence which renders it difficult for individuals to access justice in certain States where the cause of action takes

50 *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 ZASCA 85.

51 *Majola v Santam Insurance Co Ltd* 1976 1 SA 874 (SE) 877.

52 *Berger v Aiken* 1964 2 SA 396 (W).

place. Indeed, multinationals, at times, take advantage of these legal weaknesses to conduct business at lower costs and a higher profit. The registration of a company or its principal place of business can be manipulated for purposes of finding jurisdictions that have weak protections for fundamental rights. There is thus the need to expand the range of jurisdictions in which remedies for victims of rights violations by businesses can be claimed. These issues are not faced by South Africa alone but are a global problem, which provides some of the background to why there are current negotiations on an international Treaty to address these problems.[53] The Treaty process is now entering its 10th year and four drafts of the Treaty have been released. The drafts are discussed at annual meetings of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights ("IGWG"). The most recent draft treaty at the time of writing (January 2024) was released in July 2023 and took account of state comments and negotiations from the 7th and 8th sessions of the IGWG. I now turn to consider some of the proposals that have been put forward to ensure victims of rights violations are not denied remedies on the basis of courts refusing to assume jurisdiction over the cases that are the subject of this chapter. To understand the evolution of the debates, I shall examine critically the first draft that was released – known as the Zero Draft – and compare it to the most recent draft, known as the Updated Draft, highlighting along the way the shortcomings of the proposed texts. I shall also indicate where progressive proposals have been made in other drafts and, on occasion, sadly dropped to address the problems engaged in this chapter.

3.1 The Zero Draft and Jurisdiction

In 2018, a Zero Draft of the proposed Treaty was released (the "ZD").[54] The provisions of the Zero Draft on jurisdiction were very wide. They were contained in Article 5, which reads as follows:

> 1. Jurisdiction with respect to actions brought by an individual or group of individuals, independently of their nationality or place of domicile, arising from acts or omissions that result in violations of human rights covered under this Convention, shall vest in the court of the State where:
>   a. such acts or omissions occurred or;
>   b. ... the natural or legal person or association of natural or legal persons alleged to have committed the acts or omissions are domiciled.
> 2. A legal person or association of natural or legal persons is considered domiciled at the place where it has its:

53 I have explored the rational for such a treaty in D Bilchitz "The Necessity for a Treaty on Business and Human Rights" 2016 *Business and Human Rights Journal* 203-227.

54 The Zero Draft can be found at https://www.ohchr.org/sites/default/files/Documents/HRBodies/ HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.

a. statutory seat;
b. central administration;
c. substantial business interests;
d. subsidiary, agency, instrumentality, branch, representative office or the like.[55]

These provisions essentially allow for jurisdiction to be exercised where the cause of action arose or where the natural or legal persons alleged to have committed the acts or omissions are domiciled. Given that the provision is based on an allegation, it can allow jurisdiction over a parent company for the acts of subsidiaries if the harm is alleged to have been committed by the parent (a similar point would apply to a contracting company). The substantive applicable law would then decide whether or not there would be liability of the parent for acts of its subsidiary. In relation to extraterritorial jurisdiction, the main concept that has been utilized is that of the domicile of the legal person, and four criteria are provided as to where it is considered to be domiciled. The ZD remains unclear about whether there can be domicile in only one or multiple jurisdictions. Given the wide provisions, the intention appears to have been to allow jurisdiction to be exercised by multiple countries in which a company can be said to be domiciled. If this is so, the provisions themselves were expansive, allowing for jurisdiction over a legal person where it has simply a branch or representative office: the goal of these provisions appear to have been to widen jurisdiction as far as possible. That would extend the possibility of remedies for victims of rights violations but elicited criticism by states of the draft at the fourth session of the Inter-governmental Working Group.[56] The ZD also did not address the problems caused by the *forum non conveniens* doctrine for victims of fundamental rights violations.

3.2 The Updated Draft and Jurisdiction

The Updated Draft (UD)[57] shifted the jurisdiction clause somewhat, expanding it in some respects and narrowing it in others. The provisions read as follows:

9.1 State parties shall take such measures as may be necessary to establish its jurisdiction in respect of human rights abuses in cases where:

55 Art 5 of the Zero Draft.

56 See Human Rights Council *Report on the Fourth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights* A/HRC/40/48 (2 January 2019) paras 80-82 available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/000/37/PDF/G1900037.pdf?OpenElement.

57 The Updated Draft can be found at https://www.ohchr.org/sites/default/files/documents/hrbodies/ hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf.

(a) the human rights abuse took place, in whole or in part, within the territory or jurisdiction of that state party;

(b) the relevant harm was sustained in whole or in part, within the territory or jurisdiction of that state party;

(c) the human rights abuse was carried out by either:

i. a legal person domiciled in the territory or jurisdiction of that State Party; or

ii. a natural person who is a national of, or who has his or her habitual residence in the territory or jurisdiction of, that State Party; and

(d) a victim seeking a remedy through civil law proceedings is a national of, or has his or her habitual residence in the territory or jurisdiction of that State Party.

9.2 For purposes of Article 9.1, a legal person is considered domiciled in any territory or jurisdiction in which it has its:

(a) place of incorporation or registration;

(b) principal assets or operations;

(c) central administration or management; or

(d) principal place of business or activity.

9.3 State parties shall take such measures as may be necessary, and consistent with its domestic legal and administrative systems, to ensure that decisions by relevant State agencies relating to the exercise of jurisdiction in cases referred to in Article 9.1 shall respect the rights of victims in accordance with Article 4, including with respect to:

(a) the discontinuation of legal proceedings on the grounds that there is another, more convenient or more appropriate forum with jurisdiction over the matter; or

(b) the coordination of actions as contemplated in article 9.4.

9.4 If a State Party exercising its jurisdiction under this Article has been notified, or has otherwise learned, of judicial proceedings taking place in another State Party relating to the same human rights abuse, or any aspect of such human right abuse, the relevant State agencies of each State shall consult one another with a view to coordinating their actions.

Compared to the Zero Draft, there are notable extensions of some grounds on which jurisdiction can be exercised. There is a recognition that jurisdiction can be founded on the basis of only part of the violation taking place in one state. Moreover, given fundamental rights harms caused by environmental pollution, for instance, can traverse the boundaries of several states, there is a recognition

that jurisdiction can be founded in a state where harm was sustained – even if the acts which caused the harm were not committed there. The provisions also extend now to a perpetrator who is a natural person and their state of nationality or habitual residence as well as where a victim of a rights violation is a national or habitually resident. In many cases, these extensions may have a limited impact given that, for instance, victims of violations will be nationals of the state in which the harm occurred.

For purposes of this chapter, the UD carries over the founding of jurisdiction where a legal person is domiciled but narrows the definition of domicile substantially, particularly for purposes of holding a parent company to account for activities of subsidiaries and sub-contractors. The focus is now on only where it has its central and legal headquarters as well as where its principal assets and activities are located. The qualification "principal" once again limits the possibilities of exercising jurisdiction for a court. It still remains unclear whether a corporation can be said to be domiciled in more than one jurisdiction. It is notable, however, that the existence of a subsidiary or representative office will no longer be sufficient to ground jurisdiction. This will reduce the number of potential jurisdictions in which such an entity can be sued.

Let us take the example mentioned above of a company that sets up a satellite administrative office in South Africa to manage its operations in Zimbabwe, where there are allegations that rights have been violated. If the legal and administrative headquarters of the corporation are in Germany and its business interests are mainly in Zimbabwe, the Updated Draft would suggest that a South African court would not have jurisdiction in such cases. This is a pity given that South African courts may be easier for victims to access, share a common language with Zimbabwe and are relatively friendly to fundamental rights claims. This limitation could be addressed through re-introducing certain facets of the Zero Draft for determining domicile which could include where a company has a subsidiary, agency, branch or operational division. This would expand the range of jurisdictions in which claims could be brought. Should such an expansive approach be unable to command a consensus of states, there are intermediate approaches that would allow for the founding of jurisdiction where there are "substantial" or "significant" business interests or assets: the downside with these qualifiers are that they are relatively vague and may lead conservative courts to exercise their jurisdiction restrictively.

The UD seems clear that there may be multiple jurisdictions in which claims can be brought surrounding the same matter. It is a welcome development that it expressly addresses such a scenario. The provision though at present is rather weak and simply includes a duty to consult on the part of states in order to co-ordinate such legal actions. The alternative would be to create rules of priority for jurisdictions but the difficulty with this is that it could be used by states with friendlier systems to fundamental rights to deny jurisdiction over such matters

– akin to the way in which the *forum non conveniens* rule has often inhibited such claims.[58]

The UD directly engages with the *forum non conveniens* rule in article 9.3. However, the provision is very weak. It simply directs states to "take measures" and qualifies this obligation that it must be "consistent with its domestic legal and administrative systems" – that could be regarded as an escape clause for recalcitrant states and courts. It is also not clear exactly what the state must do in this regard in order to respect the rights of victims in relation to the *forum non conveniens* rule. To address the denial of jurisdiction on *forum non conveniens* grounds, a much stronger provision is necessary to require states in cases where the fundamental rights of victims are at issue to hear cases where one of the jurisdictional grounds mentioned in the treaty are present. The 3rd Revised Draft in fact included such a stronger provision which read: "Courts vested with jurisdiction … shall avoid imposing any legal obstacles, including the doctrine of *forum non conveniens*, to initiate proceedings…."[59] The problem with this provision is that it directly addressed courts and so it is unclear what its effect would be. What is needed is ultimately for states to commit to enact statutory rules to direct courts to exclude *forum non conveniens* in fundamental rights cases where the jurisdictional links mentioned in the treaty are present. A less radical proposal is to retain the doctrine but to understand it in a manner that presumes that the forum in which the victims institute a claim is the most appropriate forum unless there are strong grounds for rejecting that claim. Substantive considerations relating to enabling access to remedies and gaining redress for fundamental rights violations could also be required to play an important role in any determination of what constitutes an "appropriate" forum.[60]

A further possibility for inclusion in the treaty which has been suggested by a number of NGOs and some academics is the recognition of the notion of a *forum necessitatis* (a forum of necessity) to address problems in assuming jurisdiction over multinationals in cases of transnational human rights violations.[61] In 2010, the Ontario Court of Appeal formulated the doctrine as follows:

> The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the

58 See footnote 46 above.

59 The 3rd Revised Draft article 9.3. The 2nd Revised Draft also made significant improvements in this regard: it states in Art 9(3) that "[w]here victims choose to bring a claim in a court as per Art 9.1, jurisdiction shall be obligatory and therefore that courts shall not decline it on the basis of *forum non conveniens*". Art 7(5) also states that "State Parties shall ensure that the doctrine of *forum non conveniens* is not used by their courts to dismiss legitimate judicial proceedings brought by victims".

60 See the proposals made by Amnesty International (n 46) 11-13.

61 See for instance, C Nwapi "Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor" 2014 *Utrecht Journal of International and European Law* 24-43.

> need to ensure access to justice will justify the assumption of jurisdiction .... Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction.[62]

The 3rd Revised Draft in fact included a version of this doctrine which read as follows:

> Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair judicial process is available and there is a connection to the State Party concerned as follows:
>
> a. the presence of the claimant on the territory of the forum;
>
> b. the presence of assets of the defendant; or
>
> c. a substantial activity of the defendant.[63]

This was an important added residual prong to the jurisdictional clauses in the Treaty to enable victims to gain access to a forum to hear their claims where no other effective forum existed . Arguably, it is questionable whether the doctrine should be formulated to retain a "connection" requirement to the country in question given that its *raison d'être* is to create the possibility of liability where there is no other forum in which redress can be gained. Unfortunately, there has been regression in the Updated Draft with the removal of this provision. The inclusion of such a provision should be additional to a liberal approach to jurisdiction that allows the plaintiff to elect from a range of fora in which they wish to bring the case which have a connection to the various sites in which multinationals operate.

4 Conclusion

Ensuring access to justice for victims of fundamental rights violations by corporations that cross borders raises challenges to traditional doctrines in many jurisdictions. I have explored the approach of South African law in this regard. Whilst it appears that it often would allow for the exercise of jurisdiction, there are a number of uncertainties that remain, particularly with the passing of the new Companies Act and the recent recognition of the *forum non conveniens* doctrine in South African law. South Africa is not unique in lacking complete clarity in this area and, sadly, a number of jurisdictions have refused to hear cases on the basis of a lack of jurisdiction, often leading to a denial of claims by victims of fundamental rights violations as a result. I have also sought critically to consider the proposals made in Drafts of a Treaty on Business and Human Rights to address this situation. I have indicated the manner in which they seek to advance the current legal position; however, I have also highlighted how the

62 *Van Breda v Village Resorts Ltd* (2010) 98 OR (ed) 721 par 100.

63 Article 9.3 of the Third Revised Draft.

provisions still fall short in terms of the clarity required and in articulating a liberal position towards jurisdiction in these cases. Ultimately, the violation of fundamental rights is a matter of concern to all States, and a technical matter such as jurisdiction should be construed in a manner that enables rather than restricts access to remedies for such wrongs.

Tacit Choice of Law in International Commercial Contracts

The Position in Ghanaian, Kenyan, Nigerian and South African Private International Law

*Garth J Bouwers**

1 Introduction

In the modern era, most legal systems adopt some form of autonomy under which the parties are free to choose the law to govern the contract.[1] In many international commercial contracts, the parties will have decided on the system of law applicable to their agreement.[2] The law chosen by the parties will usually be included in the terms of the contract. However, where the parties fail to expressly select a law to govern their contract, it is left to the court to determine the law applicable to the agreement.[3] The court will first attempt to determine the parties' unexpressed

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1 A Mills *Party Autonomy in Private International Law* (2018) 1; P M North and J J Fawcett *Cheshire and North's Private International Law* (1987) 449; S Peari *The Foundation of Choice of Law* (2018) 90; J Swan "Choice of Law in Contracts" 1991 *Canadian Business Law Journal* 213; S C Symeonides *Codifying Choice of Law around the World. An International Comparative Analysis* (2014) 115; and C Walsh "The Uses and Abuses of Party Autonomy in International Contracts" 2010 *University of New Brunswick Law Journal* 12 14. See generally P E Nygh *Autonomy in International Contracts* (1999). However, see I Schwenzer, P Hachem and C Kee *Global Sales and Contract Law* (2012) 52-53 for possible exceptions.

2 M Harding *Conflict of Laws* (2014) 146. See also Swan (1991) 213: "The power of the parties to choose the 'law to govern' the contract is so well accepted that almost every commercial agreement prepared by a lawyer will contain a clause purporting to choose a 'governing law' for the parties."

3 L Collins *et al* (eds) *Dicey, Morris and Collins on the Conflict of Laws* (2012) 1809; M Davies, A S Bell and P L G Brereton *Nygh's Conflict of Laws in Australia* (2014) 442; C F Forsyth "Enforcement of Foreign Arbitral Awards, Choice of Law in Contract, Characterization and a New Attitude to Private International Law" 1987 *South African Law Journal* 4 14; C F Forsyth *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012) 326-327; North and Fawcett (1987) 444; and P E Nygh *Conflict of Laws in Australia* (1991) 277.

or tacit choice of law.[4] In the absence of a tacit choice, the court must assign an objective proper law to the contract.[5]

There appears to be some apprehension surrounding the application of a tacit choice of law in international commercial contracts. Furthermore, the concept of tacit choice of law is not always clearly perceived.[6] Although falling short of an express choice by the parties, a tacit choice still amounts to a true or real choice of law.[7] However, the notion of inferring an actual intention is based upon making assumptions that may or may not be correct.[8] This may have undesirable consequences for the parties to the contract as their reasonable expectations will not necessarily be portrayed in the inferences drawn by the court. Nevertheless, most legal systems around the world recognise the possibility of a tacit choice of law.[9] However, the determination of a tacit choice of law is not adequately addressed and remains highly divergent around the world.

This contribution examines the determination of a tacit choice of law in selected African countries, whose laws have been influenced by the English common law tradition. More specifically, the study analyses the legal position in Ghanaian, Kenyan, Nigerian and South African private international law. In examining the determination of a tacit choice of law, emphasis is placed on the level of strictness for the criterion for a tacit choice of law, indicators from which inferences have been drawn and the weight that has been attached to these indicators. Particular attention is given to the role of choice of forum clauses in the determination of a tacit choice of law (the relationship between a choice of forum

4 Collins *et al* (2012) 1809; Nygh (1991) 277; and Nygh (1999) 108-109. See J L Neels and E A Fredericks "Tacit Choice of Law in the Hague Principles on Choice of Law in International Contracts" 2011 *De Jure* 101 104: some legal systems refer to tacit choice of law while others refer to an implied choice of law. See also J P Van Niekerk and W G Schulze *The South African Law of International Trade: Selected Topics* (2016) 61. The terms "tacit", "implied" and "presumed" have been used interchangeably in private international law. See also Symeonides (2014) 120: "[M]ost recent codifications and conventions provide that the choice-of-law agreement need not be express but may also be implied." See, in general, Bouwers *Tacit Choice of Law in International Commercial Contracts – A Global Comparative Study* (2021).

5 Davies, Bell and Brereton (2014) 442 and 453; Forsyth (2012) 329; B A Marshall "Reconsidering the Proper Law of the Contract" 2012 *Melbourne Journal of International Law* 505 526-527; E Schoeman, C Roodt and M Wethmar-Lemmer *Private International Law in South Africa* (2014) 53; and Van Niekerk and Schulze (2016) 63.

6 Forsyth (2012) 304.

7 Collins *et al* (2012) 1809; Forsyth (2012) 326-327; Marshall (2012) 512-513; Neels and Fredericks (2011) 104; Nygh (1999) 108-109; and Symeonides (2014) 120: "An implied choice is distinguished from a hypothetical choice, which most codifications do not recognize." See also M Bogdan *Private International Law in Sweden* (2012) 66: "[T]he choice must be a real choice, so that a hypothetical reasoning about which law the parties would probably have chosen if they had made a choice is not sufficient."

8 North and Fawcett (1987) 461.

9 Nygh (1999) 109; Schwenzer, Hachem and Kee (2012) 55.

and a tacit choice of law is a contentious issue in private international law). The contribution draws attention to the uncertainties that exist in the aforementioned jurisdictions and the need for judicial reform concerning the determination of a tacit choice of law in international commercial contracts.

2 Ghana

2.1 Party Autonomy

Ghanaian private international law is greatly influenced by the English common law rules relating to the law applicable to an international commercial contract.[10] Case law provides the main source in ascertaining the rules and principles that regulate private international law issues.[11] However, very few authoritative texts or pronouncements (from the legislature or the courts) have been made relating to the choice of law.[12] Accordingly, a Ghanaian court will most likely turn to the traditional common law approach as persuasive authority.[13]

It is well established in English private international law that if the parties have chosen a law to govern their agreement, then that would be the proper law of the contract.[14] Ghanaian law has reiterated this position. In *Société Générale*

10 See R F Oppong "Ghana" *in* J Basedow, G Rühl, F Ferrari and P Asensio (eds) *Encyclopedia of Private International Law* (2017) 2112 2113: "To date, there has been no systematic historical account of the origin and evolution of Private International Law as an academic discipline and a field of legal practice in Ghana. However, it can be argued that Private International Law began its life under the Supreme Court Ordinance of 1876 (Act 4) .... [I]t made the common law, the doctrines of equity and the statues of general application applicable in Ghana. This meant that Private International Law problems that came before courts established by the Ordinance could be resolved using English Rules." See also Ghana's Constitution of 1992. Chapter 4 of the Constitution (Laws of Ghana) states under Art 11(1): "The laws of Ghana shall comprise— (a) this Constitution; (b) enactments made by or under the authority of the Parliament established by this Constitution; (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution; (d) the existing law; and (e) the common law."

11 R F Oppong *Private International Law in Ghana* (2012) 27; and Oppong (2017) 2113.

12 Oppong (2012) 27; and Oppong (2017) 2113.

13 Oppong (2012) 27; and Oppong (2017) 2113.

14 See, for example, A Briggs *Private International Law in English Courts* (2014) 503; R H Graveson *Conflict of Laws : Private International Law* (1974) 405-406; J H C Morris (gen ed) *Dicey and Morris on the Conflict of Laws* (1980) 747-748; and P M North *Cheshire and North Private International Law* (1979) 195. See also *Mount Albert Borough Council v Australasian Temperance and General Life Assurance Society Ltd* 1938 AC 224 240: "The proper law of the contract means that law which the English court is to apply in determining the obligations under the contract"; and *Vita Food Products Inc v Unus Shipping Co Ltd* 1939 63 Lloyd's Rep 21 27: "It is now well settled that by English law the proper law of the contract is the law which the parties intended to apply."

de Compensation v Ackerman,[15] the Court of Appeal held that the proper law of a contract is the system of law by which the parties intended the contract to be governed.[16] Party autonomy is a fundamentally important principle in Ghanaian private international law.[17] In confirming party autonomy, the court in *Fattal v Fattal*[18] held:

> Thus where the parties have expressly stipulated that a particular law should govern the transaction, that law will be the proper law of the contract, the only requirement being that the choice must be *bona fide* and not offend against public policy ….[19]

Apart from the limitation of *bona fides* and public policy considerations, the extent to which the parties may exercise their freedom of choice is uncertain. There appears to be no authority on aspects such as the choice of a neutral, unconnected system of law; the possibility of *dépeçage*; and a choice of a non-State system of law.

The court in *Garcia v Torrejoh*[20] highlighted the process of ascertaining the proper law of the contract:

> First, the court would inquire whether the parties have made an express selection of the proper law. But should it find out that no such specific choice has been made the court would find out whether there is an implied selection …. Again if none exists, the court would then determine from all surrounding circumstances which system of law the transaction did have its most closest and most real connection with.[21]

15 [1972] 1 GLR 413.

16 *Société Générale de Compensation v Ackerman* (n 15) 421. See also *Fattal v Fattal* [1999-2000] 1 GLR 331 351; *Garcia v Torrejoh* [1992] 1 GLR 143 152; Oppong (2012) 53; R F Oppong *Private International Law in Commonwealth Africa* (2013) 131; and Oppong (2017) 2115.

17 *CILE v Chiavelli* [1967] GLR 651 655: "Just as parties to contracts regularly and freely opt to submit their disputes to arbitration and effect is given to their option, so, I think, should effect be given to such an expressed intention of the parties if they opt that their disputes should be submitted only to the judicial authority of a particular place." See also Oppong (2017) 2115; and Oppong 2012 (53).

18 [1999-2000] GLR 331.

19 *Fattal v Fattal* (n 16) 351. See also Oppong (2013) 132; and Oppong (2012) 54: "The court can refuse to enforce the parties' choice of law on the ground that its enforcement will be against Ghana's public policy."

20 [1992] 1 GLR 143.

21 *Garcia v Torrejoh* (n 16) 152. See also *Fattal v Fattal* (n 16) 351 [1999-2000] GLR 331 351; *Godka Group of Companies v PS International Ltd* [1999-2000] 1 GLR 409 419; and *Société Générale de Compensation v Ackerman* (n 15) 421 [1972] 1 GLR 413 421.

Therefore, parties may exercise their choice through an express stipulation in their agreement.[22] In the absence of an express choice, the court must determine whether a tacit choice of law exists.[23] However, it seems that the distinction between a tacit choice of law and the assignment of the proper law is not clearly defined. The reason for this is that the assignment of the proper law (where there is no real choice) is often justified on the grounds that the governing law is the legal system that the parties may be presumed to have chosen. In *Société Générale de Compensation v Ackerman*,[24] for instance, the court held:

> The mode of judicial ascertainment of the proper law is, in the absence of an express choice of a system of law, the objective and pragmatic one of applying the external standard of the reasonable man of business and then considering what the parties ought to have intended had they considered the question of proper law at the time of formation of the contract .... [M]y task is to discover the system of law by reference to which the parties to this appeal made the contract herein or the system of law with which the contract has its closest and most real connection. I have to examine objectively the connecting ties of the contract to Ghana and France in turn; and paying due regard to the nature and the type of contract entered into i.e. a service contract, the terms of the service contract; the situation and conduct of the parties at the time of the formation to the contract; and generally all the surrounding circumstances, we have to discover which of the two rival legal systems, Ghanaian or French, or the parties must be deemed to have intended to govern their contract had they thought about the matter.[25]

Similarly, in *Godka Group of Companies v PS International Ltd*,[26] the court stated:

> In the absence of any expressed intention as to the proper law of the contract, it seems to me that the legal system of Ghana must govern any dispute arising from the contract, as the implied choice of law by the parties which satisfies the general rules as to the place of performance and the place with which the transaction had substantial connection.[27]

22 Oppong (2013) 131; Oppong (2012) 53; and Oppong (2017) 2115.
23 Oppong (2013) 131; Oppong (2012) 53; and Oppong (2017) 2115.
24 [1972] 1 GLR 413.
25 *Société Générale de Compensation v Ackerma*n (n 15) 421-423.
26 [1999-2000] 1 GLR 409.
27 *Godka Group of Companies v PS International Ltd* (n 21) 420.

The determination of a tacit choice of law and the assignment of the proper law are treated in a similar manner, and it is unclear whether the case falls into one category or the other.[28]

2.2 Level of Strictness of the Criterion for a Tacit Choice of Law

It must be noted that in order to discover the true or real intention of the parties, rather than a purely hypothetical one, a criterion required for identifying the choice of law should be articulated clearly and stringently.[29] Unfortunately, there appears to be no judicial authority regarding the level of strictness of the criterion for inferring a tacit choice of law. The absence of a clear and stringent threshold in Ghanaian law has given rise to a muddled approach in discerning the proper law. In the absence of an express choice of law, Ghanaian courts have referred to the parties' "presumed intention" or "what the parties ought to have intended" had they thought about the matter.[30] This distorts the determination of a tacit or real choice of law.[31]

2.3 Indicators of a Tacit Choice of Law

According to the court in *Garcia*,[32] where the parties to the contract failed to express their intention as to the proper law, the implied selection is determined from "the terms and nature of the contract and from the general circumstances of the case".[33] Similarly, in *Fattal*,[34] the court held that the parties' intention could be inferred "from the contract as a whole and all its surrounding circumstances".[35] It is clear from these *dicta* that a court is not only bound to consider the terms of the contract but must also examine the surrounding circumstances in searching for a tacit choice of law.

Ghanaian private international law provides little guidance concerning the factors (or the weight that should be attached to these factors) in ascertaining a tacit choice of law. The court in *Fattal*[36] held that, in inferring the parties' intention,

28 See also *Fattal v Fattal* (n 16) 351-352 [1999-2000] 1 GLR 331 351-352; *Karachi Gas Co Ltd v Issaq* [1965] EA 42; and *Société Générale de Compensation v Ackerman* (n 15) 421 [1972] 1 GLR 413 421.

29 Marshall (2012) 516; and Nygh (1999) 111.

30 See for instance *Fattal v Fattal* (n 16) 351; *Garcia v Torrejoh* (n 16) 152; and *Société Générale de Compensation v Ackerman* (n 15) 421.

31 See for example Oppong (2017) 2115: "The approach to ascertaining judicially the proper law … of the contract is, in the absence of an express choice of law agreement, an objective and pragmatic one. The courts apply the standard of a reasonable business man then consider what the parties would have intended had they considered the question of the proper law at the time the contract was executed."

32 [1992] 1 GLR 143.

33 *Garcia v Torrejoh* (n 16) 152.

34 [1999-2000] GLR 331.

35 *Fattal v Fattal* (n 16) 351.

36 [1999-2000] GLR 331.

> the court is guided by certain prima facie (and so rebuttable) inferences or presumptions, the primary one being the *lex loci contractus*. But the old-age position of the law … is that in the case of a contract which is performed wither wholly or partly in a country other than that in which it was executed, the presumption is that the parties intend the transaction to be governed by that law. The more modern authority which set the test to apply and has been relied on in a host of other cases is *Bonython v Commonwealth of Australia* [1951] AC 201. In the words of Lord Simonds at 219-221: "… the proper law of the contract [is] the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection …".[37]

As previously mentioned, it appears that the courts are often determining the objective proper law as opposed to inferring the parties' actual intention.[38]

3 Kenya

3.1 Party Autonomy

English law was first applied in Kenya after the country fell under British rule in 1920.[39] After its independence in 1963, Kenya inherited the "entire colonial legal material by re-enacting and adopting colonial legislation".[40] In fact, English law became a formal source of law enforceable in Kenyan courts.[41] Section 3(1) of the Judicature Act of 1967 provided:

> The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with–
>
> (a) the Constitution;
>
> (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule of the Act, modified in accordance with PART II of that Schedule;
>
> (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrine of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date ….[42]

37 *Fattal v Fattal* (n 16) 351.

38 See *Société Générale de Compensation v Ackerman* (n 15) 423-425.

39 M N Wabwile "The Place of English Law in Kenya" 2003 *Oxford University Commonwealth Law Journal* 51 58.

40 Wabwile (2003) 51.

41 Wabwile (2003) 52.

42 See Sec 3(1) of the Judicature Act of 1967. See also Wabwile (2003) 52: "The section thus prescribes the hierarchy of the formal sources of law enforceable by Kenyan courts.

English law continues to influence the Kenyan legal system.[43] Moreover, its influential role extends to Kenya's private international law regime, particularly in the field of obligations.

Kenyan private international law generally recognises the principle of party autonomy in respect of choice of law in international commercial contracts.[44] For example, in *Nedermar Technology BV Ltd v Kenya Anti-corruption Commission*,[45] the court stated that "the parties' right of choice of law is recognized" and that "the parties have the autonomy to make whatever bargain they want".[46] Furthermore, in *Fonville v Kelly III*,[47] the court held: "The position in law is that where the parties have expressly stipulated that a contract is to be governed by a particular law that law is the proper law of contract."[48]

It appears that the parties are afforded a relatively wide freedom to choose the law to govern their agreement. In *Nedermar*,[49] the court declared:

> The rule is that, so long as the intention on the choice of law is: (i) bona fide (ii) legal and (iii) there is no reason for avoiding the parties choice on the grounds of public policy the parties are absolutely free to choose for themselves the applicable law. The options that may be available to the contracting parties include: (i) national law (ii) public international law (iii) concurrent laws (iv) combined laws (or the tonic commune doctrine) (v) the *shariah* (vi) transactional law (including the general principles of law); international development law; the *lex mercatoria*; codified terms and practices; and trade usages) (vi) equity and good conscience.[50]

These, in order of binding force, are the Constitution of Kenya 1992 (Constitution), all other local legislation, the imported English law, and the African customary law."

43 Wabwile (2003) 51: "Quite apart from the fact that the entire legal order rests on values and principles based on the common law as agreed in the independence constitutional settlement of 1963, the legal system of this country is heavily dependent on the applied English law."

44 See B J Mwimali "Conflict of Laws" www. academia.edu/5275415/CONFLICT_OF_LAWS (assessed 12 February 2019) 53. See also R F Oppong "Private International Law in Africa: The Past, Present, and the Future" 2007 *The American Journal of Comparative Law* 677 682; and Oppong (2013) 132. The principle of party autonomy is echoed in Sec 29(1) of the Arbitration Act 4 of 1995 which provides: "The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute." See also Sec 2, 10 and 20(1) of the Arbitration Act of 1995.

45 [2008] KLR 476.

46 *Nedermar Technology BV Ltd v Kenya Anti-corruption Commission* (n 45) 493. See generally *DP Bachheta v Government of the United States of America* [2011] eKLR 1; *Fonville v Kelly III* [2002] eKLR 1; *Friendship Container Manufacturers Ltd v Mitchell Cotts (K) Ltd* [2001] 2 EA 338; and *Karachi Gas Co. Ltd v Issaq* (n 28).

47 [2002] eKLR 1.

48 *Fonville v Kelly III* (n 46) 7.

49 [2008] KLR 476.

50 *Nedermar Technology BV Ltd v Kenya Anti-corruption Commission* (n 45) 499-500.

The only limitation on the parties' freedom is that the choice of law must be legal, *bona fide* and not against public policy.[51] This case seems to authorise the choice of a non-national system of law as the proper law of the contract. Furthermore, it does not expressly exclude a choice of law that bears no connection to the parties or the contract.[52] The court also provided for a choice of "concurrent" or "combined" laws. It may be argued that this represents an explicit endorsement of *dépeçage*. The *dictum* in *Karachi Gas Co Ltd v Issaq*[53] lends support to the view that different proper laws may govern different parts of the contract:

> I am of the view that it is not necessary for the determination of this case to decide what is the proper law of the whole contract as it appears to me that the parties intended that, in so far as the shipment and delivery of the goods were concerned, these were to be carried out in accordance with the law of Kenya, but, in so far as it concerned the importation into Pakistan and the payment of the purchase price, this was to be governed by the law of Pakistan.[54]

Parties may exercise their autonomy by expressly stating the law applicable to their agreement.[55] In the absence of an express choice of law, a Kenyan court is given the task to determine whether there is a tacit choice of law,[56] failing which a court must assign a proper law to the contract. However, there appears to be some confusion between a tacit choice of law and the assignment of the proper law (where there is no real choice of law). For instance, in *Karachi*,[57] Newbold J held:

51 See *Nedermar Technology BV Ltd v Kenya Anti-corruption Commission* (n 45) 493: "... choice of law cannot be used as a device to evade the application of a mandatory (provision) of law within a relevant legal system such as that of Kenya .... Chitty on contracts General principles 27th Edition defines 'bona fide and legal' as follows: 'that the parties cannot pretend to contract under one law in order to validate an agreement that clearly has its closer connection with another law. If after having discovered that one particular provision was void under the proper law, they were to try and evade its consequences by claiming that the provision was subject to another legal system, their claim should not be considered as bona fide expression of their intentions'." See also Mwimali (n 44) 60: "It has also been suggested that the requirement the choice of law be 'bona fide and legal' imports some minimum degree of reasonableness, in the sense that it must not be capricious, no good reason possibly existing for the chosen law to govern."

52 See also Oppong (2013) 135.

53 [1965] EA 42, 1965 ALR Comm 35.

54 *Karachi Gas Co Ltd v Issaq* (n 28) 47. See also Oppong (2013) 136.

55 See *DP Bachheta v Government of the United States of America* (n 46) 1 5-6; *MG Radia v Transocean (Uganda) Ltd* [1975] eKLR 1 5; and *Nedermar Technology BV Ltd v Kenya Anti-corruption Commission* (n 45) 492-494. See also Mwimali (n 44) 53.

56 *DP Bachheta v Government of the United States of America* (n 46) 6; and *MG Radia v Transocean (Uganda) Ltd* (n 55) 5. See also Mwimali (n 44) 54.

57 [1965] EA 42, 1965 ALR Comm 35.

> The various factors in this case, as is so often the position, point in different ways for the purpose of determining what is the proper law of the contract. The test to be applied is, in my view, the system of law by reference to which the contract was made, or that with which the transaction has its closest and most real connection. Applying that test to the facts of this case .... I have, with some hesitation, come to the conclusion that the proper law of the contract is the law of Kenya.[58]

It is unclear which test was applied in the determination of the proper law. Mwimali asserts that the first part of the test (the system by reference to which the contract was made) refers to an implied choice by the parties, while the second part (the law with which the transaction has its closest connection) comes into operation when the parties have failed to make a choice, whether expressly or impliedly.[59] Spry J, in his judgment in *Karachi*, held:

> There is nothing in the evidence to suggest that the parties ever applied their minds to the question of the law to govern their contract. That being so, the proper law is, I think, that "with which the transaction has its closest and most real connexion" .... After weighing all these considerations, I am on a balance of the opinion that the proper law of the contract was Kenya law.[60]

Even though the judges reached the same conclusion, it is submitted that the latter approach represents the correct differentiation between a real choice of law and the assigned proper law in the absence of choice.

Another example in which the court failed to distinguish a tacit choice of law from the assigned law is *MG Radia v Transocean (Uganda) Ltd*.[61] In determining the proper law of the contract, the court asserted:

> The law on the matter is clear. The parties not having expressed in their contract the law applicable and to it the court will infer the law which the parties ought to have intended to apply from the terms of the contract itself and the circumstances surrounding it .... The proper law is that with which the transaction has its closest and most real connection .... I find that the parties intended the contract to be governed by the law of Kenya.[62]

Once again, the determination of a tacit choice of law and the assignment of the proper law are treated in a similar manner, and it is unclear whether the case falls into one category or the other.

58 *Karachi Gas Co Ltd v Issaq* (n 28) 53. See also Oppong (2013) 132.
59 Mwimali (n 44) 54.
60 *Karachi Gas Co Ltd v Issaq* (n 28) 56–58.
61 [1975] eKLR 1.
62 *MG Radia v Transocean (Uganda) Ltd* (n 55) 5.

3.2 Level of Strictness of the Criterion for a Tacit Choice of Law

There is very little guidance in Kenyan private international law regarding the level of strictness of the criterion for inferring a tacit choice of law. There appears to be no judicial pronouncements or academic opinion regarding the extent to which a tacit choice of law may be inferred. The absence of a clear threshold has contributed to the uncertainty in determining the governing law in the absence of an express choice.

3.3 Indicators of a Tacit Choice of Law

According to the court in *Radia*,[63] in the absence of an expressly stated proper law, the court may infer a choice of law "from the terms of the contract itself and the circumstances surrounding" the agreement.[64] This means that a Kenyan court, in deciding whether the parties have made a tacit choice of law, is not confined to the written agreement, but may take account of considerations surrounding the contract.

As aforementioned, the distinction between a tacit choice of law and the assigned proper law has not been clearly perceived by Kenyan courts. Nevertheless, Oppong states: "Whatever the distinction, it remains unquestionable that the factors relevant to deciding whether there is an implied choice are equally significant in ascertaining the legal system with which a transaction is most closely connected."[65]

However, it is unclear whether certain factors (*i.e.* the presumptions) that the courts have placed reliance on will be as decisive in the determination of a true tacit choice of law. For instance, in *Radia*,[66] the court held:

> The presumption in favour of the *lex loci contractus* comes into operation if the place where the contract is made coincides with the place where it is to be performed. The plaintiff has rebutted this presumption by a stronger presumption of *lex loci solutionis*, the place where the contract is to be performed ....[67]

It may be argued that these presumptions do not necessarily reflect the parties' intention in selecting the applicable law. Furthermore, the court considered the place and form of payment as significant factors in this regard.[68] Another factor

63 *MG Radia v Transocean (Uganda) Ltd* (n 55).

64 *MG Radia v Transocean (Uganda) Ltd* (n 55) 5. See also Mwimali (n 44) 54: "The system of law by reference to which the contract was made, i.e. an implied or tacit choice of law, may be inferred by the court from the terms or form of the contract or the surrounding circumstances."

65 Oppong (2013) 136.

66 *MG Radia v Transocean (Uganda) Ltd* (n 55).

67 *MG Radia v Transocean (Uganda) Ltd* (n 55) 5.

68 *MG Radia v Transocean (Uganda) Ltd* (n 55) 5.

that has been taken into account is the use of technical terms or language in the contract.[69] When the agreement is drafted in a language that is understood by reference to the law of a particular country, it may be possible to infer that the parties intended the law of that country to govern the contract.[70] Mwimali highlights other factors that may be relevant in ascertaining a tacit choice of law.[71] Some notable examples include "the use of terminology or concepts peculiar to a law, often contained in a standard form drafted against the background of that law"[72] and an express choice of law in a related transaction between the parties.[73]

Kenyan private international law is silent on the role of forum clauses in the determination of a tacit choice of law. Mwimali states that a choice of forum or localised arbitration clause constitutes a strong indication of an implied choice of law.[74] However, Kenyan courts are yet to address the issue of whether the inclusion of a clause selecting a court or arbitral tribunal should by itself be regarded as an expression of choice or merely an indicator to the unexpressed choice of the parties.

4 Nigeria

Nigeria's legal system is strongly influenced by the English common law tradition.[75] English law also guides its private international law regime.[76] Unfortunately, Nigerian private international law is relatively underdeveloped, particularly in the field of obligations.[77] Regarding the choice-of-law process, Oppong states: "There are no statutorily defined rules and case law in the area is scant."[78] As a result, Nigerian courts will turn, in all likelihood, to the traditional common law rules and case law for guidance in this regard.

69 See for example *Karachi Gas Co. Ltd v Issaq* (n 28) 53.

70 Mwimali (n 44) 54-57 highlights other factors that may be relevant in ascertaining a tacit choice of law. First, the use of terminology or concepts peculiar to a particular law, which are often contained in a standard form drafted with reference to a particular system of law, may be relevant. Secondly, if the contract is valid under one law with which the contract is connected but invalid under another, the court may infer a choice of the validating law. Finally, an inference may be drawn from an express choice of law in a related transaction between the parties.

71 Mwimali (n 44) 54-57.

72 Mwimali (n 44) 54.

73 Mwimali (n 44) 57.

74 Mwimali (n 44) 54.

75 Oppong (2017) 2379.

76 Oppong (2017) 2379: "In general it can be said that the reception of English law into the colony of Lagos in 1863 and the rest of Nigeria in 1900 marked the introduction of private international law, as we know it today, into the Nigerian legal system."

77 Oppong (2017) 2379 and 2381.

78 Oppong (2017) 2381.

Nigerian private international law generally recognises the principle of party autonomy in respect of choice of law in a contract.[79] However, the extent to which the parties may exercise this choice is uncertain. In *JSF Investments v Brawal Line Ltd*,[80] the court stated that it would give effect to the law chosen by the parties, provided the law was not against public policy.[81] In *Sonnar (Nigeria) Ltd v Partenreedri MS Nordwind*,[82] the court held:

> It is also conceded that when the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention in general and as a general rule determines the proper law of the contract. But to be effective the choice of law must be real, genuine, *bona fide*, and reasonable. It should not be capricious and absurd. Choosing German law to govern a contract between a Nigerian skipper and a Liberian "shipowner" is to my mind capricious and unreasonable. Luckily nowadays a choice of the proper law by the parties is not considered by the courts as conclusive … the proper law of the contract must have some relationship to, and must be connected with the realities of, the contract considered as a whole.[83]

It appears from this case that the choice of a legal system that bears no connection to the parties or the contract will not be permissible. In *Eagle Super Pack (Nigeria) Ltd v African Continental Bank Plc*,[84] the court held that in order for the Uniform Customs Practice for Documentary Credits to be applicable, it must be *incorporated* in a contract.[85] However, the parties' choice of a non-national system of law, such as the *lex mercatoria* or "general principles of international commercial law" as the proper law of the contract, has not been settled by a Nigerian court.[86]

There is no judicial authority or guidance from academic authors in respect of the choice-of-law process in the absence of an express choice of law by the parties. As previously mentioned, Nigerian courts are likely to turn to the

79 Oppong (2013) 133; and Oppong (2017) 2381.

80 [2010] 18 NWLR 495 as referred to in Oppong (2013) 133.

81 See Oppong (2013) 133; and Oppong (2017) 2381.

82 [1987] 1 All NLR (Part I) 396 414, [1988] LRC (Comm) 191.

83 *Sonnar (Nigeria) Ltd v Partenreedri MS Nordwind* (n 82) 210.

84 [2006] 19 NWLR 20.

85 As referred to in Oppong (2013) 137.

86 See Oppong (2013) 137: "An issue that remains judicially undecided is whether the parties' choice of non-state law as the proper law would be upheld …. The effectiveness or enforceability of such a term is a matter of national law. It is for national courts to decide whether they will give effect to such an agreement …." See also R F Oppong "Globalization and Private International Law in Commonwealth Africa" 2014 *University of Arkansas at Little Rock Law Review* 153 157-158.

jurisprudence of English courts and traditional common law rules for guidance in this regard.[87]

5 South Africa

5.1 Party Autonomy

The South African legal system is an uncodified one that has been influenced by both the civil and common law traditions to form a hybrid (or mixed) system of law.[88] Schoeman *et al* explain:

> Because our common law remains largely unwritten, the decisions of the courts, legislation and customary law are important sources of law. Where statutes are available, they serve as the primary legal source, subject to the Constitution, and in that sense we have much in common with civil law systems like those in Europe. Statutes are interpreted restrictively as part of our English law heritage. However, unlike the civil law systems, our courts generally follow a system of precedent.[89]

South Africa's private international law is based on Roman-Dutch law,[90] but strongly influenced by English law, "particularly in the field of obligations".[91]

87 See generally G Bouwers "Brexit and the Implications for Tacit Choice of Law in the United Kingdom" 2018 *Obiter* 727-746 for the English common law approach in determining a tacit choice of law.

88 The discussion on tacit choice of law in South Africa is based on G J Bouwers "Tacit Choice of Law in International Commercial Contracts – the Position in South Africa and Under the Rome I Regulation" in T M J Möllers and C Hugo (eds) *Transnational Impacts on Law – Perspectives from South Africa and Germany* (2017) 69. See also Forsyth (2012) 17-19; J L Neels "The Role of the Hague Principles on Choice of Law in International Commercial Contracts in Indian and South African Private International Law" 2017 *Uniform Law Review* 443 444; and Schoeman, Roodt and Wethmar-Lemmer (2014) 13-14. See also E Schoeman "South Africa" *in* J Basedow, G Rühl, F Ferrari and P Asensio (eds) *Encyclopedia of Private International Law* (2017) 2515 2516: the South African legal system is "shaped by continental civil law, English common law and African customary law to form a hybrid (mixed) system of law".

89 Schoeman, Roodt and Wethmar-Lemmer (2014) 14.

90 See, for example, Schoeman (2017) 2516: "As a result of the establishment of a refreshment station at the Cape of Good Hope by the Dutch Vereenigde Geoctroyeerde Oost-Indische Compagnie (VOC) in 1652, Roman-Dutch law became the common law of South Africa."

91 See Neels (2017) 444. See also Schoeman (2017) 2516: "During the British occupations of the Cape (1795-1803 and 1806-1910) and the subsequent period of the Union of South Africa (1910-1961), Roman-Dutch law remained the common law of South Africa." See also J C W van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) 67.

Following the traditional English law rule,[92] South African courts refer to the "proper law of the contract" to describe the law which creates and governs an international commercial contract.[93]

In *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd*,[94] Booysen J stated:

> That our law recognises party autonomy in respect of the proper law of a contract seems clear. Thus where the parties have expressly or impliedly (or tacitly) agreed upon a governing law our Courts would give effect to the intention of the parties.[95]

Accordingly, South African private international law generally recognises party autonomy in respect of choice of law in a contract.[96] Van Niekerk and Schulze state that the "parties have a wide but probably not unlimited freedom of choice of proper law".[97] However, the extent to which the parties may exercise their choice is uncertain.[98]

92 E Spiro *Conflict of Laws* (1973) 155-157. For a further discussion on the proper law rule, see Bouwers (2018) 741-742.

93 Forsyth (2012) 316; E A Fredericks and J L Neels "The Proper Law of a Documentary Letter of Credit (Part 1)" 2003 *South African Mercantile Law Journal* 63 64; Schoeman (2017) 2519; and Schoeman, Roodt and Wethmar-Lemmer (2014) 50. See for instance *Benidai Trading Co Ltd v Gouws and Gouws (Pty) Ltd* 1977 3 SA 1020 (T) 1034; *Ex parte Spinazze* 1985 3 SA 650 (A) 665F; *Guggenheim v Rosembaum (2)* 1961 4 SA 21 (W) 31A; and *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 2 SA 138 (C) 145B.

94 1986 3 SA 509 (D).

95 *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 94) 525. See also *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171 185: "[I]t must not be forgotten that the intention of the parties to the contract is the true criterion to determine by what law its interpretation and effects are to be governed."

96 Forsyth (2012) 321; Schoeman, Roodt and Wethmar-Lemmer (2014) 50; J P Van Niekerk "Choice of Foreign Law in South African Marine Insurance Policy: An Unjustified Limitation of Party Autonomy?" 2011 *Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law* 159 166; and Van Niekerk and Schulze (2016) 59. See, for example, *Guggenheim v Rosenbaum (2)* 1961 4 SA 21 (W) 31A: "[T]he proper law of the contract is the law of the country which the parties have agreed or intended or presumed to have intended shall govern it". See also *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171 185; and *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 2 SA 138 (C) 145A.

97 Van Niekerk and Schulze (2016) 59. See also Fredericks and Neels (2003) 64: "The parties may, in principle … choose the proper law of their contract. But there are limitations to this general principle, such as the mandatory rules of the *lex fori* or perhaps a third legal system." See also Forsyth (2012) 321-325; Schoeman, Roodt and Wethmar-Lemmer (2014) 50; and Van Niekerk (2011) 166. See Spiro (1973) 160: "It is obvious, even if one accepts that the parties are at liberty to select the legal system applicable to their contract, that there must be some limitations."

98 W de Vos "Freedom of Choice of Law for Contracts in Private International Law" 1961 *Acta Juridica* 3 and 6-14; Schoeman, Roodt and Wethmar-Lemmer, (2014) 50; and Van

There is no judicial authority on whether a particular legal system, which bears no connection to the parties or the contract, may be chosen.[99] However, South African authors are in favour of permitting the parties to choose an unconnected system of law to govern the contract.[100] Furthermore, there appears to be no case law in which the court was tasked with determining whether the parties are able to choose different laws for different parts of the contract. Van Niekerk and Schulze opine that "a choice of several systems should, in theory, also be possible".[101] It remains to be seen whether a splitting-up (*dépeçage*) of the applicable law will be allowed. The legal position in respect of the parties' choice of a non-national system of law, such as the *lex mercatoria* or "the general principles of international commercial law", has not been settled by a South African court. However, Van Niekerk and Schulze state the following in this regard:

> [A] stipulation in an international sale that it is to be governed by "the general principles of fairness", or by "the general principles of international commercial law", or by "the customary law of international trade", may well be too vague and will on that basis not be given affect to by a South African court. By contrast, the choice of a well-known, international set of rules or a body of international law designed to enhance international uniformity, may … be given effect to by a South African court ….[102]

Fredericks and Neels seem to support the notion that parties should be allowed to adopt an "international set of rules or a body of international law", such as the UCP, the CISG, the UPICC or standard terms of the ICC.[103]

Niekerk (2011) 166-167. See also Van Niekerk and Schulze (2016) 59: "There is little if any unequivocal judicial authority as to how far parties' freedom of choice will be permitted."

99 Neels (2017) 445.

100 Neels (2017) 445. See also Van Niekerk and Schulze (2016) 60: "Allowing party autonomy in principle should, for instance, include the recognition that the parties to an international contract of sale may for sound reasons choose neither the seller's nor the buyer's law, but a third system of law …. While this impartial third system of law is unrelated to the parties, it may either be linked incidentally to the contract or it may have no direct link or connection to it …. Whatever the case, it is suggested that there should in our law be no general objection to any serious, legal choice of an unrelated legal system." See also Forsyth (2012) 320; J L Neels "The Nature, Objectives and Purposes of the Hague Principles on Choice of Law in International Contracts" 2013/2014 *Yearbook of Private International* 45 51-52; Schoeman, Roodt and Wethmar-Lemmer (2014) 50; Spiro (1973) 150; Van Niekerk, (2011) 166-167; and Van Rooyen (1972) 69 and 72.

101 Van Niekerk and Schulze (2016) 61.

102 Van Niekerk and Schulze (2016) 61.

103 Fredericks and Neels (2003) 65-66. See the Uniform Customs and Practice for Documentary Letters of Credit (the UCP 600) (2007), the United Nations Convention

As previously mentioned, the parties may exercise their autonomy by expressly stating the law applicable to their contract.[104] In *Improvair (Cape) (Pty) Ltd v Establissements Neu*,[105] it was said that where there is an express choice "there is usually no difficulty in finding that the agreed system constitutes the proper law of the contract".[106] When the parties fail to record their intention, the court is given the task to determine whether there is a tacit choice of law,[107] failing which a court must assign a proper law to the contract.

In South African case law,[108] the line between a real "tacit choice" and an "assignment of law" is often blurred.[109] The reason for this is that the assignment of the proper law (where there is no real choice) is often justified on the grounds that the assigned law is the legal system that the parties may be presumed to have chosen.[110] In *Standard Bank of South Africa Ltd v Efroiken and Newman*,[111] for instance, despite the fact that the parties clearly lacked any intention in respect of the governing law, the court still presumed that they must have had some legal system in mind.[112] Thus tacit choice of law and the assignment of law are treated in a similar manner, and frequently it is unclear whether a case falls into one category or the other.[113] Forsyth correctly states that it is artificial to refer to the parties' presumed intention, which the court knows to be absent.[114] Nevertheless,

on Contracts for the International Sale of Goods (1980), the UNIDROIT Principles of International Commercial Contracts (2016) and the International Commercial Terms (Incoterms) of the International Chamber of Commerce (2020).

104 Forsyth (2012) 325-327; Fredericks and Neels (2003) 64; Oppong (2013) 133; Schoeman (2017) 2519; Schoeman, Roodt and Wethmar-Lemmer (2014) 50-51; Van Niekerk (2011) 166; Van Niekerk and Schulze (2016) 59; and Van Rooyen (1972) 99-100.

105 1983 2 SA 138 (C).

106 *Improvair (Cape) (Pty) Ltd v Establissements Neu* (n 93) 145B. See also Schoeman, Roodt and Wethmar-Lemmer (2014) 51: an express choice of law is the most concrete expression of party autonomy and is usually easy to identify.

107 Forsyth (2012) 325 and 327; Fredericks and Neels (2003) 64; Oppong (2013) 133; Schoeman (2017) 2519; Schoeman, Roodt and Wethmar-Lemmer (2014) 50-51; Van Niekerk (2011) 166; and Van Rooyen (1972) 99-100.

108 See for example *Improvair (Cape) (Pty) Ltd v Establissements Neu* (n 93) 145-146.

109 For a discussion and further references, see Forsyth (2012) 326-327; Fredericks and Neels (2003) 66-67; Schoeman, Roodt and Wethmar-Lemmer (2014) 53-54; and Van Niekerk and Schulze (2016) 63.

110 Forsyth (2012) 326; Fredericks and Neels (2003) 66; Schoeman, Roodt and Wethmar-Lemmer (2014) 53; and Van Niekerk and Schulze (2016) 63.

111 1924 AD 171.

112 *Standard Bank of South Africa Ltd v Efroiken and Newman* (n 95) 185. See Fredericks and Neels (2003) 66.

113 Forsyth (2012) 326-327; and Van Niekerk and Schulze (2016) 63. See also Forsyth (1987) 15.

114 Forsyth (2012) 326. See also Forsyth (1987) 15.

Forsyth believes that the parties' choice of the applicable law is "genuine for being made tacitly".[115]

5.2 Level of Strictness of the Criterion for a Tacit Choice of Law

There is very little guidance in South African private international law with regard to the level of strictness of the criterion for inferring a tacit choice of law. In *Improvair (Cape) (Pty) Ltd v Establissements Neu*,[116] Grosskopf J held that "it is clear that such a term should not readily be implied".[117] South African authors Neels and Fredericks advocate a strict test in this regard, as "readily deduced tacit or implied agreements leads to unpredictability of decision and legal uncertainty".[118] The phrase "should not readily be implied" suggests that a court must be certain of the existence of a tacit choice of law. It may be argued that this signifies a strict criterion for inferring a tacit choice of law.[119]

5.3 Indicators of a Tacit Choice of Law

In searching for indicators of a tacit choice of the law, a South African court will examine not only the provisions of the contract but also all the circumstances surrounding the agreement.[120] There are a number of factors that South African courts have considered in the search for a tacit choice of law.[121] In *Improvair (Cape) Pty Ltd v Establissements Neu*, it was held:

> There may nevertheless be circumstances, e.g., where the contract deals with concepts peculiar to a particular system, in which the parties may

115 Forsyth (2012) 325. See also De Vos (1961) 14-15.

116 1983 2 SA 138 (C).

117 *Improvair (Cape) (Pty) Ltd v Establissements Neu* (n 93) 145B–C: "Difficulties arise, however, where there is no express agreement. In such event there may be cases in which a court may conclude that the contract contains a tacit term concerning the law to be applied .... It is clear that such a term should not readily be implied."

118 Neels and Fredericks (2011) 106. See also J L Neels and E A Fredericks "Revision of the Rome Convention on the Law Applicable to Contractual Obligations (1980): Perspectives from International Commercial and Financial Law" 2004 *Revue européene de droit bancaire et financier / European Banking and Financial Law Journal* 173, reprinted in 2006 *Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law* 125: "Allowing an unqualified tacit choice of a legal system leaves too much to the discretion of the individual judge and decisions will accordingly be unpredictable."

119 See Bouwers (2017) 76-77.

120 Forsyth (2012) 327; Schoeman (2017) 2519; and Van Niekerk and Schulze (2016) 61. See also *Standard Bank of South Africa v Efroiken and Newman* (n 95) 185: "[W]here parties did not give the matter a thought, courts of law have of necessity to fall back upon what ought, reading the contract by the light of the subject-matter and of the surrounding circumstances, to be presumed to have been the intention of the parties."

121 Forsyth (2012) 328; Schoeman, Roodt and Wethmar-Lemmer (2014) 51-52; and Van Niekerk and Schulze (2016) 61-62.

> be held to have agreed tacitly that their contract should be governed by a particular legal system.[122]

Similarly, a reference to the legislation of a particular country has also been taken as evidence of a tacit choice of that country's law.[123] However, one must be mindful to draw a distinction between a choice of law, and the *incorporation* of certain statutory measures of a foreign legal system to govern a particular aspect of the contract.[124] For example, Van Niekerk and Schulze state:

> [W]here parties to an international sale agree that the rules of English law relating to the rejection of defective goods will apply to their relationship, that is not necessarily a (tacit) choice of English law generally to govern as the proper law; in fact, their express specification of a particular aspect of the foreign legal system would seem to contradict any such intention ....[125]

In *Ex Parte Spinazze*,[126] the use of a standard form was considered as a factor that may indicate a tacit choice of law.[127]

The South African authors are of the opinion that factors such as the use of technical terms, references to legislation or the use of a standard form are mere indications of a tacit choice of law and not automatically conclusive of such a

122 In *Improvair (Cape) Pty Ltd v Establissements Neu* (n 93) 145D–E, Grosskopf J did however, acknowledge that such cases would be rare.

123 *Stretton v Union Steamship Company Ltd* (1881) 1 EDC 315 323.

124 Schoeman, Roodt and Wethmar-Lemmer (2014) 52; and Van Niekerk and Schulze (2016) 62: "Thus, where parties to an international sale agree that the rules of English law relating to the rejection of defective goods will apply to their relationship, that is not necessarily a (tacit) choice of English law generally to govern as the proper law; in fact, their express specification of a particular aspect of the foreign legal system would seem to contradict any such intention ...." See also Forsyth (2012) 328.

125 Van Niekerk and Schulze (2016) 62.

126 1985 3 SA 650 (A).

127 *Ex Parte Spinazze* (n 93) 665E–H: "Reverting to the facts of this case, I am of the opinion that the proper law or *lex causae* of the antenuptial contract in issue was unquestionably South African law. The contract was in South African form; it was entered into in order to avoid a matrimonial property regime, viz community of property, which obtained in South Africa at the time, but not in Italy (according to the expert evidence, in 1957 marriages governed by Italian law were out of community of property); at the time when the contract was executed the deceased was domiciled and resident in South Africa; and the parties to the contract obviously intended South Africa to be their matrimonial home and the country where the contract was to operate. These factors may be taken either as indicating a tacit choice of South African law or, at any rate, as showing that South African law was the system with which the contract had its closest and most real connection."

choice.[128] This is particularly relevant when the question arises as to whether a choice of forum constitutes a choice of law. The role of choice of forum clauses in South African private international law is not settled.[129] Based on the maxim *qui elegit iudecem elegit ius*,[130] it is sometimes suggested that a choice of court or localised arbitration clause may be taken as an implied choice of the law of the relevant country as the proper law of the contract.[131] However, in *Benidai Trading Co Ltd v Gouws and Gouws (Pty) Ltd*[132] the court held:

> In the international commercial world it has almost become a universal practice to select London as the seat for arbitration proceedings, not because the parties to an international mercantile transaction necessarily have confidence in English law, but for purposes of convenience, because London is an important commercial centre and because of the expertise of London arbitrators. And if they do so they do not, unless there is an express indication in the contract or other circumstances which point in that direction, submit to the jurisdiction of the English Courts. Not only do the parties not submit to the jurisdiction of the English law, but, unless a clear inference is to be drawn to the contrary, they do not even accept English law as the proper law of the contract ....[133]

Although the court expressly stated that a choice of a localised arbitration tribunal does not automatically indicate a choice of law, it did not express a view on the connection between choice of *court* and a tacit choice of law.[134] In addition to the

128 Forsyth (2012) 326; Schoeman, Roodt and Wethmar-Lemmer (2014) 52; and Van Niekerk and Schulze (2016) 62-63.

129 Although a South African court (*Reiss Engineering Co Ltd v Isamcor* 1983 1 SA 1033 (W) 1039 A–B) has pronounced that a choice of a proper law does not constitute submission to jurisdiction, the opposite has yet to be clarified. See Neels and Fredericks (2006) 126. See also De Vos (1961) 15.

130 See Schoeman, Roodt and Wethmar-Lemmer (2014) 51: he who chooses the judge, chooses the law. See also Forsyth (2012) 328.

131 Forsyth (2012) 328; Schoeman, Roodt and Wethmar-Lemmer (2014) 51; Van Niekerk and Schulze (2016) 61; and Van Rooyen (1972) 44: "Oor die algemeen word 'n jurisdiksie-klousule nie beskou as 'n stilswyende regskeuse nie. Aan die ander kant word dit as praktiese reëling aanvaar dat die aanwysing van 'n arbiter wel ook 'n aanwysing van sy regstelsel inhou – die rede: arbiters, in teenstelling met regters, is gewoonlik leke wat die reg betref!"

132 1977 3 SA 1020 (T).

133 *Benidai Trading Co Ltd v Gouws and Gouws (Pty) Ltd* (n 93) 1028H–1029A. The court referred to the English case of *Compagnie d' Armement SA v Compagnie Tunisienne de Navigation SA* [1970] 3 WLR 389, where the House of Lords concluded that an arbitration clause was not necessarily conclusive of a choice of law.

134 See Neels (2017) 446.

lack of clarity in case law, the opinions of South African authors are also divided in this regard.[135]

6 Conclusion

The private international law systems of Ghana, Kenya, Nigeria and South Africa generally recognise (albeit to varying degrees) the principle of party autonomy in respect of choice of law in international commercial contracts.[136] These jurisdictions commonly accept that parties may exercise their autonomy by means of an express choice of law.[137] However, there appears to be no judicial authority or guidance from academic authors in respect of the choice-of-law process in the absence of an express choice of law in Nigeria.[138] As previously mentioned, Nigerian courts are likely to turn to the jurisprudence of English courts and traditional common law rules for guidance in regard.[139]

Although the courts in Ghana, Kenya and South Africa explicitly recognise the possibility of a tacit choice of law,[140] significant uncertainty exists in this regard. The distinction between a tacit choice of law (the actual/real choice of law) and the assignment of law (where there is no real choice) is not clearly defined. The reason for this is that the assignment of the proper law is often justified on the ground that the assigned law is the legal system that the parties may be presumed to have chosen. The determination of a tacit choice of law and the assignment of the proper law are therefore treated in a similar manner, and it is unclear whether the case falls into one category or the other.

A lack of clarity persists regarding the level of strictness of the criterion for a tacit choice of law. Ghanaian and Kenyan law seems to offer little guidance in respect of the threshold for a tacit choice of law. The position in South African private international law is by no means certain. The court in *Improvair* held

135 Neels (2017) 446. See for instance Forsyth (2012) 328: "[I]t is submitted that as a general rule our courts should adopt the *qui eligit judicem elegit ius* principle to a sufficient extent so that the express choice of an arbitrator in a particular country will be held to be a tacit choice of that country's law. After all, the arbitrator – a layman in most cases – can hardly be expected to apply any but his own law. *Qui eligit judicem elegit ius* should not, however, be extended to cover a contractual submission to the jurisdiction of a particular court ...." See also Van Rooyen (1972) 99-100. See however Bouwers (2017) 82-83; Neels (2013/2014) 53-54; Neels (2016) 362-365 and 370-371; Neels (2017) 446-447; and Neels and Fredericks (2011) 107-110. These authors support the principle that a choice of court or localised arbitral tribunal should not on its own be taken to indicate a choice of law by the parties.

136 See par 2.1, 3.1, 4.1 and 5.1.

137 See par 2.1, 3.1, 4.1 and 5.1.

138 See par 4.1.

139 See par 4.1.

140 See par 2.1, 3.1 and 5.1.

that "it is clear that such a term should not readily be implied".[141] The current author is of the opinion that this represents a strict criterion for inferring a tacit choice of law.[142] Nevertheless, more clarity is needed in all three jurisdictions. When the opportunity arises, the courts in these respective legal systems should advocate for a strict test as "readily deduced tacit or implied agreements leads to unpredictability of decision and legal uncertainty".[143] A strict threshold will also assist the courts in discerning a real tacit choice of law from merely imputing a hypothetical choice to the parties.

The position under Ghanaian, Kenyan and South African private international law is that a court must examine the terms of the contract and the surrounding circumstances in searching for indicators of a tacit choice of law. As previously mentioned, it appears that the courts frequently determine the objective proper law as opposed to inferring the parties' actual intention.[144] As such, it is sometimes difficult to ascertain which factors will be decisive in the determination refer of a real tacit choice of law.[145] Nevertheless, the courts in these jurisdictions refer to a number of factors that may be relevant in determining the existence of a tacit choice of law.[146]

The courts in these jurisdictions are yet to address the issue of whether the inclusion of a forum clause should by itself be regarded as an expression of choice or merely an indicator to the unexpressed choice of the parties.[147] Although a choice of forum should be a factor in the determination of a tacit choice of law,[148] it is suggested that a choice of law and choice of forum are, in principle, separate

141 *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 2 SA 138 (C) 145B–C: "Difficulties arise, however, where there is no express agreement. In such event there may be cases in which a court may conclude that the contract contains a tacit term concerning the law to be applied .... It is clear that such a term should not readily be implied."

142 See par 5.2.

143 Neels and Fredericks (2011) 106. See also Neels and Fredericks (2006) 125: "Allowing an unqualified tacit choice of a legal system leaves too much to the discretion of the individual judge and decisions will accordingly be unpredictable."

144 See par 2.2, 3.1 and 5.1.

145 See par 2.3, 3.1 and 3.3.

146 See par 2.3, 3.3 and 5.3. Ghanaian courts refer to the *locus contractus* and the *locus solutionis*. Kenyan courts refer to the *locus contractus*, the *locus solutionis*, the place and form of payment and the use of technical terms or language in the contract. South African courts refer to the use of technical terms, the legislation of a particular state and the use of a standard form in the contract.

147 See par 3.3 and 5.3. Although a South Africa court has expressly stated that a choice of a localised arbitration tribunal does not indicate a choice of law, it did not express a view on the connection between choice of court and a tacit choice of law.

148 See Neels and Fredericks (2011) 108; Neels (2013/2014) 53-54; J L Neels "Choice of Forum and Tacit Choice of Law: the Supreme Court of India and the Hague Principles on Choice of Law in International Commercial Contracts (An Appeal for an Inclusive Comparative Approach to Private International Law)" in International Institute for the Unification of Private Law (UNIDROIT) (ed) *Eppur si muove – The Age of Uniform Law.*

issues and must be distinguished.[149] A forum may be chosen for its neutrality, experience or expertise and not necessarily for the application of its domestic law.[150] Furthermore, the forum will determine the law of the contract in terms of the applicable rules of private international law.[151] Parties who submit to a court or tribunal's jurisdiction do not intend thereby that the forum should abandon its choice of law process and mechanically apply the *lex fori*.[152] A choice of court or localised arbitral tribunal should therefore not on its own be taken to indicate a choice of law by the parties. When the opportunity arises, it is recommended that the courts in these jurisdictions should adopt a similar approach in clarifying the relationship between a choice of forum and tacit choice of law.

Essays in Honour of Michael Joachim Bonell to Celebrate his 70th Birthday vol 1 (2016) 358 364-365; and Neels (2017) 447.

149 Neels (2016) 364-365; and Neels and Fredericks (2011) 107.

150 Neels (2016) 364-365; Neels (2017) 447; and Neels and Fredericks (2011)107-108.

151 Neels (2016) 364-365; and Neels (2017) 447.

152 Forsyth (2012) 328; and Van Rooyen (1972) 99-100.

The African Principles and Mauritian Private International Law

What Lessons to be Learned?

*Robin Cupido**

1 Introduction

The African Principles on the Law Applicable to International Commercial Contracts (hereafter "the African Principles") are the result of a project undertaken by the Research Centre for Private International Law in Emerging Countries (RCPILEC) at the University of Johannesburg under the supervision and guidance of Prof Jan L Neels. The African Principles are designed to "set forth general principles for determining the law applicable to international commercial contracts".[1] Having such general principles in place contributes to the creation of a legal system of international commercial law in Africa, one which crosses intra-African borders and promotes economic growth and sustainable development on the continent.

One way in which the African Principles can contribute to the construction of a general standard of international commercial law regulation in Africa is to serve as "a model for national, regional and supranational legislative instruments in Africa".[2] Used in this way, the African Principles can play a key role in the harmonisation of the law[3] applicable to international commercial contracts, allowing other countries to use them as a guideline or example when drafting their own private international law of contract.

Mauritius is currently in the process of updating its private international law, with the Law Reform Commission of Mauritius (hereafter MLRC for Mauritian Law Reform Commission) conducting a review of the existing private international law. Mauritian private international law is presently regulated in a fragmented

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1 Preamble to the African Principles.

2 Preamble to the African Principles.

3 Harmonisation or uniformity of decision is described by Forsyth as being a "Utopian dream". Despite this, he opines that it can still be a useful guide in the development of private international law, stating that "the closer systems of private international law are to each other, the fewer cases there will be in which the result of the dispute depends on where the matter is litigated". See C F Forsyth *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (2012) 5.

way, incorporating rules found in the English common law,[4] common-law French private international law[5] and judgments of the Mauritian courts themselves. The MLRC acknowledged that a reform of private international law in Mauritius is needed, and in 2016 it published a document containing a recommendation of various provisions that could be introduced to regulate Mauritian private international law. The *Issue Paper on Incorporation in the Code Civil Mauricien of Provisions Relating to Aspects of Private International Law*[6] provides a proposed fourth book to be added to the *Code Civil Mauricien*. This document contains a proposed codification of the private international law rules that should find application in Mauritius, based on the *Code Civil du Québec*.[7] No reasons are provided by the MLRC for the choice of the *Code Civil du Québec*, although it has been suggested that it could be due to the fact that both Mauritius and Québec have mixed common-law and civil-law systems.[8]

An alternative suggestion is that the MLRC (and other bodies involved in the reform of Mauritian private international law) can consider the African Principles as a guideline in its revision of the Mauritian law, in accordance with the African Principles' stated aim of providing a model law for African countries to use in developing their own rules of international commercial contracting. While the MLRC could still rely on the *Code Civile du Québec* as a framework for other aspects of private international law, it is submitted that the African Principles may be better suited to use as a guideline for the rules on private international law of contract, given their specific focus on international commercial contracting. This chapter is thus aimed at providing a brief comparison of the relevant sections of the MLRC Issue Paper on Incorporation and the African Principles, highlighting ways in which the African Principles could be used to refine or add to the MLRC's current proposal. This comparison will be conducted by considering various aspects of choice of law identified in the African Principles, comparing each identified Article with the corresponding section of the MLRC (if any).

2 Scope and Application of the Instruments

The first Article of the African Principles sets out the situations in which the Principles would apply. The Principles will apply only to international contractual obligations in civil and commercial matters, where each party acts in the exercise

4 *Ramduth v Auto Car Fire* (1929) MR 1.

5 *Austin v Bailey* (1962) MR 113; *Immobilien Development Indien I GMBH & Co KG v Kalra A (Mr)* (2016) SCJ 463.

6 Mauritian Law Reform Commission *Issue Paper on Incorporation in the Code Civil Mauricien of Provisions Relating to Aspects of Private International Law* (2016) (hereafter MLRC *Issue Paper on Incorporation*).

7 *Code Civile du Québec* SQ 1991, c64.

8 R Cupido "Mauritius" in D Girsberger, T Kadner Graziano and J L Neels (gen eds) *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague Principles* (2021) 320-335.

of their own trade or profession.[9] Expressly excluded are various types of contracts,[10] the law governing arbitration agreements and that governing choice of court agreements.[11] This is a very limited scope, allowing for a detailed regulation of the specified contractual obligations.

The MLRC's draft reform instrument is much broader in scope than the African Principles. Its structure is that of a fourth book to be added to the *Code Civil Mauricien* entitled *Du Droit International Privé*, which covers a range of topics in private international law. The book encompasses general provisions, the conflict of laws, the international competence of the Mauritian judiciary and the recognition and enforcement of foreign judgments. This is a very comprehensive approach to the codification of private international law in Mauritius, encompassing the key areas of private international law.[12]

Although the African Principles and MLRC draft reform instrument have such different scopes, one suggestion for the MLRC would be to include a provision at the beginning of the proposed *Du Droit International Privé* that expressly sets out the scope of the instrument. At present there is no such provision, and the scope is to be inferred from the layout of the instrument and the different chapter headings chosen. Including such a provision would promote legal certainty and indicate to parties choosing to rely on the provisions whether their particular private international law issue would be covered by this document.

3 Aspects of Choice of Law

3.1 Freedom of Choice of Law

Article 3 of the African Principles begins with the statement that a contract is governed by the law chosen by the parties.[13] This entrenches the concept of party autonomy as the baseline principle to be followed when international contractual obligations are determined, meaning that the will of the parties must always be considered first. Interestingly, the African Principles provide for a wide freedom of choice, allowing parties to choose the law applicable to the whole contract or parts thereof,[14] and to assign different laws to govern different parts of the contract.[15] In keeping with this wide freedom, parties may elect a legal system that

9 Art 1(1) of the African Principles.

10 Art 1(2)(a)-(d) of the African Principles.

11 Art 1(3) of the African Principles.

12 Choice of law, jurisdiction and recognition and enforcement of judgment are generally accepted as the broad topics that make up private international law. For a discussion of the role of each of these, see CF Forsyth *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (2012) 2-4.

13 Art 3(1) of the African Principles.

14 Art 3(2)(a) of the African Principles.

15 Art 3(2)(b) of the African Principles.

has no connection to either the parties or the contract,[16] allowing them to choose whatever is most favourable to them.

The rules relating to choice of law in the MLRC draft reform instrument are somewhat less extensive. These rules can be found in the proposed Article 2319, which also takes the principle of party autonomy as its point of departure. The Article provides that parties are free to choose the law that will govern their contract, expressly stating that this choice must then be given effect to.[17] This acknowledgement of party autonomy and the weight accorded to it is in keeping with the spirit of the African Principles.

However, the MLRC could take further guidance from the African Principles in respect of providing more detail about the extent of this party autonomy and the contexts in which it may be exercised. As mentioned above, the African Principles expressly allow for parties to choose different governing laws for different aspects of the contract and for them to choose a governing law completely unrelated to the contract or themselves. In addition, parties may make or modify their choice at any stage in the contracting process.[18] These provisions give the parties a very wide scope in which to exercise their autonomy, allowing wide contractual freedoms and allowing them to choose the best way in which to regulate their transactions. The MLRC's draft reform instrument does not mention any of these details, and it is suggested that including similar provisions in a future draft of the instrument would do much to provide certainty around the extent to which parties may exercise their autonomy under Mauritian private international law of contract.

3.2 Choice of Non-State Law

The African Principles also include a provision as to the types of law that may be chosen, permitting parties to choose non-State law as the governing law of their contract.[19] This provision lists various non-State law instruments that parties could choose from, including the UNIDROIT Principles of International Commercial Contracts, treaties and other supranational instruments. The choice of these instruments are afforded the same status as the choice of the law of a particular country, and afford greater flexibility to parties, allowing them to apply more specified rules to their contract than domestic legal systems may offer.

16 Art 3(3) of the African Principles.

17 "Le principe de base est que les parties sont libres de chosir la loi qui va régir leu contrat. Il y a là une consécration de l'autonomie de la volonté. La volonté de parties exprimée à cet égard doit être respectée par le juge" – MLRC *Issue Paper on Incorporation* 179.

18 Art 3(4) of the African Principles.

19 Art 4 of the African Principles.

In contrast to this broad approach, the MLRC has taken its cue from the provisions of the Rome Convention[20] and the Rome I Regulation[21] in relation to choice of non-State law. In the Issue Paper on Incorporation, before setting out its draft reform instrument, the MLRC confirms that parties are limited to choosing a State law system to govern their contracts.[22] Although this is in line with the European approach as evidenced in the Convention and Regulation mentioned above, this approach may be out of step with more recent instruments such as the Hague Principles on Choice of Law in International Commercial Contracts (hereafter "the Hague Principles").[23]

The Hague Principles allow parties to choose any "rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise".[24] This is an expansive interpretation of choice of law, allowing parties the freedom to regulate their contract according to any rules they choose as long as the selected set of rules is both neutral and balanced. This same freedom has been echoed in the African Principles and would seem to be indicative of a shift in the international approach to recognising the choice of non-State law. It remains to be seen whether this shift will influence the development of individual State law relating to commercial contracts.

3.3 Express or Tacit Choice of Law

Party autonomy means that the parties' choice of a governing law for their contract must be given effect to. In keeping with this, it is clear that any express indication of a choice of law by the parties will be adhered to as far as the law allows. By contrast, a tacit choice of law is not always seen as valid, and its validity differs according to the legal system it is sought to be applied in, as well as the provisions of various sources of non-State law. The African Principles removes any doubt as to the validity of a tacit choice of law, confirming that, in terms of the Principles, choice of law or any modification of an initial choice may be made expressly or tacitly.[25] Article 5 also sets out guidelines for determining whether there has indeed been a tacit choice of law, stating that such a choice must be manifestly clear from the provisions of the contract, the circumstances of the matter at hand or both of

20 Convention on the Law applicable to Contractual Obligations [1980] OJ L266 (Rome Convention).

21 Council Regulation (EC) 593/2008 on the Law Applicable to Contractual Obligations (Rome I Regulation) [2008] OJ L177.

22 "Par loi, la Convention de Rome entendait une loi étatique. De plus, le texte du règlement 'Rome I' n'a pas retentu la possibilité de choix d'un droit non étatique. Ainsi, comme sous l'empire de la convention de Rome, les parties choisissent une loi étatique pour régir leur contrat" – MLRC *Issue Paper on Incorporation* 71.

23 Hague Principles on Choice of Law in International Commercial Contracts (2015).

24 Art 3 of the Hague Principles.

25 Art 5(1) of the African Principles.

these things.[26] The choice of a court or seat of arbitration may be a factor used in determining tacit choice of law, but is not equivalent to a choice of law.[27]

Article 2319 of the MLRC draft reform instrument contains the provision relating to choice of law, stating that legal acts must be governed by the legal system expressly identified in those acts. An express choice of law is thus always given effect to, as parties will have indicated their wishes and the contract would be governed by the specified legal system. The Article also makes provision for what should happen in the absence of such a choice, saying that the governing legal system should be determined by considering the other provisions of the contract.[28] This is an acceptance of tacit choice of law, and is thus in line with the African Principles. However, the Principles are more detailed in relation to how such a tacit choice may be determined, giving factors to be considered in such determination.

The MLRC draft reform instrument limits what can be considered to determine a tacit choice to the other provisions of the contract, leaving no room for a consideration of the surrounding circumstances. It is thus narrower in scope than the African Principles, and given other limitations on choice of law seen in the MLRC draft reform instruments, not likely to change to incorporate the broader understanding of tacit choice of law adopted in the African Principles.

4 Absence of Choice of Law

Article 6 of the African Principles is dedicated to the determination of the applicable law in the absence of a choice of law. This Article is inspired by similar provisions in the Rome Convention[29] and Rome I Regulation,[30] and provides specific connecting factors that must be considered to determine the governing law in the absence of parties' express or tacit choice. These connecting factors include the law of the country of habitual residence of the seller,[31] the law of the country of habitual residence of the service provider[32] and the law of the country where immovable property is situated,[33] each applicable according to the type of contract in question. Where the applicable law cannot be determined according to one of the connecting factors identified in Article 6(1)-(2), then the contract will be governed by the law of the country with which it is most closely connected.[34]

26 Art 5(2) of the African Principles.

27 Art 5(3)-(4) of the African Principles.

28 "L'acte juridique, qu'il présente ou non un élément d'extranéité, est régi par la loi designee expressément dans l'acte ou dont la designation résulte d'une façon certaine des dispositions de cet acte" – MLRC *Issue Paper on Incorporation* 179.

29 Art 4 of the Rome Convention.

30 Art 4 of the Rome I Regulation.

31 Art 6(1)(a) of the African Principles.

32 Art 6(1)(b) of the African Principles.

33 Art 6(1)(c) of the African Principles.

34 Art 6(4) of the African Principles.

The MLRC has also included a provision on the law applicable in the absence of a choice of law in its draft reform instrument. Article 2320 of that instrument states that in the event that there has been no express or tacit choice of law by the parties, or if the law chosen renders the contract invalid, the courts will apply the law of closest connection to govern the contract.[35] Guidance is also given as to how the law of closest connection will be determined, as Article 2321 states that a juridical act (a contract, in this context) is presumed to be most closely connected with the State where the party who is to make characteristic performance is habitually resident.

This presumption echoes the position taken in the Rome I Regulation in the instance where the contract does not fall into a prescribed category. This focus on the habitual residence of parties being used as a means of determining the law of closest connection is also found in Article 6(2) of the African Principles.[36] Indeed, the connecting factor of habitual residence is afforded such importance in the African Principles that Article 15 is dedicated to an explanation of what would constitute the habitual residence of various entities[37] and when such habitual residence is to be determined.[38]

The inclusion of the requirement that the law of closest connection will govern the contract in the absence of a choice of law means that the MLRC's proposed reform is in line with international norms. However, the draft reform instrument could take a stronger position, expanding to include specific connecting factors to determine the governing law for specific types of contracts, employing categorisation as seen in both the Rome I Regulation[39] and the African Principles.[40] Expressly including such a guideline could arguably increase legal certainty by providing concrete rules to follow in such an instance, and thus it is recommended that the MLRC consider the inclusion of a similar clause when codifying the Mauritian private international law of contract.

35 "En l'absence de designation de la loi dans l'acte ou si la loi designee rend l'acte juridique invalide, les tribunaux appliquent la loi de l'État qui, compte tenu de la nature de l'acte et des circonstances qui l'entourent, présente les liens les plus étroits avec cet acte" – MLRC *Issue Paper on Incorporation* 179.

36 Art 6(2) of the African Principles states that "[w]here the contract is not covered by paragraph (1) or where the elements of the contract would be covered by more than one of points (a) to (f) of paragraph (1), the contract is governed by the law of the country of the habitual residence of the party required to effect the performance which is most characteristic of the contract".

37 Art 15(1)-(2) of the African Principles provides that the habitual residence of juristic persons is in the country of their central administration and the habitual residence of a natural person acting in the course of their business activities is the country of their principal place of business.

38 Art 15(4) of the African Principles.

39 Art 4(1) of the Rome I Regulation.

40 Art 6(1) of the African Principles.

5 Scope of the Law Applicable to the Contract

Once the law is chosen by the parties expressly or tacitly, or determined with reference to other connecting factors, it must be questioned which aspects of the contract that selected legal system would be applicable to.

Similarly to the provision in the Hague Principles, which sets out the scope of the chosen law in terms of that instrument,[41] there is a provision in the African Principles that sets out what the scope of the law applicable to the contract would be. Article 13 of the African Principles states that the law applicable to the contract in terms of the Principles would govern all aspects of the contract between the parties, setting the scope very broadly.[42] Specific aspects such as interpretation,[43] rights and obligations arising from the contract[44] and pre-contractual obligations[45] are expressly named, but these by no means constitute an exclusive list. The Article also makes provision for the law governing issues of performance,[46] the consequences of breach and the potential assessment of damages,[47] ensuring that the governing law chosen is applicable at every stage of contracting, from pre-contractual negotiations to consequences of a failure to comply with contractual obligations.

Interestingly, the current MLRC draft reform instrument does not make any reference to the scope of the law applicable to the contract. This would seem to indicate that the Mauritian common-law approach to determining the scope of the chosen law is still the preferred one. The Mauritian common law would take its guidance from the French private international law rules as indicated by the court in *Austin v Bailey*,[48] and so it is those rules that must be considered. According to the French private international law, the general rule is that the substance of the contract will be governed by the chosen law, while specific aspects of the contract such as formalities and performance are governed by other legal systems determined by the type of issue at hand.[49] While it is good that there is some provision in Mauritian law for the scope of the applicable law of the contract, the MLRC may wish to pursue a different path in its reform of the Mauritian private international law.

From the above it is evident that the African Principles provide a specific guideline on which aspects of the contract will be governed by the parties' chosen law; this serves to reduce the potential legal systems that could find application

41 Art 9 of the Hague Principles.
42 Art 13(1) of the African Principles.
43 Art 13(1)(a) of the African Principles.
44 Art 13(1)(b) of the African Principles.
45 Art 13(1)(f) of the African Principles.
46 Art 13(2)(a) of the African Principles.
47 Art 13(2)(b)-(d) of the African Principles.
48 (1962) MR 113.
49 D Holleaux, J Foyer and G de Geouffre de La Pradelle *Droit International Privé* (1987) 589 and 602.

and in so doing promotes simplicity and certainty. It is thus suggested that the MLRC follow this approach in its proposed legal reform, as doing so will keep the Mauritian private international law in step with global developments.

6 Provisions Relating to Validity

6.1 Choice of Law in the Battle of Forms

Article 8 of the African Principles sets out the rules relating to material validity and the choice of law in the battle of forms. In terms of this Article, the existence and material validity of a contract must be determined by the law that would govern it under the African Principles if the contract in question were valid.[50] The Article goes on to say that the law of habitual residence of a party will determine whether they have consented to the contract if for some reason it is unreasonable to make that determination in terms of the law identified under the African Principles.[51]

The African Principles also anticipate the situation where parties choose two sets of standard terms that point to different legal systems to govern the contract, stating that if this is the case then there will be no express choice of law.

The Mauritian law is silent on this topic, as the existing *Code Civil Mauricien* makes no provision for determining the legal system that would determine whether parties have in fact agreed to a specific choice of law. The MLRC's draft reform instrument also does not make any mention of such a provision, and makes no recommendation as to a potential conflict between provisions contained in standard terms. This gap should be addressed, as standard terms are a common part of international commercial contracts and it is thus very likely that parties could use two sets of standard terms that designate different laws to be applicable to their contract. In refining and developing their draft reform instrument, the MLRC should consider including a provision like that found in Article 8 of the African Principles. Having the rules relating to choice of law in the battle of the forms clearly laid out will do much to resolve potential conflicts relating to choice of law between the parties, possibly pre-empting them entirely.

6.2 Formal Validity

Moving away from material validity to formal validity, under the African Principles it is not necessary for a choice of law clause to comply with any requirements as to form unless the parties agree otherwise.[52] The Article proceeds to set out the legal systems in terms of which the contract would be deemed formally valid if it complies with the requirements of that system.[53] Amongst these potential legal systems are the law of the country where the contract was concluded,[54] the law

50 Art 8(1) of the African Principles.
51 Art 8(2) of the African Principles.
52 Art 9(1) of the African Principles.
53 Art 9(2) of the African Principles.
54 Art 9(2)(a) of the African Principles.

applicable to the contract in terms of the African Principles,[55] the law of the country of habitual residence of any of the parties[56] or the law of the country of the agreed place of substantial performance.[57] Having such a wide array of legal systems to choose from to determine formal validity seems to indicate a preference to have a contract deemed valid rather than invalid. This would give full effect to the parties' exercise of their contractual autonomy.

The MLRC draft reform instrument identifies the law of the place where the contract is entered into as the legal system that governs the formal validity of that contract.[58] Much like the African Principles, it also provides alternative legal systems by which the formal validity of the contract can be assessed. Article 2317 of the draft reform instrument further states that a juristic act (in this context, a contract) will be valid if it is in the form prescribed by the law applicable to the act itself, the law of the place where immovable property is situated or by the law of the place of domicile of one of the parties when the act is concluded.[59]

Although the MLRC draft reform instrument differs from the African Principles in that it identifies the domicile of the parties – as opposed to their respective habitual residences – as a potential connecting factor, the underlying idea of the provisions seems to be the same, namely that there are many possibilities in terms of which a contract can be formally valid. This open approach to the determination of formal validity of a contract in both instruments is indicative of a willingness to uphold agreements between contractual parties and in so doing comply with the universal contractual value of *pacta servanda sunt*.

7 *Renvoi*

Article 10 of the African Principles contains an express exclusion of *renvoi*, stating that the application of the law of any country referred to by the rules contained in the African Principles must be an application of that country's own laws and not its rules of private international law.[60] This is the default position and will be changed only if the parties expressly provide otherwise. Such an exclusion of *renvoi* is also found in the Hague Principles,[61] evidence that this approach is reflective of an international norm.

The approach to *renvoi* in the Mauritian common law is similar, taken from the French private international law position of excluding *renvoi* in issues relating to the law of contract. The MLRC draft reform instrument maintains the Mauritian common-law rejection of *renvoi*, including an express statement that, where the application of private international law rules lead courts to apply the law of

55 Art 9(2)(b) of the African Principles.
56 Art 9(2)(c)-(d) of the African Principles.
57 Art 9(2)(e) of the African Principles.
58 Art 2317 MLRC *Issue Paper on Incorporation* 179.
59 MLRC *Issue Paper on Incorporation* 179.
60 Art 10 of the African Principles.
61 Art 8 of the Hague Principles.

another country, it will be the domestic law of that country that applies and not its private international law rules.[62] The MLRC draft reform instrument is thus in line with both the African Principles and Hague Principles in this regard.

8 Public Policy and Mandatory Provisions

Both the African Principles and the MLRC draft reform instrument make provision for the impact of public policy on choice of law and whether effect is given to what parties have expressly or tacitly chosen.

Article 12 of the African Principles is entitled "Public policy of the forum" and says that the application of a provision of the law applicable in terms of the Principles may be refused only if such application is "manifestly incompatible with fundamental notions of the public policy of the forum".[63] This serves to place considerations of public policy at the heart of whether a choice of law is applicable or not, allowing parties' choice to take effect only if they do not contravene the fundamental values of the forum as determined by public policy in that area. Such an inclusion means that public policy considerations, including freedom of contract, are underlying values of international commercial contracting, as they cannot be excluded.

The African Principles also includes rules relating to specific overriding mandatory provisions. These provisions are defined as

> rules of law which are regarded as crucial by a country for safeguarding its public interests (including its political, social or economic organisation) to such an extent that they are applicable to any situation falling within their scope, *irrespective of the law otherwise applicable to the contract under this instrument* [emphasis added].[64]

These rules may never be derogated from, as they give effect to the foundational public policy values and *boni mores* of their particular forum and community and will always be given preference, even if another legal system has been chosen as the governing law of the contract. The African Principles recognise the mandatory provisions of the law of the forum[65] or the law of the country of the agreed place of any substantial performance under the contract,[66] indicating the importance of contracting parties fitting in with generally accepted public policy values across communities.

62 "Lorsqu'en vertu des règles du present livre la loi d'un État étranger s'applique, il s'agit des règles du droit interne de cet État, à l'exclusion de ses règles de conflits de lois" – MLRC *Issue Paper on Incorporation* 172.

63 Art 12 of the African Principles.

64 Art 11 of the African Principles.

65 Art 11(3)(a) of the African Principles.

66 Art 11(3)(b) of the African Principles.

The MLRC draft reform instrument does not specifically mention "overriding mandatory provisions", but does recognise that public policy rules can be applied to override choice of law and party autonomy. In drafting their proposed reform instrument, the MLRC maintains the approach taken by the Mauritian courts,[67] namely that parties' choice of law will take effect only if it is not contrary to the *ordre public*. Article 2289 of the MLRC draft reform instrument specifically refers to international standards of public policy, saying that the application of a foreign legal system as a result of choice of law will be excluded if it is found to be incompatible with public policy as it appears in the international context.[68] This confirms the importance of accepted standards of legality at both the domestic and international level, and is indicative that the MLRC's view of public policy is in keeping with that seen in other regulatory instruments.

9 Concluding Remarks

The introduction of the African Principles has been a positive step in the development of an African system of international commercial contracting, providing a guideline for countries in the region to use in the development of their own law and, in so doing, creating some uniformity on the topic within the African continent.

This chapter has investigated the ways in which Mauritius could use the African Principles in its own private international law reform, given the recent movement towards creating a more unified body of Mauritian private international law. Mauritian courts and lawmakers alike have recognised the importance of bringing their domestic private international law rules in line with global legal standards, and the first step towards doing so could be to develop their own rules in keeping with the values and provisions set out in the newly drafted African Principles.

Promisingly, there are already some commonalities between the MLRC draft reform instrument and the African Principles, suggesting that the MLRC is consciously adopting a more international approach in its reform process, being mindful of the current global standards of international commercial contracting. However, there are still some areas where the MLRC could add more detail to its proposed instrument, especially regarding the scope of the instrument itself,[69] the extent of party autonomy under Mauritian private international law of contract and,[70] notably, the approach to the question of tacit choice of law.[71]

67 *Pillay v Pillay* 1973 MR 179.

68 "L'application des dispositions de la loi d'un État étranger est exclue lorsqu'elle conduit à un résultat manifestement incompatible avec l'ordre public tel qu'il est entendu dans les relations internationals" – MLRC *Issue Paper on Incorporation* 172.

69 See section 2 above.

70 See section 3.1 above.

71 See section 3.3 above.

There are also those important areas on which the MLRC draft reform document is silent, including the scope of the chosen law and the instance where there is a battle of the forms. These are necessary considerations in international commercial contracting, and it is suggested that they are thus necessary additions that the MLRC must make to any draft reform instrument to be proposed. In making these additions, the MLRC can look to the African Principles to provide some guidance, as the African Principles are reflective of the international legal standards while providing a potential unifying standard for African states. Over time, it is hoped that the development of private international laws by states like Mauritius, using one regional instrument, will lead to greater harmonisation in the region and the facilitation of intra-African trade.

The Law Applicable to Arbitrability in Lusophone Legal Systems

*Rui Dias**

1 Introduction

Arbitrability may be defined as the susceptibility of a dispute to be settled by arbitrators.[1] Only to those subject matters or disputes that are *arbitrable* will rules of national law apply, as well as the New York Convention.[2] The latter expressly refers to this notion ("capable of settlement by arbitration") in its Articles II, no 1, and V, no 2(a), as well as the UNCITRAL Model Law, Articles 34, no 2 (b)(i), and 36, no 1(b)(i).[3] All these tackle what we may call "objective arbitrability".

But we may also question, *ratione personae*, whether certain individuals or entities are capable of submitting disputes to arbitration. The issue is to determine if certain qualities of the parties, or the relationship between each one of them and the dispute, legitimizes them to resolve it through arbitration.[4] We are now addressing "subjective arbitrability".[5]

The common attitude of States not to authorize parties to submit all kinds of controversies to arbitration is easily understandable. In some cases, such

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1 The expression "non-arbitrability" is often given a less technic, much broader meaning, especially in the United States of America, covering cases where an arbitration agreement will be inoperable for several other reasons. See G A Bermann *International Arbitration and Private International Law* (2017) 178 with indication of relevant case law. See also *inter alia* Stavros Brekoulakis "Arbitrability and Conflict of Jurisdictions: The (Diminishing) Relevance of *Lex Fori* and *Lex Loci Arbitri*" in Franco Ferrari and Stefan Kroll (eds) *Conflict of Laws in International Commercial Arbitration* (2019) 144.

2 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

3 UNCITRAL Model Law on International Commercial Arbitration (1985/2006).

4 See Antonio Menezes Cordeiro *Tratado da Arbitragem – em Comentário à Lei 63/2011* (2015) Art 1 annotation 20.

5 On this terminology, see a brief reference in Bermann (2017) 179.

as in French law, appeal is made to the notion of *public interest*, in the sense that subject matters where such public interest is more intense or relevant are reserved for judicial adjudication. A point of equilibrium must be found, allowing a consideration of, on the one hand, a plausible *jurisdictional reserve of the State*, in respect of those more sensitive issues, and, on the other hand, of *party autonomy,* in a way that does not inhibit self-determination in an exaggerated, non-indispensable way: for parties have a legitimate claim to settle their differences in their preferred guise, where no general interest considerations demand otherwise. Such point of equilibrium shall be determined by each State, taking into account the reigning political, social, and economic convictions.[6] But a trend is quite visible towards favouring the latter self-determination, to the expense of the former jurisdictional reserve of the State.

Let us now have a brief overview on how issues of arbitrability are treated in chosen arbitration laws of the Portuguese-speaking world, including the Southern African countries of Angola and Mozambique, further tackling the question of which law is applicable to arbitrability.

2 Subjective Arbitrability

As indicated above, one shall verify whether the parties have the *substantive legitimacy*[7] to enter into arbitration, in as far as a given dispute is concerned. General civil law rules will apply to construe a notion of subjective arbitrability,[8] given that legislators tend to be vaguer in indications for this question when compared to *objective* arbitrability, as we will also see.

Portuguese arbitration law only refers to a once controversial topic, which is the possibility of a State to resolve its disputes through arbitration – in other words, the problem of subjective arbitrability. Article 1, no 5 of the Portuguese law states: "The State and other public-law entities may conclude arbitration agreements, insofar as there is legal authorization or the disputes derive from private law."[9] Influenced by both Swiss and Spanish law, in respect of international arbitration, which partly deserves a particular set of rules, Article 50 of the Portuguese law provides that:[10]

6 See Nigel Blackaby and Constantine Partasides *Redfern and Hunter on International Arbitration* (2015) 2.127; Julian D M Lew, Loukas A Mistelis and Stefan M Kroll *Comparative International Commercial Arbitration* (2003) 198-200; and Bermann (2017) 180-182. See also Manuel Pereira Barrocas *Manual de Arbitragem* (2013) 221.

7 See the reference to the notion of arbitrability by Cordeiro (2015) Art 1 annotation 29. *See* also Philippe Fouchard and John Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) 312; and Bernard Hanotiau "The Law Applicable to Arbitrability" 2014 *Singapore Academy of Law Journal* 874 875.

8 Cordeiro (2015) Art 1 annotation 20.

9 This and all further translations of Portuguese-speaking countries' law into English are my own and not official.

10 Critically, Cordeiro (2015) Art 50 annotations 5 *et seq*.

> When the arbitration is international and one of the parties in the arbitration agreement is a State or a State-controlled organization or company, this party may not invoke its domestic law in order to challenge the arbitrability of the dispute or its ability to be a party in arbitration, nor to in any other way evade its obligations arising out of the said agreement.

In this avoidance of possible abuses leveraged by the privileged position of a State to regulate its own ability to submit to arbitration, the law creates a standard that will even override the personal law of a foreign entity,[11] in what may be seen as a justifiable expression of a transnational public policy.[12]

In Brazil, this same problem is treated in Article 1 of the Arbitration Act: "A person capable of entering into contracts may use arbitration to resolve disputes related to patrimonial, disposable rights. § 1 – Direct and indirect public administration may use arbitration to resolve disputes related to patrimonial, disposable rights." The intervention of public entities will further have consequences at the level of applicable law. According to Article 2, § 3, "[a] rbitration involving the public administration will always be in law", thus with no possibility of decisions in equity.

In Angola, concerning the position of the State and other public law entities, Article 1, no 3, states: "The State and, in general, public-law entities may enter into arbitration agreements only in the following cases: a) to decide on issues regarding private law relationships; b) in administrative contracts; c) in cases especially determined by law."

In Mozambique, the topic is also subject to explicit legal treatment, in Article 6, no 1: "The State and other public law entities may conclude arbitration agreements if they concern disputes regarding private law relationships or of contractual nature and also if they are authorized to do so by special law."

The question of subjective arbitrability goes beyond the problems raised by the intervention of public entities. One might also question whether, in general, a private entity or an individual is in the condition of entering into arbitration agreements and resolve his or her disputes in this manner.

If one surveys Portuguese law, there is no specific legal rule to address the problem, which is why general civil law rules are to be applied.[13] However, Angolan and Mozambican law, as well as Brazilian law, have expressly dealt with this issue.

Starting with the latter, Article 1, no 1, of the Brazilian Arbitration Act of 1996 determines that arbitration may be resorted to by "persons capable of

11 Dario Moura Vicente Artigo 50.º – Inoponibilidade de exceções baseadas no direito interno de uma parte" in Dario Moura Vicente (coord) *Lei da Arbitragem Voluntária Anotada* (2019).

12 Rui Manuel Moura Ramos "O novo direito português da arbitragem" 2014 *BFD* 567 602-603.

13 Raul Ventura "Convenção de arbitragem" 1986 *ROA* 289 305; and Cordeiro (2015) Art 1 annotation 21.

entering into contracts". Angolan law, in Article 1, no 1, refers to "all those who dispose of contractual capacity", adding in no 2:

> Minors and persons under full or partial guardianship are not allowed to enter into arbitration agreements, even if through the intermediation of their legal representatives, but, in case of succession, disputes in which they are interested may be resolved by the arbitral tribunal on the basis and under the terms of the arbitration agreement concluded by those whom they have succeeded.

Further limiting *vis-à-vis* the possibility of those lacking full capacity to act being able to take part in arbitration, Mozambican law states in Article 6, no 2: "Those to be considered non-emancipated minors or persons under full or partial guardianship, according to civil law, are not allowed to be parties in arbitration proceedings, not even through the intermediation of their legal representatives."

3 Objective Arbitrability: General Criteria

The first rules of the Portuguese Arbitration Act are dedicated to *arbitrability*. Article 1, no 1 provides: "Unless exclusively submitted to judicial courts or compulsory arbitration through special law, any dispute related to interests of a patrimonial nature may be submitted by parties, through an arbitration agreement, to decision by arbitrators." The same Article 1, in no 2, adds: "An arbitration agreement is also valid in respect of disputes where interests of a patrimonial nature are not involved, as long as parties are allowed to enter into a settlement on the controversial right."

Through this rule, a first caveat is introduced, namely the anticipation of a possible *special law* excluding the possibility of an agreement to arbitrate, either because judicial adjudication is mandatory or due to the matter being subject to a compulsory form (*ie* regardless of parties' will) of arbitration. Until recently, included in the latter case were pharmaceutical-related disputes, given that intellectual property rights concerning drugs were subject to a mandatory submission to institutionalized or non-institutionalized arbitration.[14] However, after legislative amendment that took place in 2018,[15] those interested in invoking such an intellectual property right shall do it at the Intellectual Property Court or, in case of agreement between the parties, in an institutionalized or non-institutionalized arbitral tribunal. This is tantamount to a termination of the compulsory form of arbitration that existed since 2011, in favour of a possibility of truly voluntary arbitration.[16]

14 Art 3 no 1 of Law no 62/2011 of 12 December 2011, in its original wording.

15 See Decree-Law no 110/2018 of 10 December 2018.

16 On this evolution, see Evaristo Mendes "O fim da arbitragem necessária em matéria de patentes farmacêuticas. Velhos e novos problemas" 2019 *Revista de Direito Comercial* 75 *et seq*; Vicente (2019) 211 *et seq*; and J P Remedio Marques "A alteração da Lei n.º 62/2011 em matéria de patentes e certificados complementares de proteção no setor

The general criterion of arbitrability is defined in Article 1, nos 1 and 2. It is based primarily upon the "patrimonial" nature of the interests under dispute, which is from the outset broader than the "disposability" criteron adopted in the previous Arbitration Act of 1986. In addition, disputes where non-patrimonial interests are involved, but the rights claimed are subject to settlement by the parties, are also deemed arbitrable according to the new rule.

In Brazil, Article 1 of the 1996 Arbitration Act in force states that those "capable of entering into contracts may use arbitration to resolve disputes concerning disposable, patrimonial rights". It is, hence, a cumulative conjugation of both criteria, patrimoniality and disposability.[17]

Angolan law adopts disposability as criterion for objective arbitrability, as set out in Article 1, no 1:

> All those with capacity to enter into contracts may, under the terms of this law, resort to an arbitral tribunal to resolve disputes concerning disposable rights, through an arbitration agreement, except those submitted through special law to exclusive jurisdiction of state courts or to compulsory arbitration.[18]

The Mozambican Law on Arbitration, Conciliation, and Mediation dedicates Article 5 to arbitrability. Its three provisions are:

1. Disputes of all nature may be submitted to arbitration, as regulated in this Law, except for the cases mentioned in the following number.
2. The following disputes are excluded from arbitration:
   a) those which, according to special law, are exclusively submitted to a judicial court or to a special regime of arbitration not revoked by the present Law;
   b) those which relate to non-disposable rights or rights unsusceptible of a settlement.
3. The present Law is subsidiarily applicable to special arbitration regimes.

dos medicamentos: o fim da arbitragem necessária" 2019 *Revista Internacional de Arbitragem e Conciliação* 93 *et seq*.

17 See Carlos Alberto Carmona *Arbitragem e Processo – Um Comentário* (2009) 38 *et seq*; and Nadia de Araujo *Direito Internacional Privado: Teoria e Prática Brasileira*, Revolução (2016) 672 *et seq*.

18 See Manuel Goncalves, Sofia Vale and Lino Diamvutu *Lei da Arbitragem Voluntária Comentada* (2013) 33 *et seq*. For an extensive study by an Angolan author of the arbitrability criteria in connection with the idea of *favour arbitrandum*, see Lino Diamvutu *O favor arbitrandum – ensaio de uma teorização* tese de doutoramento (2018) 240 *et seq*.

So, as we can see, in addition to the particular safeguards in respect to special regimes, arbitrability is generally accepted *vis-à-vis* disputes related to rights that are disposable or susceptible of settlement by the parties.

4 Law Applicable to Arbitrability

With this framework in mind as to which disputes are arbitrable, both in the objective as well as in the subjective sense, a conflicts problem may arise when determining, in international arbitration, the law applicable to arbitrability.

The answer is not straightforward, as several distinctions have to be drawn, namely between subjective and objective arbitrability. But not only that: the moment when the question is raised, as well as the entity before whom it is raised, both constitute further relevant aspects in determining such answer.

The issue of arbitrability may be raised at the beginning of proceedings before the arbitral tribunal, in the context of a challenge to the susceptibility of a given dispute being resolved by such means, a question relevant for the decision of the tribunal on its own competence (in the framework of the so-called competence-competence principle, as received, for instance, in Article 18 of the Portuguese Arbitration Act). It may also be raised in a state court where a party challenges the interlocutory arbitral decision affirming the tribunal's competence. It may be subsequently raised at the moment when the annulment of the arbitral award is sought. And it may further emerge when a party opposes recognition and enforcement[19] of a foreign arbitral award.

A survey of scholarly opinions shows how different laws may be considered as potentially applicable to the issue at hand: namely, as Bermann summarizes, "the law applicable to the arbitration agreement; the law of the seat of arbitration; the law of the country where the arbitration agreement is sought to be enforced; the law under which the cause of action whose arbitrability is at issue arises; the law of the country where enforcement of the eventual award is or is likely to be sought; or even in exceptional cases international trade usages".[20]

Concerning *subjective* arbitrability, there is widespread rejection of the argument by the State or other public entity invoking its own insusceptibility of submitting to arbitration, in order to request annulment or oppose recognition, in all those cases where there has been a previous, unequivocal agreement on the submission to arbitration of disputes related to a certain contract they have entered into. Accordingly, a resolution of the Institution of International Law, taken in 1989 in its session at Santiago de Compostela, states in its Article 5: "A

19 On the general, theoretical question (not centred in arbitration) of why foreign judgments are to be recognized and enforced, as well as the distinction between recognition and enforcement, see Christopher Forsyth *Private International Law. The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (2012) 417 *et seq*.

20 Bermann (2017) 184 *et seq*.

State, a state enterprise, or a state entity cannot invoke incapacity to arbitrate in order to resist arbitration to which it has agreed."[21]

With respect to *objective* arbitrability, the less difficult issues arise at the moment of recognition and enforcement. This is because the New York Convention included a conflicts rule in this regard. In its Article V(2)(a), it is stated that recognition and enforcement may be refused namely if the subject matter of the difference is not capable of settlement by arbitration "under the law of that country". In other words, the *lex fori* of recognition and enforcement will govern arbitrability at that stage.

Similar regulation is to be found in Portuguese law, both regarding annulment (Article 46, no 3(b)(i)) and recognition (Article 56, no 1(b)(i)), and in Brazilian law, where Article 39(I) prescribes: "Homologation for recognition or enforcement of a foreign arbitral award will also be denied if the Superior Court of Justice verifies that: I – *according to Brazilian law*, the subject matter of the dispute is insusceptible of being resolved by arbitration."[22]

Also the Mozambican rules on arbitration determine in Article 44, no 2(b)(i) that a "resort to state courts" may be founded on the subject matter of the dispute not being "susceptible of being decided through arbitration under the terms of the Law of the Mozambican State".

Angolan law, when dealing with the annulment of arbitral awards in Article 34, does not identify the applicable law, as it merely states: "The arbitral award may be annulled by the Judicial Court on any of the following grounds: a) the dispute cannot be resolved through arbitration …." Then, as to the opposition to enforcement, Article 39, no 1 states that "an opposition to enforcement on the grounds of Articles 813 and 814 of the Civil Procedure Code is admitted when a cause of annulment is alleged, or annulment proceedings are pending". From the cited Article 814 of the Civil Procedure Code, it is not possible to derive an explicit reference to the applicability of Angolan law in international arbitration:

> The court will deny *ex officio* the request for enforcement when it verifies that the dispute could not have been committed to a decision by arbitrators, either for being submitted through a special law to the exclusive jurisdiction

21 The resolution is available at http://www.idi-iil.org/app/uploads/2017/06/1989_comp_ 01_ en.pdf. See Hanotiau (2014) 878. For Angolan law, see Goncalves, Vale and Diamvutu (2013) 38: "In short, if the public administration is capable to enter into the contract, it can also opt for the arbitral forum and enter into settlements" (translated from Portuguese).

22 (Emphasis added). On the connections between the latter rule and Art 2 § 1 (on choice of law and the public policy safeguard) of the Brazilian Arbitration Act, see Clávio Valença Filho "A propósito do art. 2º § 1º da Lei de Arbitragem: o direito aplicável à convenção de arbitragem, à jurisdição direta do juiz do foro e à indireta do juiz estrangeiro" in Carlos Alberto Carmona, Selma Ferreira Lemes and Pedro Batista Martins (coords) *20 Anos da Lei de Arbitragem – Homenagem a Petrônio R Muniz* (2017) 25 *et seq*.

> of Judicial Courts or to compulsory arbitration, or due to the non-disposability of the right under dispute.

Unlike Article V, Article II of the New York Convention does not provide choice-of-law indications as to the law applicable to arbitrability when the problem is faced with regard to the arbitration agreement, which is relevant for the party seeking its effectiveness. In the absence of a uniform orientation in arbitral laws or practice,[23] it seems fair, on the one hand, to be scrupulous in the acceptance of national constructions against arbitrability, given that the goal of the New York Convention is precisely to maximize the effectiveness of arbitral awards rendered in any of the Contracting States, while, on the other hand, not forgetting that there is an irredeemable margin for effectuation of "vital local public policies",[24] which might be implicit in certain non-arbitrability rules. Let us not lose sight of the circumstance that States make their choices on the balance to be struck between their own mandatory *jurisdictional reserve* and, what is left, to the full game of the *parties' self-determination.*[25]

Against this background, it seems reasonable to accept that the State court, when confronted with a request for annulment of the arbitrators' decision on their own competence, applies forum law.[26] That will also be the case, as we have seen, whenever that State court is called to intervene at the stage of recognition and enforcement, on the basis of Article V(2)(a) of the New York Convention. It is thus prudent, on the side of the arbitrators, that they also consider the law according to which the arbitral tribunal is organized, *ie* the law of the seat of arbitration, when considering this question – all the more so due to the fact that, notwithstanding some acceptance of the recognition of foreign arbitral awards annulled in the State of the seat of arbitration, that State will hardly cease to remain as a reference. Hence, some, even if limited, uniformity of judgments is achieved in this regard, given that the arbitral tribunal will be applying to this question, with great probability, the same law which the judicial court of the State of the seat of arbitration would, or will, apply.

This, however, does not inhibit more favourable solutions, such as the one that seems to derive from Article 51, no 2, of the Portuguese law: "The State court to which an application is made to set aside an award in an international arbitration seated in Portugal, on the grounds foreseen in Article 46, nr. 3, *b)*, of this Law, shall take into consideration the preceding number of this Article" – which in turn states: "In an international arbitration, the arbitration agreement is valid as to substance, and the dispute is susceptible of being submitted to arbitration, if the requirements set out either by the law chosen by the parties to govern the arbitration agreement, the law applicable to the merits, or Portuguese

23 As diagnosed by Bermann (2017) 189.

24 Gary B Born *International Commercial Arbitration* (2014) 616.

25 See Bermann (2017) 180-182.

26 See Hanotiau (2014) 884.

law are met." This means that if the annulment of an arbitral award is sought in Portugal in regard to an arbitration seated in this country, the annulment based on an alleged non-arbitrability will be decided, as far as the substantial validity of the arbitration agreement is concerned, through the application not only of Portuguese law, but also, if necessary in order to obtain validation of the arbitration agreement, of the law chosen to govern such agreement, or the law applicable to the merits.[27]

27 See Vicente (2019) annotation to no 2. On some doubts concerning the scope of this provision, see Mario Esteves de Oliveira, Frederico Goncalves Pereira and Rodrigo Esteves de Oliveira et al *Lei da Arbitragem Voluntária Comentada* (2014) 628 *et seq*; and Cordeiro (2015) Art 51 annotations 12 *et seq*.

Developing the *Forum Non Conveniens* Doctrine in South African Law

A Comparative Perspective

Sieg Eiselen*

1 Introduction

In the recent decision of *Agri Wire (Pty) Ltd v The Commissioner of the Competition Commission*,[1] the Supreme Court of Appeal seems to have cast some doubt on the possible application of the *forum non conveniens* doctrine in South Africa despite the contrary indications in the earlier case of *Bid Industrial Holdings (Pty) Ltd v Strang*.[2] Forsyth clearly favours the development of the doctrine within South Africa as a healthy development and a sophistication needed to counter the wide ambit of mere presence as a ground for jurisdiction.[3]

In this contribution, the history of the doctrine in South African law will be traced to determine whether the apparent rejection of the doctrine in the *Agri Wire* case is justified or not or whether the door is still open for the further development of the doctrine along the lines suggested by the Supreme Court of Appeal in the *Strang* case and by Forsyth. In his analysis of the doctrine, Forsyth relied mostly on English law.[4]

On the basis that the door may not have been finally closed on the adoption of the doctrine, especially since the Constitutional Court has not yet had an opportunity to pronounce on the issue,[5] and may well decide to develop the common law in line with constitutional imperatives, the application of the doctrine in the United States of America will be examined to establish whether that legal system, where the doctrine is well established and has developed in a somewhat

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1 2013 5 SA 484 (SCA).

2 2008 3 SA 355 (SCA).

3 C F Forsyth *Private International Law. The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (2012) 204. For an early analysis, see E Spiro "*Forum Non Conveniens*" 1980 *CILSA* 333.

4 The doctrine originated in Scotland from where it was adopted by English law – see P Torremans *et al* (eds) *Cheshire, North and Fawcett Private International Law* (2017) 393; and *Kinney Systems Inc v Continental Ins Co* 674 So 2d 86 (Fla 1996) 88.

5 In *South African Human Rights Commission v Standard Bank of South Africa Ltd* 2023 3 SA 36 (CC), doubt is cast on the categorical nature of the pronouncement in the *Agri Wire* case but not authoritatively settled.

different direction to English law, may provide some pointers for the development of the doctrine in South African law. American law is chosen since an analysis of the doctrine in English law in comparison with South African law has already been undertaken by Forsyth and other commentators.[6] The doctrine has also been in existence for much longer in the United States.[7]

2 *Forum Non Conveniens* in South Africa

2.1 Introduction

The *forum non conveniens* doctrine is a doctrine that has been applied mostly in common law countries.[8] With the possible exception of China, it has not been introduced in any civil law systems where courts will simply exercise their jurisdiction where the requisites for jurisdiction are met.[9] According to this doctrine, a court with the necessary jurisdiction according to its own domestic rules of jurisdiction may refuse to exercise that jurisdiction because there is another court elsewhere that has concurrent jurisdiction, and that court is the more appropriate court to adjudicate the dispute between the parties.[10] As has been pointed out, the name of the doctrine may be misleading, because the principles of the doctrine are not concerned with convenience, but rather with appropriateness and justice.[11] In *Societe du Gaz*,[12] Lord Dunedin stated the following with regard to the terminology: "In my view, 'competent' is just as bad a translation for 'competens' as 'convenient' is for 'conveniens'. The proper translation for these Latin words, so far as this plea is concerned, is 'appropriate'."

The court also refers to the decision in *Clements v Macaulay*,[13] where the court stated:

6 See Forsyth (2012) 187-188 and 204-205; J Taitz "Jurisdiction and *Forum Conveniens* – A New Approach?" 1980 *THRHR* 187 *ff*; Spiro (1980) 333 *ff*; A Beck "A Jurisdictional Conundrum" 1985 *THRHR* 305; A Beck "The Convenience of Jurisdiction" 1982 *CILSA* 344; H C A W Schulze "*Forum Non Conveniens* in Comparative Private International Law" 2001 *SALJ* 812; and S Eiselen "Goodbye Arrest *ad Fundandam*, Hello *Forum Non Conveniens*" 2008 *TSAR* 794-800.

7 Torremans (2017) 392-394; Spiro (1980) 334. This early discussion by Spiro is somewhat outdated and provides only a broad overview.

8 Forsyth (2012) 4; Torremans (2017) 392-394; and *Spiliada Maritime Corp v Cansulex Ltd* 1986 3 All ER 843 (HL).

9 Torremans (2017) 393-394.

10 Torremans (2017) 392-394; Forsyth (2012) 173; and *Spiliada Maritime Corp v Cansulex Ltd* (n 8).

11 *Spiliada Maritime Corporation v Cansulex Ltd* (n 8) 853-854; and *Great River Shipping Inc v Sunnyface Marine Ltd* [1992] 4 All SA 615 (C).

12 1926 SC (HL) 13; and *Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd, Telkom SA Soc Ltd v Blue Label Telecoms Ltd* 2014 3 SA 265 (GP).

13 (1866) 4 Macph (Ct of Sess).

> [O]ne cannot think of convenience apart from the convenience of the pursuer or the defender or the Court, and the convenience of all these three, as the cases show, is of little, if any, importance. If you read it as "more convenient, that is to say, preferable, for securing the ends of justice," I think the true meaning of the doctrine is arrived at. The object, under the words "*forum non conveniens*" is to find that forum which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that forum is more likely to secure those ends.

The necessity for this exception to the general rules of jurisdiction is a result of jurisdictional rules that are excessively wide or long-arm statutes that provide for jurisdiction where courts would not normally exercise it.[14] In South Africa, a number of commentators[15] discussed the possibility of the doctrine having been accepted after the decision in *Estate Agents Board v Lek*,[16] where the court stated: "In the present context of our unitary judicial system of having one Supreme Court with different Divisions, … convenience and common sense, are, *inter alia*, valid considerations in determining whether a particular Division has jurisdiction to hear and determine the particular cause."

The decision did not first and foremost deal with the doctrine proper and the commentators may have read more into the case than was there,[17] because there was no immediate response by the courts to the support for the doctrine expressed by some of these commentators.[18]

2.2 The Doctrine in Admiralty Cases

Despite the judicial silence on the topic generally, the doctrine is not totally foreign to South African law, as section 7(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 contains the doctrine in the following terms:[19] "A Court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that the action can more appropriately be adjudicated upon by another court in the Republic or by any other court, tribunal or body elsewhere."

Although section 7 of the Act has been mentioned in some admiralty cases, it has rarely been applied and few guidelines for its application have been developed. Our courts have recognized that this is *forum non conveniens* in a legislative cloak. In the *Great River Shipping* case, the court stated that this provision embodies the doctrine.[20] Also, in the *Thalasini Avgi* case, the court remarked that the principles as

14 Forsyth (2012) 4.

15 See Taitz (1980) 187 *ff*; Spiro (1980) 333 *ff*; J Taitz "Jurisdiction and *Forum Conveniens* – A Reply" 1981 *THRHR* 372 *ff*; Beck (1985) 305; and Beck (1982) 344.

16 1979 3 SA 1048 (A).

17 Forsyth (2012) 187.

18 See Eiselen (2008) 798.

19 See also Forsyth (2012) 186; and G Bradfield "Shipping" in J Faris (ed) *LAWSA* (2011) par 7.

20 *Great River Shipping Inc v Sunnyface Marine Ltd* (n 11) 316F.

set out in the leading English cases were impliedly incorporated into South African law by this provision and applied them.[21] It remarked, however, that there is a heavy onus on a party contending that it will not receive a fair hearing in a foreign court where it would appear *prima facie* that such court is a more appropriate one to try the action. In the *Great River Shipping* case,[22] the court refers to the following requirements as set out in the leading English case, *The Spiliada*:[23]

> The legal position, as it appears from *The Spiliada*, as it is to be applied in South African law, may shortly be stated as follows, *viz*:
>
> (a) "The basic principle is that a stay will only be granted (or a warrant of arrest set aside) on the ground of *forum non conveniens* where the Court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action". The other available forum must be one which is more appropriate for the resolution of the parties' dispute rather than one which is merely competent or despite the wording of the label applied to the principle convenient.
>
> (b) An initial general onus rests on the party seeking the stay of proceedings (or, as here, the setting aside of the warrant of arrest of the vessel) to persuade the Court to exercise its discretion to grant the stay (or to set aside the arrest).
>
> (c) Once that party succeeds in discharging that onus, *viz* of satisfying the Court that there is another forum available for the resolution of the dispute which prima facie is a more appropriate one, then the onus will be shifted to the other party, *ie* the party relying on the arrest of the vessel to establish the Court's jurisdiction, to show that special circumstances exist which warrant the dispute being resolved in this forum.
>
> (d) In deciding whether such special circumstances exist, the Court will have regard to what "connecting factors" (as they have been called) are present which point towards another forum as that with which the action has the most real and substantial connection, for example, the availability of witnesses; the place(s) where the parties reside or where they carry on business; the extent of expenses and costs which will be incurred; the law governing the situation; the likelihood (or otherwise) of the arresting party obtaining justice in that other forum. All this does not purport to be exhaustive of these connecting factors, for the Court will indeed have regard to all relevant circumstances.
>
> (e) The onus of establishing the existence of these special circumstances resting on the party contesting the application for a stay of proceedings (the setting aside of the arrest) is dischargeable on a preponderance of

21 *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* [1989] 2 All SA 436 (A) 448.

22 *Great River Shipping Inc v Sunnyface Marine Ltd* (n 11).

23 [1987] 1 Ll LR 1 (HL).

> probabilities, although and, more particularly, because of its relevance to the present case where it is contended by that party that it will not obtain justice in the foreign jurisdiction, positive and cogent evidence to support this contention will have to be adduced, for the onus in this regard has been authoritatively described in this country ... as a "heavy" one.

Applying these principles, the court held that there was indeed a more appropriate forum for the case to be adjudicated in, and that, the respondent failed to prove any of the special circumstances that would have excluded a stay of proceedings.[24] The court here quite clearly favoured the English approach adopted in the *Spiliada* case despite criticisms against this approach in, amongst others, the Australian courts.[25] This case is one of the few that have actually applied the statutory doctrine under section 7 of the Admiralty Jurisdiction Regulation Act.[26]

More recently the Constitutional Court has clearly set out the nature of this remedy in the *Standard Bank* case[27] where it stated:

> So, a South African admiralty court may decline to exercise jurisdiction even in instances where another South African admiralty court will exercise jurisdiction and it is more appropriate that the proceedings be adjudicated by that other court. In terms of the section, *forum non conveniens* also applies intra-nationally. Interestingly, section 27(1)(b) of the Superior Courts Act provides for a similar species of *forum non conveniens* (or should I say *forum conveniens*).

2.3 Revival of the Doctrine

Interest in the doctrine was revived with the decisions in *Richman v Ben Tovim*[28] and the *Strang* case.[29] The *Ben Tovim* case did not directly deal with the doctrine, as it was first and foremost concerned with the recognition of an English judgment in which the English court exercised jurisdiction where the only jurisdictional nexus was in-jurisdiction service of the summons. The court remarked that due to the constitutional aspect of the South African rule of founding jurisdiction by arrest, it was necessary to broaden the grounds of jurisdiction in South African law to include in-jurisdiction service as being sufficient.[30] The court, however, did not mention any restrictions on founding jurisdiction in this manner. In the *Strang*

24 *Great River Shipping Inc v Sunnyface Marine Ltd* (n 11) 623.

25 *Great River Shipping Inc v Sunnyface Marine Ltd* (n 11) 618-619.

26 For more recent references, see *MS "Bonanza" Schiffahrtgesellschaft mbH & Co KG v Durban Coal Terminal Company (Pty) Ltd* 2018 JDR 0458 (KZD).

27 *South African Human Rights Commission v Standard Bank of South Africa Ltd* 2023 3 SA 36 (CC) fn 92.

28 2007 2 SA 283 (SCA).

29 *Bid Industrial Holdings (Pty) Ltd v Strang* (n 2). See also Forsyth (2012) 187.

30 *Richman v Ben Tovim* (n 28) par 9.

case, the Supreme Court of Appeal was confronted with the constitutionality of the arrest procedure and held that it was indeed constitutionally unacceptable.[31] The court then stated that the practice that service of summons on someone who is only temporarily present (mere presence) as a sufficient ground for jurisdiction is one of the acceptable substitute procedures that may be adopted to replace the abolition of jurisdictional arrest.[32]

The court went on to discuss the fact that although effectiveness was one of the core principles of the law of jurisdiction in South Africa, that principle has been eroded over time. The court argues that in many cases attachment as a procedure to found jurisdiction is often more symbolic than real because the value of the property attached need not have any real bearing on the quantum of the claim.[33] The court also recognizes that the effectiveness of a judgment is primarily the concern of the plaintiff and not that of the court or public policy. The plaintiff choosing a jurisdiction where the judgment may not be effective in the place where it needs to be enforced is a risk assumed by the plaintiff.[34]

It is in this context that the court raised the question of *forum non conveniens*, stating:[35]

> And if the plaintiff decides in favour of suing here it is open to the defendant to contest, among other things, whether the South African court is the *forum conveniens* and whether there are sufficient links between the suit and this country to render litigation appropriate here rather than in the court of the defendant's domicile.

The court did not discuss the doctrine or its requirements in any specificity, nor did it refer to the application of the doctrine in admiralty cases. It simply stated that "appropriateness and convenience are elastic concepts which can be developed case by case".[36] It was regarded at the time as the first possible step towards a general acceptance of the doctrine as a corrective to the extended jurisdiction grounds introduced in the *Ben Tovim* and *Strang* cases.[37] It seemed that the stage was set for the further development of the doctrine in South African law, as predicted by Forsyth.[38]

31 *Bid Industrial Holdings (Pty) Ltd v Strang* (n 2) par 52.
32 *Bid Industrial Holdings (Pty) Ltd v Strang* (n 2) par 52 and 56. See also Forsyth (2012) 187.
33 *Bid Industrial Holdings (Pty) Ltd v Strang* (n 2) par 5.
34 *Bid Industrial Holdings (Pty) Ltd v Strang* (n 2) par 55.
35 *Bid Industrial Holdings (Pty) Ltd v Strang* (n 2) par 55.
36 *Bid Industrial Holdings (Pty) Ltd v Strang* (n 2) par 56.
37 Eiselen (2008) 799.
38 Forsyth (2012) vi, and 187.

2.4 Rejection in *Agri Wire*

The decision in *Agri Wire (Pty) Ltd v The Commissioner of the Competition Commission* therefore came as quite a surprise and even a shock. Without reference to the developments described above the court held that:[39]

> The court [*a quo*] went on to hold, on the facts of that case, that the court before which the review proceedings were brought should have exercised its discretion to decline to grant relief by way of review and left the issues in the case to be dealt with by the Tribunal in the course of the referral. That is a different matter from the court declining to exercise the jurisdiction with which it is vested by law. Save in admiralty matters, our law does not recognise the doctrine of *forum non conveniens*, and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction.

For this conclusion the court relied on *Makhanya v University of Zululand*,[40] *Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd*,[41] *Standard Credit Corporation Ltd v Bester*[42] and *Marth v Collier.*[43] However, the court did not refer to the decision in *Bid Industrial Holdings (Pty) Ltd v Strang*[44] or any of the other cases or the academic commentary on the subject.

In the *Makhanya* case, the court did not refer to the *forum non conveniens* doctrine at all but simply made a general statement in regard to the jurisdiction of our courts:

> [33] An exception to the particulars of claim, on the basis that the high court lacked jurisdiction to consider the claim, would have been taken and disposed of first, with reference only to the particulars of claim. Indeed, had the matter been pleaded conventionally, the court hearing the jurisdictional exception would not even have been aware that a further exception (on the basis that the claim was bad in law) was waiting in the wings. It would have been called upon to consider the jurisdictional issue with reference to the particulars of claim, on the assumption that the claim was good in law. Clearly the exception could not have been sustained, because it is manifest from the Constitution that the high court has jurisdiction to consider such a claim. But if the court had (unaccountably) upheld the exception, then the matter would have ended there, and the challenge to the validity of the claim would not even have arisen.

39 *Agri Wire (Pty) Ltd v The Commissioner of the Competition Commission* (n 1) par 19.
40 2010 1 SA 62 (SCA) par 33 and 34.
41 1990 2 SA 906 (A) 914E- G.
42 1987 1 SA 812 (W) 815E-F and 819 D-E.
43 [1996] 3 All SA 506 (C) 508 E-F.
44 2008 3 SA 355 (SCA).

> [34] Some surprise was expressed in *Chirwa* at the notion that a plaintiff might formulate his or her claim in different ways and thereby bring it before a forum of his or her choice but that surprise seems to me to be misplaced. A plaintiff might indeed formulate a claim in whatever way he or she chooses – though it might end up that the claim is bad. But if a claim, as formulated by the claimant, is enforceable in a particular court, then the plaintiff is entitled to bring it before that court. And if there are two courts before which it might be brought then that should not evoke surprise, because that is the nature of concurrent jurisdiction. It might be that the claim, as formulated, is a bad claim, and it will be dismissed for that reason, but that is another matter.

These paragraphs deal only with the general constitutional mandate of the courts and their powers, and they do not address the fact that there might be exceptions or limitations to these general rules such as *forum non conveniens*. There is also no indication in these paragraphs that the doctrine would be unconstitutional or against public policy. The *Makhanya* case is therefore scant authority for the bold proposition of the court in *Agri Wire*.

In the *Longman Distillers* case, on which the *Agri Wire* case also relies, the court stated:

> In our law, once an *incola* applicant (plaintiff) establishes that *prima facie* he has a good cause of action against the peregrine respondent (defendant), the Court must, if other requirements are satisfied, grant an order for the attachment *ad fundandam* of the property of the peregrine respondent (defendant). It has no discretion (Pollak T*he South African Law of Jurisdiction* at 64, citing *Lecomte v W and B Syndicate of Madagascar* 1905 TS 696 at 702). The Court will not inquire into the merits or whether the Court is a convenient forum in which to bring the action (Pollak (*ibid*)). Nor, it is conceived, will the Court inquire whether it is "fair" in the circumstances for an attachment order to be granted.

Once again, this discussion took place in relation to whether a court will attach goods to found jurisdiction and not primarily with reference to the *forum non conveniens* doctrine. In any event, if the discussion can be understood to refer to the doctrine, then it is *obiter*. The issue was not properly argued before the court and should therefore not be used as conclusive authority for a rejection of the doctrine as raised in the *Strang* case.

The court also relied on *Standard Credit Corp Ltd v Bester*,[45] where the court was concerned with the abuse of the High Court for simple debt collecting, which could have been done in the Magistrates' Court. In that case, too, the statements are not conclusive and did not directly deal with the application of the *forum non*

45 1987 1 SA 812 (W).

conveniens doctrine in an international context. The court in *Bester* states in the relevant passages relied on:[46]

> On the authority of *Koch*'s and *Goldberg*'s cases, this Court should hear a matter properly before it and within its jurisdiction. If a lower court also had jurisdiction in the matter and it can be dealt with in that court at less expense to the litigants the Court can discourage the approach to the Supreme Court by an appropriate order regarding costs.
>
> Is this now the only solution to the problem of congested rolls brought about by the applications under consideration among others? The answer lies in the judgment in *Goldberg*'s case and in the *Bank of Lisbon and South Africa Ltd* case.
>
> The Supreme Court has an inherent jurisdiction in this regard the jurisdiction namely to regulate its proceedings and to prevent an abuse of its process. *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 271-272; *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 at 517-520; *Hudson v Hudson and Others* 1927 AD 259 at 268-270; *Smit v Smit* 1978 2 SA 720 (W).

If anything, this case supports the principle that there are certain circumstances under which public policy may restrict the very wide jurisdictional powers of the High Court. The question as raised in the *Strang* case is whether *forum non conveniens* may be such an instance.

In the recent *Gqirana* case,[47] the Eastern Cape High Court expressed doubt about the impact of the *Agri Wire* decision, stating that the position may have been overstated by the Supreme Court of Appeal.[48] This sentiment was repeated in the *Thobejane* case in the Gauteng High Court.[49] However, on appeal, the Supreme Court of Appeal simply referred to its decision in the *Agri Wire* case stating that based on the *Bester* case our law does not recognise the *forum non conveniens* doctrine except in admiralty cases.[50] As in the *Agri Wire* case, this statement was merely *obiter* and therefore in principle not binding on other courts. There are,

46 *Standard Credit Corp Ltd v Bester* (n 42) 815 E-F.

47 *Nedbank Limited v Gqirana*; *First Rand Bank Limited v Cornellisson*; *Standard Bank of South Africa Limited v Msutu*; *Nedbank Limited v Gcina*; *Firstrand Bank Limited t/a Wesbank v Twynham*; *FFS Finance SA (Pty) Limited t/a Ford Credit v Jabanga*; *FFS Finance SA (Pty) Limited t/a Ford Credit v Rolomane* [2019] 4 All SA 211 (ECG).

48 *Nedbank Limited v Gqirana*; *First Rand Bank Limited v Cornellisson*; *Standard Bank of South Africa Limited v Msutu*; *Nedbank Limited v Gcina*; *Firstrand Bank Limited t/a Wesbank v Twynham*; *FFS Finance SA (Pty) Limited t/a Ford Credit v Jabanga*; *FFS Finance SA (Pty) Limited t/a Ford Credit v Rolomane* (n 47) par 67.

49 *Nedbank Ltd v Thobejane and Similar Matters* 2019 1 SA 594 (GP) par 44.

50 *Standard Bank of SA Ltd v Thobejane*; *Standard Bank of SA Ltd v Gqirana NO* [2021] 3 All SA 812 (SCA).

however, a number of cases in the various divisions of the High Court where this position has simply been accepted without further comment.[51]

There are, however, also a number of cases which, strangely and often without reference to the *Agri Wire* case, refer to the application of the doctrine or even seem to apply it.[52] The court in the *Vedanta Resources* case stated that, at least since the *Strang* case, our courts have adopted a more relaxed view as to jurisdiction and that considerations of appropriateness and convenience must be taken into account.[53]

To date, the strongest doubt on the correctness of the *Agri Wire* case was expressed in an *obiter* footnote of the Constitutional Court where Madlanga J states:

> [22] *Agri Wire* above n 6 at para 19. More fully this part of the judgment says "[s]ave in admiralty matters, our law does not recognise the doctrine of *forum non conveniens*, and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction". In the text, I have deliberately left out the first part of the quote because I think some qualification is necessary. I do not believe that we can be as categorical as *Agri Wire* is on the non-recognition of the doctrine of *forum non conveniens* outside of admiralty matters.
>
> ....
>
> So, a South African admiralty court may decline to exercise jurisdiction even in instances where another South African admiralty court will exercise jurisdiction and it is more appropriate that the proceedings be adjudicated by that other court. In terms of the section, *forum non conveniens* also applies intra-nationally. Interestingly, section 27(1)(b) of the Superior Courts Act provides for a similar species of *forum non conveniens* (or should I say *forum conveniens*). This section provides:

51 See, for instance, *Export Development Canada v Westdawn Investments Proprietary* [2018] 2 All SA 783 (GJ); *Alphera Financial Services, a division of BMW Financial Services (South Africa) (Pty) Ltd v Lemmetjies* (6380/2020) [2021] ZAGPPHC 163 (8 March 2021); *TMT Services & Supplies (Pty) Ltd t/a Traffic Management Technologies v MEC: Department of Transport, Province of KwaZulu-Natal* 2022 4 SA 583 (SCA).

52 See, for instance, *Holloway v Padi Emea Ltd* (38785-2014) [2017] ZAGPJHC 381, 2020 5 SA 172 (GJ) (8 March 2017); *L v Minister of Home Affairs* 2015 4 SA 197 (GJ), [2015] 1 All SA 335 (GJ); *HAT v DBT* (33546/2020) [2021] ZAGPJHC 548 (19 October 2021); *Mapula Solutions (Pty) Ltd v African Banking Corporation of Zambia Ltd* (33936/2016) [2018] ZAGPJHC 651 (12 December 2018) [21]; *Standard Chartered Bank, Johannesburg Branch v Mapula Solutions (Pty) Ltd In Re: Mapula Solutions (Pty) Ltd v African Banking Corporation of Zambia Ltd* (2016/33936) [2017] ZAGPJHC 247 (11 August 2017).

53 *Vedanta Resources Holdings Limited v ZCCM Investment Holdings PLC* (2019/23462) [2019] ZAGPJHC 250 (23 June 2019 (GJ) par 34. See also *Fleet Africa (Pty) Ltd v Cargill Cotton Ginners Ltd* 2010 JDR 1253 (GSJ).

> "If any proceedings have been instituted in a Division [of the High Court] or at a seat of a Division, and it appears to the court that such proceedings –
>
> (b) would be more conveniently or more appropriately heard or determined –
>
> (i) at another seat of that Division; or
>
> (ii) by another Division,
>
> that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be."
>
> A similarly worded provision, which was applicable when *Agri Wire* was decided, was section 9(1) of the now repealed Supreme Court Act 59 of 1959. Also worth noting is the fact that there are many instances which do not involve a denial of jurisdiction but an exercise of jurisdiction. One example is a stay pending an arbitration or mediation. Another is where, in special circumstances and outside of admiralty matters, a South African court, considers, on grounds of comity, a foreign court to have a closer connection to the matter (see, for example *Bid Industrial Holdings (Pty) Ltd v Strang* 2008 3 SA 355 (SCA) at par 59).[54]

It would therefore seem that a strong case can be made out that, despite the *obiter* remarks in the *Agri Wire* case, there is still an opportunity to develop the *forum non conveniens* doctrine in South African law as a corrective to the extended grounds of jurisdiction developed by the courts in the *Ben Tovim* and *Strang* cases, especially since the Constitutional Court reopened the door in the *Standard Bank* case.

In the South African discussions of the doctrine,[55] reference is usually made to the application of the doctrine in English law, even though it is of fairly recent origin in that jurisdiction, whereas the doctrine has been applied for a far longer time and developed in much more detail in the United States of America.[56] It may therefore be instructive to assess the American version of the doctrine as a possible example for South African courts to follow. For this purpose, regard will be made to the development of the doctrine in both federal courts as well as in the state courts of Florida.

3 *Forum Non Conveniens* in the United States of America

3.1 Introduction

A number of legal systems, especially in common law jurisdictions, also make use of exclusionary rules, which permits a court to decline to exercise

54 *South African Human Rights Commission v Standard Bank* (n 27) fn 92. Also see the text at n 27.

55 See Forsyth (2012) 184; Taitz (1980) 187 *ff*; and Spiro (1980) 333 *ff*.

56 Torremans (2017) 392.

jurisdiction despite the fact that it may strictly speaking have jurisdiction based on the consideration that another forum may be a more appropriate forum in the particular case.[57] This is the so-called *forum non conveniens* doctrine. It is a complex and somewhat controversial doctrine, especially in Europe, where the usual rules of jurisdiction are also subject to regional conventions and regulations.[58]

The *forum non conveniens* doctrine is an important common law instrument to restrict the injustice that may result from excessive jurisdictional rules such as in-country service on a person merely present in the jurisdictional area of a court in the absence of any other relevant jurisdictional factors or the long-arm statutes of many American states.[59] In the United States the doctrine has been adopted in federal as well as state courts.

The doctrine has been in use in the United States for much longer than in English law, partly due to the federal nature of law in the United States. Despite the fact that there is a unified commercial code, the Uniform Commercial Code, that applies in most of the states, major parts of the law, such as contract and tort, are subject to state law and not federal law. Due to the ease of movement of persons and goods within the United States, conflicts in these areas of the law very often result in trans-border disputes due to the mobility of people and goods and the lack of any controlled borders, requiring courts to consider competing jurisdictional factors. In many cases, the competing jurisdiction between state and federal courts must also be resolved. More so, in a globalized economy, competing international jurisdictional considerations have also become more frequent. In this context, *forum non conveniens* has become an important and often used remedy in United States courts, whether at the state or the federal level.

In the United States, a distinction is drawn between the concepts of venue and jurisdiction. It is more usual to refer to the place of adjudication as the *venue* and to reserve the term *jurisdiction* for *subject matter jurisdiction*.[60] The distinction was first made in the *Neirbo* case, where the court stated:[61]

> The jurisdiction of the federal courts – their power to adjudicate – is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a lawsuit – the place where judicial authority may be exercised – though defined by legislation, relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the court's power and the litigant's convenience is historic in the federal courts.

57 *Kinney Systems Inc v Continental Ins Co* (n 4).

58 U Magnus and P Mankowski (eds) *Brussels I Regulation* (2007) par 4.

59 *Kinney Systems Inc v Continental Ins Co* (n 4). See also M Stewart "*Forum Non Conveniens*: A Doctrine in Search of a Role" 1986 *California LR* 1259.

60 C A Wright and A R Miller *Federal Practice and Procedure* (2020) § 3801.

61 *Neirbo Co v Bethlehem Shipbuilding Corporation* 308 US 165, 167-168, 60 S Ct 153, 154, 84 L Ed 167 (1939). This distinction has, however, not always been heeded by lawmakers, resulting in difficulties for courts that are well aware of this distinction.

This distinction has since consistently been followed by courts in the United States.[62] Wright and Miller explains the difference as follows:[63]

> To state it another way, subject matter jurisdiction addresses whether a dispute may be heard by a federal court at all. If so, venue then determines which federal court – usually meaning which federal district – should hear the case. The federal trial courts are divided geographically into districts, and the venue statutes prescribe appropriate districts for each case.

The distinction between the two terms is also confirmed by the Federal Courts Jurisdiction and Venue Clarification Act of 2011, which contained the first general legislative definition of venue in civil actions. The Act defines venue as "the geographic specification of the proper court" in the federal judicial system.[64]

3.2 Federal Courts

At the federal level, the question of competing jurisdictions was first authoritatively discussed and decided in *Gulf Oil Corporation v Gilbert*[65] in 1947, despite strong views opposing its acceptance. The judges were almost equally divided in their decisions, but the majority opted for the acceptance of the doctrine. In this case, the Supreme Court had to decide whether a United States District Court had the inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens* and, if so, whether that power had been abused in the case.[66]

The plaintiff lodged his action in the Southern District of New York, but he was resident in Lynchburg, Virginia, where he operated a public warehouse. He alleged that the defendant, in violation of the ordinances of Lynchburg, negligently handled the delivery of gasoline to his warehouse tanks and pumps, causing an explosion and fire which burnt down the warehouse building and caused him financial loss.[67]

The case involved no federal question but was brought in the United States District Court because of the diversity in citizenship of the parties.[68] The District Court decided that the law of New York on *forum non conveniens* applied and that the court was required to leave the case to the Virginia courts. It therefore

62 Wright and Miller (2020) § 3801.

63 Wright and Miller (2020) § 3801.

64 28 USCA § 1390. *Scope* "(a) *Venue defined.* As used in this chapter, the term 'venue' refers to the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general, and does not refer to any grant or restriction of subject-matter jurisdiction providing for a civil action to be adjudicated only by the district court for a particular district or districts."

65 330 US 501, 67 S Ct 839, 91 L Ed 1055 (1947).

66 *Gulf Oil Corporation v Gilbert* (n 65) 502.

67 *Gulf Oil Corporation v Gilbert* (n 65) 502-503.

68 *Gulf Oil Corporation v Gilbert* (n 65) 503.

dismissed the case.[69] The Circuit Court of Appeals disagreed on the applicability of New York law and took a restrictive view on the application of the *forum non conveniens* doctrine in federal courts and, with one judge dissenting, reversed the decision.[70]

The Supreme Court stated, with reference to the earlier *Canada Malting* case:[71]

> This Court, in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances. As formulated by Mr. Justice Brandeis the rule is: "Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents, or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal. ...
>
> We later expressly said that a state court "may in appropriate cases apply the doctrine of *forum non conveniens*".[72]

The court laid down the various factors that need to be considered as follows:[73]

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

69 *Gulf Oil Corporation v Gilbert* (n 65) 503.

70 *Gulf Oil Corporation v Gilbert* (n 65) 503.

71 *Canada Malting Co Ltd v Paterson Steamships Ltd* 285 US 413 422, 423, 52 S Ct 413, 415, 76 L Ed 837.

72 Referring to *Broderick v Rosner* 294 US 629, 643, 55 S Ct 589, 592, 79 L Ed 1100, 100 ALR 1133; and *Williams v State of North Carolina* 317 US 287, 294 n 5, 63 S Ct 207, 87 L Ed 279, 143 ALR 1273.

73 *Gulf Oil Corporation v Gilbert* (n 65) 508.

Wright and Miller remark that this decision firmly entrenched the *forum non conveniens* doctrine in federal courts.[74]

The factors in the *Gulf Oil* case were later confirmed by the Supreme Court in the *Piper Aircraft* case.[75] That case established the second pillar of the doctrine as it is applied in the United States today.[76] The case arose from a small commercial airplane that crashed in Scotland, resulting in the death of the pilot and all the passengers. The deceased were all Scottish citizens and residents. The heirs and family were also all Scottish citizens and residents. The plaintiffs brought wrongful death claims in Scotland against the owner and operator of the plane and the estate of the pilot. The plaintiffs lodged a separate suit in a California state court against Piper Aircraft, the manufacturer of the airplane, and against Hartzell Propeller, the manufacturer of the propeller. The airplane was manufactured in Pennsylvania and the propeller in Ohio.[77]

The defendants raised the *forum non conveniens* defence before the district court in Pennsylvania and the court dismissed the suit.[78] The court, using the balancing of factors set out in the *Gulf Oil* case, decided that Scotland was an appropriate alternative forum for resolution of the dispute.[79] The court also held that the choice of venue by the plaintiff should not be given undue weight because the plaintiffs were not United States citizens. In weighing the public and private interest factors from *Gulf Oil*, the court decided that litigation in Scotland was preferable to litigation in the Middle District of Pennsylvania. In coming to this conclusion, it considered the fact that there was a related claim pending in Scotland, and that important witnesses and evidence about the maintenance of the airplane and the pilot's training as well as the investigation into the accident were all available in Scotland rather than Pennsylvania.[80]

On appeal, the Court of Appeals for the Third Circuit Court reversed the decision on the basis that the district court had abused the discretion in the way that it balanced the various factors set out in the *Gulf Oil* case.[81]

In assessing the decision of the Third Circuit, the Supreme Court came to the conclusion that it was based on two grounds, namely (a) that the District Court had abused its discretion in weighing the factors set out in the *Gulf Oil* case and (b) that dismissal is never appropriate where the law of the alternative forum is less favourable to the plaintiff.[82] The court stated:[83]

74 Wright and Miller (2020) § 3801.
75 *Piper Aircraft Co v Reyno* 454 US 235, 102 S Ct 252, 70 L Ed 2d 419 (1981).
76 Wright and Miller (2020) § 3801.
77 *Piper Aircraft Co v Reyno* (n 75) 235.
78 *Piper Aircraft Co v Reyno* (n 75) 241.
79 *Piper Aircraft Co v Reyno* (n 75) 241-242.
80 *Piper Aircraft Co v Reyno* (n 75) 243.
81 *Piper Aircraft Co v Reyno* (n 75) 244.
82 *Piper Aircraft Co v Reyno* (n 75) 244.
83 *Piper Aircraft Co v Reyno* (n 75) 247.

> The Court of Appeals erred in holding that plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.

However, the court explained its qualification by the word "ordinarily" by stating:[84]

> We do not hold that the possibility of an unfavorable change in law should never be a relevant consideration in a *forum non conveniens* inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.

The Court also confirmed the District Court's approach that a court is entitled to distinguish between cases where the plaintiffs are American citizens and cases where they are foreigners.[85] The court also held that dismissal is particularly appropriate where the applicable law would be foreign law, thereby lending considerable weight to the choice of law issue in a particular case.[86]

These rules have also been cemented legislatively in § 1406 of the United States Code.[87] It reads as follows:

> § 1406. Cure or waiver of defects
>
> a. The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Wright and Miller indicates that often federal courts have decided that human rights abuses, mass torts, or products liability claims that arose from injuries in foreign countries, allegedly caused by American defendants, would be more appropriately dealt with in the country where the injuries occurred.[88] Although this has often been done on an objective basis, as was the case in the *Union Carbide*

84 *Piper Aircraft Co v Reyno* (n 75) 254.
85 *Piper Aircraft Co v Reyno* (n 75) 256.
86 Wright and Miller (2020) § 3801.
87 United States Code Annotated Title 28 Chapter 87 § 1406. See also Wright and Miller (2020) § 3801.
88 Wright and Miller (2020) § 3801.

decision,[89] there are also cases where there has been a clear discriminatory element against foreign plaintiffs, as in the *Piper Aircraft* decision. Stein early on suggested that the increasing reliance on the doctrine of *forum non conveniens* "represents a disintegration of the rule of law and its replacement with informal and tacit decision making".[90] He goes on to state that a litigant today "has a greater chance of getting into a more desirable court and a better chance that the court will apply different law than would be applied by an alternative forum".[91]

3.3 State law – Florida

The law of Florida on personal jurisdiction represents a cross between applying the residence factor, where the usual residence within the state of Florida offers the necessary contact element, and the presence factor, where jurisdiction is founded upon service of court documents on a person who is voluntarily within the state whilst in the state.[92] Florida also has a long-arm statute which extends jurisdiction to persons doing business in the state or breaching a contract by failing to perform their obligations in the state.[93] The possible unfairness and harshness of these extended forms of jurisdiction are tempered, though, by the constitutional requirement that there need to be minimum contacts between the defendant and the state of Florida,[94] as well as by the *forum non conveniens* doctrine.[95]

In *Cacioppo v Pool Mart Services*, the court described the minimum contacts requirement as follows:[96]

> The threshold requirement for specific jurisdiction is the concept of "minimum contacts" where "there [is] some act by which the defendant purposefully avails [oneself] of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L. Ed.2d 1283, 1298 (1958) (citing Int'l Shoe v. Wash., 326 U.S. 310, 319, 66 S.Ct. 154, 160, 90 L. Ed. 95, 104 (1945)); Lebel v. Everglades Marina, Inc., 115 N.J. 317, 323 (1989) (holding that the minimum contacts requirement is satisfied so long

89 *In re Union Carbide Corp Gas Plant Disaster at Bhopal, India* 1984 634 F Supp 842 (SDNY, 1986).

90 A R Stein "*Forum Non Conveniens* and the Redundancy of Court-Access Doctrine" 1985 *University of Pennsylvania Law Review* 841 845.

91 Stein (1985) 781.

92 28 USCA § 1391; Wright and Miller (2020) § 3801; J Glen *et al Florida Jurisprudence* (2021) § 47.

93 Glen *et al* (2021) § 65; L A Zakolski *Florida Jurisprudence* (2021) § 30; Wright and Miller (2020) § 3801.

94 *International Shoe Co v Washington* 326 US 310 (145) 316; Glen *et al* (2021) §§ 58-59; AMJUR Process § 172; and P Hay, P J Borchers and S C Symeonides *Conflict of Laws* (2010) § 5.4.

95 Glen *et al* (2021) § 96; Wright and Miller (2020) § 3801. See also Fla R Civ P Rule 1.061.

96 A.2d, 2007 WL 2162427 par 2.

> as the contacts resulted from a defendant's purposeful conduct and not the unilateral activities of a plaintiff).

The minimum-contacts test is not a mechanical or quantitative test; instead, a question of reasonableness is assessed.[97] This test is a flexible test dependent on the particular facts. The primary issue is whether it is fair and reasonable to expect a defendant to defend an action in a particular forum, based on the nature of his or her activities in that forum. The facts of each case must be weighed to determine whether the requisite contacts exist.[98]

It has been held that the bare existence of minimum contacts is not sufficient to allow a court to exercise personal jurisdiction over a non-resident defendant. Rather, the court must also determine that the assertion of jurisdiction would comply with traditional notions of "fair play and substantial justice". In other words, the court must conclude that the assertion of jurisdiction is reasonable.[99]

In the *Nucall Foods* case, the court states that the "constitutional touchstone" of specific jurisdiction is whether the defendant purposefully established "minimum contacts" in the forum state, and the plaintiff's claim arose out of those contacts.[100] In analysing whether it is reasonable to exercise personal jurisdiction under traditional notions of fair play and substantial justice, courts must evaluate the following factors: (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the several states in furthering fundamental substantive social policies.[101]

The law of Florida clearly recognizes and applies the *forum non conveniens* doctrine.[102] In the *Kinney Systems* case,[103] the Florida Supreme Court adopted the standards applied in federal cases[104] to the doctrine. The federal doctrine provides a well-defined method of balancing the often-competing interests involved.

97 Glen *et al* (2021) § 96.

98 Glen *et al* (2021) § 172; *Travelocity.com LP v Pier 35 Events Inc* 2014 WL 2999208 S D Fla 2014.

99 Glen *et al* (2021) § 96.

100 *NuCal Foods Inc v Quality Egg LLC* 887 F Supp 2d 977, 89 Fed R Evid Serv 174 (ED Cal 2012). See also USCA Const Amend 14; *Burger King Corp v Rudzewicz* 471 US 462 476.

101 *WorldCare Ltd Corp v World Ins Co* 767 F Supp 2d 341 (D Conn 2011). See also Hay, Borchers and Symeonides (2010) § 5.11.

102 Hinshaw and Mark *Florida Jurisprudence* (2019) § 124.

103 *Kinney Systems Inc v Continental Ins Co* (n 4). For a general discussion of the doctrine, see H Koh *Transnational Litigation in United States Courts* (2008) 157 *et seq*; and Hay, Borchers and Symeonides (2010) §§ 11.8–11.13.

104 See *Gulf Oil Corp v Gilbert* 330 US 501, 67 S Ct 839, 91 L Ed 1055 (1946); *Piper Aircraft Co v Reyno* 454 US 235 (1981); and Glen *et al* (2021) § 97. See also The Florida Bar *Business Litigation in Florida* (2017) § 1.19.

Applying the considerations set out in the *Piper Aircraft* case, Florida courts require a four-step analysis in the application of the doctrine:[105]

> (a) As a prerequisite, the court must establish whether an adequate alternative forum exists which possesses jurisdiction over the whole case.
>
> (b) Next, the trial judge must consider all relevant factors of private interest, weighing in the balance a strong presumption against disturbing plaintiffs' initial forum choice.
>
> (c) If the trial judge finds this balance of private interests in equipoise or near equipoise, he must then determine whether or not factors of public interest tip the balance in favour of a trial in [another] forum.
>
> (d) If he decides that the balance favours such a ... forum, the trial judge must finally ensure that plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice.

The elements of the decision were subsequently embodied in statute and practice rules.[106] Florida Statute § 47.122 states quite simply: "For the convenience of the parties or witnesses or in the interest of justice, any court of record may transfer any civil action to any other court of record in which it might have been brought."

The Florida Rules of Civil Procedure added Rule 1.061 after Florida's adoption of the federal doctrine of *forum non conveniens* in the *Kinney* case and Florida Statute § 47.122 to provide for the orderly transfer of actions.[107] It reads as follows:

> Rule 1.061 Choice of Forum
>
> (a) Grounds for Dismissal. An action may be dismissed on the ground that a satisfactory remedy may be more conveniently sought in a jurisdiction other than Florida when:
>
> (1) the trial court finds that an adequate alternate forum exists which possesses jurisdiction over the whole case, including all of the parties;
>
> (2) the trial court finds that all relevant factors of private interest favor the alternate forum, weighing in the balance a strong presumption against disturbing plaintiffs' initial forum choice;
>
> (3) if the balance of private interests is at or near equipoise, the court further finds that factors of public interest tip the balance in favor of trial in the alternate forum; and
>
> (4) the trial judge ensures that plaintiffs can reinstate their suit in the alternate forum without undue inconvenience or prejudice.

105 *Kinney Systems Inc v Continental Ins Co* (n 4). See also M C M Leahy *West's Florida Practice Series* (2019) § 6:4.

106 Leahy (2019) § 6:4.

107 Leahy (2019) § 6:4.

> The decision to grant or deny the motion for dismissal rests in the sound discretion of the trial court, subject to review for abuse of discretion.

The Court Commentary states that Rule 1.061 should be interpreted in light of *Kinney*. In the *Kinney Systems* case, the doctrine is explained as follows:[108]

> *Forum non conveniens* is a common law doctrine addressing the problem that arises when a local court technically has jurisdiction over a suit but the cause of action may be fairly and more conveniently litigated elsewhere. *Forum non conveniens* also serves as a brake on the tendency of some plaintiffs to shop for the "best" jurisdiction in which to bring suit – a concern of special importance in the international context. Commentators generally have noted a growing trend in private international law of attempting to file suit in an American state even for injuries or breaches that occurred on foreign soil. There already is evidence the practice is growing to abusive levels in Florida. Michael J. Higer & Harris C. Siskind, Florida Provides Safe Haven for Forum Shoppers, Fla.B.J., Oct. 1995, at 20, 24–26 (documenting instances of abuse in Florida courts); Linda L. Silberman, Developments in Jurisdiction and *Forum Non Conveniens* in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard, 28 Tex. Int'l L.J. 501 (1993) (Florida favored by international plaintiffs); Jacques E. Soiret, The Foreign Defendant: Overview of Principles Governing Jurisdiction, Venue, Extraterritorial Service of Process and Extraterritorial Discovery in U.S. Courts, 28 Tort & Ins. L.J. 533 (1993) (same).

Hinshaw and Mark describe Rule 1.601 as a "convenience statute" even though it closely resembles the doctrine as set out in the courts.[109] They state that whereas the plaintiff's choice of jurisdiction is an important factor to consider, when assessing venue, that choice must be balanced with the convenience of all parties and witnesses.[110]

3.4 Conclusion

The doctrine as first established in the *Gulf Oil* case took into account mainly personal factors in determining whether a stay should be granted. This included factors such as the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive; as well as enforceability of the judgment. A second pillar to the assessment was added in the *Piper Aircraft* case, namely

108 *Kinney Systems Inc v Continental Ins Co* (n 4). See also Koh (2008) 157 ff; and Hay, Borchers and Symeonides (2010) §§ 11.8–11.13.

109 Hinshaw and Mark *Florida Jurisprudence* § 124.

110 Hinshaw and Mark *Florida Jurisprudence* § 124.

that if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that in reality it is no remedy at all, the unfavourable change in applicable law may be given substantial weight. It also added a third pillar, namely that a court is entitled to distinguish between cases where the plaintiffs are American citizens and cases where they are foreigners. This added a public policy element to the assessment.

The federal law as set out by the Supreme Court is fairly uniformly applied in state law and has also led to legislative measures adopting the federal provisions in states like Florida. In the *Kinney Systems* case, the court set out a four-step process to do so. These factors are mirrored in Rule 1.106 of the Rules of Civil Procedure. In the *Kinney Systems* case, the public policy element is particularly emphasized due to the abusive use of the rules on venue.[111]

There is a definite tendency of discrimination against foreign plaintiffs in the application of the *forum non conveniens* doctrine in the United States. The discriminatory approach was quite boldly stated in the *Piper Aircraft* case where the Supreme Court held that less weight should be accorded to a foreign plaintiff's choice of court than to that of a citizen's choice.[112] The practical result has been a reluctance by courts to provide a foreign forum for foreign plaintiffs in the absence of strong factors favouring the plaintiff.[113] Courts have also been reluctant to dismiss a suit where the plaintiff is a citizen.[114] This runs counter to the almost universally accepted general rule that defendants may be sued where they reside or have their usual place of business despite any other factors.[115]

Stein indicated already in 1985 that *forum non conveniens* decisions had become a mechanical quoting of the language used by the Supreme Court but which has resulted in a crazy quilt of *ad hoc*, capricious, and inconsistent decisions.[116] He also concludes that courts have gone further than a reasonableness assessment by introducing a public policy element leading to discrimination against foreign citizens.[117]

4 Comparative conclusion

The *forum non conveniens* doctrine is an important corrective to ameliorate the possible harshness of jurisdictional grounds which may be too wide or unfairly disadvantage a defendant in a particular case, or long-arm statutes that artificially extends the scope of courts' jurisdiction. The necessity for the doctrine has been

111 *Kinney Systems Inc v Continental Ins Co* (n 4). See also Koh (2008) 157 *et seq*; and Hay, Borchers and Symeonides (2010) §§ 11.8–11.13.

112 *Piper Aircraft Co v Reyno* (n 75) 256.

113 Stein (1985) 781.

114 *Piper Aircraft Co v Reyno* (n 75) 242 and 257.; Glen *et al* (2021) § 101.

115 S Eiselen "Jurisdiction" in L A DiMatteo *et al International Sales Law* (2016) pars 8 and 9.

116 Stein (1985) 837.

117 Stein (1985) 836-837.

recognized mainly in common law or mixed legal jurisdictions, such as Australia, Canada, England, New Zealand and Scotland.

In South African law, influenced by English admiralty law, the doctrine has been introduced in admiralty cases with the requirements based on English law. However, it was usually accepted that the doctrine did not apply generally in South African law, apart from admiralty cases. However, with the rejection of arrest to found jurisdiction and the acceptance of in-country service as a sufficient replacement ground of jurisdiction, the question was mooted whether it would be necessary to introduce the doctrine to soften the wide import of in-country service as a ground of jurisdiction where there are no other accepted grounds of jurisdiction and the fleeting presence of a defendant in the country is the only nexus.

In the *Agri Wire* case, the court without reference to the latest developments and decisions of the Supreme Court of Appeal simply adopted the earlier views that the doctrine does not apply. Fortunately, this part of the decision is *obiter* and there is still room for courts to introduce the doctrine in an appropriate case, a development also favoured by Forsyth, amongst others. This is even more true since the Constitutional Court has indicated that the pronouncement in the *Agri Wire* case cannot simply be adopted without qualification.

In a discussion of the *Strang* case,[118] I came to the conclusion that the provisions of English law and the provisions of the Admiralty Jurisdiction Regulation Act provide a good starting point for our courts in the development of the doctrine locally. In that discussion, only English law was considered on a comparative basis.

The doctrine that originated in Scotland was introduced into American law, on both the federal and the state level, at a much earlier stage than in English law, and this contribution therefore assesses whether the doctrine, which has been firmly established in the various jurisdictions in the United States, might provide further assistance in the development of the doctrine in South Africa.

Due to the shared origin of the rules in the United States, England and South African admiralty legislation, there is a semblance of similarity in the requirements for the application of the doctrine. All of the systems require that the defendant prove that there is an appropriate alternative court that has jurisdiction over the parties. It must also be established that the foreign court is more appropriate to deal with the dispute between the parties.

In considering the appropriateness of the alternative forum, the court in the *Great River Shipping* case, applying South African admiralty legislation, stated that the court must have regard to, amongst other things, the availability of witnesses; the place(s) where the parties reside or where they carry on business; the extent of expenses and costs which will be incurred in the litigation; the law governing the situation; and the likelihood or otherwise of the plaintiff obtaining justice in that

118 Eiselen (2008) 794.

other forum.[119] In the American *Gulf Oil* case, the court mentions the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses; possibility of visiting of premises, if visiting would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. All of this relates to what the court states are private matters and is similar to the factors mentioned in the *Great River Shipping* case.

In the *Gulf Oil* case, there was still a strong plaintiff bias, that is, the choice of venue by the plaintiff will not be easily disturbed. This is similar to the placing of quite a substantial onus on the defendant under South African admiralty law to prove that the foreign court is more appropriate.[120] However, in the United States, the *Piper Aircraft* case, a distinctly American bias was introduced by the Supreme Court when it confirmed that a court is entitled to discriminate between citizens and foreigners. The same bias is also found in state law, where a further element, namely the role of public policy, has been strongly emphasized, based on the *Piper Aircraft* case. The public policy element is also present in the requirements set out in the *Thalassini* case but is rather limited to cases where the heavy burden on the plaintiff to prove that it will not obtain substantive justice in the foreign court is satisfied.

The application and quite open discrimination against foreign plaintiffs in American law is an element that should be discouraged in the South African development of the doctrine.

The comparison of the doctrine as applied in the United States, both federally and locally, with the South African law as set out in the *Great River Shipping* and *Thalassini* cases, provides a good basis for the positive adoption of the doctrine by South African courts. There are, however, also warning signs emanating from the American position that need to be heeded.

119 *Great River Shipping Inc v Sunnyface Marine Ltd* 1992 4 SA 313 (C).

120 *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* [1989] 2 All SA 436 (A) 448.

The African Principles on the Law Applicable to International Commercial Contracts

Proposal to Include a Provision on the *Ex Officio* Application of the Foreign Law

Béligh Elbalti*

> "Of course, foreign law is not fact: it is law although foreign. And, therefore, it seems illogical to treat it as fact."[1]

1 Introduction

In Prof Forsyth's seminal scholarly contribution in the field of private international, the recurrent emphasis on the importance of the idea of "uniformity of decision" (also called "decisional harmony") as a major purpose of modern private international law is noteworthy.[2] In the words of Prof Forsyth, "the quest for uniformity of decision is a fundamental – indeed the central – purpose of private international law".[3] For Forsyth, "[this] quest for harmony of decision is a consequence of the desire to ensure that justice depends as little

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1 C F Forsyth *Private International Law – The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012) 109.

2 See *eg* Forsyth (2012) 70-73; C F Forsyth "The Provenance and Future of Private International Law in Southern Africa" 2002 *JSAL* 60 74; C F Forsyth "The Eclipse of Private International Law Principle? The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era" 2005 *Journal of Private International Law* 93 100; C F Forsyth "Certainty versus Uniformity: *Renvoi* in the Context of Movable Property" 2010 *Journal of Private International Law* 637 646; C F Forsyth "Characterisation Revisited: An Essay in the Theory and Practice of the English Conflict of Laws" 1998 *Law Quarterly Review* 141 158; C F Forsyth "The Value of the Comparative Ethos to the Judicial Process in the Conflict of Laws" in Visser (ed) *Essays in Honour of Ellison Kahn* (1989) 151 154; and C F Forsyth "A Modest Defense of *Renvoi*" 2009 *TSAR* 135 136. In the latter at 141, Prof Forsyth, talking about the principle of uniformity of decision, says that he "[p]erhaps ... over-stressed it".

3 Forsyth (2005) 100; Forsyth (1989) 154; Forsyth (1998) 158; and Forsyth (2010) 646.

as possible on the court in which a matter happens to be heard".[4] Although Prof Forsyth acknowledges that achieving uniformity of decision is "a Utopian dream" and an "unattainable ideal", he also recognises that it is a dream or ideal that is "worth striving after".[5] Therefore, it is not surprising that Prof Forsyth expresses his disagreement with what he called "the occasional writer who rejects uniformity in terms",[6] or strongly criticises the theories that undermine the pursuit of this objective.[7]

The African Principles on the Law Applicable to International Commercial Contracts (hereafter, "the African Principles" or "the Principles")[8] undoubtedly

4 Forsyth (2002) 74. *Cf* Forsyth (2009) 141; Forsyth (2005) 100; Forsyth (1989) 155; and Forsyth (2010) 646.

5 Forsyth (2012) 5, 72, 73. In support of his ideas, Forsyth approvingly cites the following insightful passage from Sir Otto Kahn-Freund *General Problems of Private International Law* (1976) 323-324 (also published in 1974-III *Collected Courses* 469-470): "The pursuit of harmony is the principal task of those who make it their concern to think about private international law .... An immense intellectual effort has been invested in this discipline for many centuries. If any result commensurate with this effort is ever to be achieved, a clear vision of the ideal of harmony must be combined with an equally clear insight into the social facts which will ever prevent it from being attained. Only those advance society – this is a commonplace – who combine the qualities of Don Quixote with those of Sancho Panza. Many will never be able to see more than a tilt at windmills .... Sometimes they may even be right. But one hopes that there will always at least be some who can see that these hazards are giants of injustice, and who will, as best they can, try to overcome them." This passage if often cited by Forsyth. See *eg* Forsyth (2002) 74-75; Forsyth (2005) 101; Forsyth (2010) 647; Forsyth (1989) 155; and Forsyth (1989) 136-137.

6 Forsyth (2012) 72 fn 284 responding to Prof Hartley's assertion that "attempts to attain international uniformity of result are futile". See T C Hartley *International Commercial Litigation* (2009) 8. Indeed, Prof Hartley not only rejects uniformity of result as a "grand objective" of private international law, but also considers that the attempts to achieve this objective "can be positively harmful".

7 Forsyth (2012) 72 describing "Caver's result selection" as a "pragmatic morass", Currie's governmental interest analysis as "unworkable" and Ehrenzweig's recourse to the *lex fori* as "savage". On these theories, see also Forsyth (2012) 62-67.

8 On the African Principles, see J L Neels *African Principles on the Law Applicable to International Commercial Contracts* (2023); J L Neels "The African Principles on the Law Applicable to International Commercial Contracts – A First Drafting Experiment" 2020 *Uniform Law Review/Revue de droit uniforme* 426; J L Neels "International commercial law emerging in Africa" 2022 *Potchefstroom Electronic Law Journal* (Special Edition: *Festschrift Charl Hugo*) 1; J L Neels "The Southern African Development Community and the African Principles on the Law Applicable to International Commercial Contracts" in M R Phooko, L T Chigowe and H 'Nyane (eds) *The Development and Application of SADC Community Law in Member States* (2023) ch 8; J L Neels "Novel Aspects of the Proposed African Principles on the Law Applicable to International Commercial Contracts" 2024 *TSAR* 247; J L Neels and E A Fredericks "An Introduction to the African Principles of Commercial Private International Law" 2018 *Stell LR* 347; and J L Neels

strive to achieve this objective.[9] The Principles, drafted under the auspices of the Research Centre for Private International Law in Emerging Countries at the University of Johannesburg, "set forth general principles for determining the law applicable to international commercial contracts" (Preamble 1). While the principle of uniformity of decision is not explicitly articulated in the instrument, it goes without saying that the very purpose of such a choice of law instrument of this kind is to achieve this objective.[10] Indeed, the Principles aim to establish a harmonised general framework of choice of law in international commercial contracts that "may be used as a model for national, regional, and supranational legislative instruments in Africa" (Preamble 2). They "may [also] be used by African courts in the interpretation, supplementation and development of the rules of private international law of contract" (Preamble 3). More explicitly, Article 16 of the Principles refers to the "need to promote uniformity" in the interpretation and application of the instrument. This is in line with Prof Forsyth's thoughts: he considers that achieving uniformity may not only be accomplished by adopting identical choice of law rules, but also – and probably more importantly – by ensuring uniform interpretation. It is through such a uniform interpretation and application that one can "advance harmony of decision".[11]

It is worth noting, however, that the adoption of a harmonised system of choice of law rules alone may not be sufficient to achieve this laudable objective. As has been rightly pointed out, "[w]ithin a harmonized system of law, the absence of a common set of rules governing the *application of foreign law* can have a devastating effect …; *it hampers decisional harmony* …" (emphasis added).[12] This, in turn, risks creating "a real and insurmountable weakness in the whole process of harmonization that is capable of undermining the very effectiveness of the designated common system of choice-of-law rules".[13] Such statements are undeniably true. This is particularly crucial in the field of international contracts, where the principle of party autonomy is significant. It is indeed widely acknowledged that this "quasi-universal"[14] principle of

and E A Fredericks "The African Principles of Commercial Private International Law and the Hague Principles" in D Girsberger, T Kadner Graziano and J L Neels (gen eds) *Choice of Law in International Commercial Contracts – Global Perspectives on the Hague Principles* (2021) 239.

9 *Cf* Jan L Neels, the leading drafter of the African Principles, who explicitly refers to the "ideal of harmony of decision" as defended by Forsyth (2012) 72-73. See Neels (2023) ch 8, sec 3.

10 *Cf* Forsyth (2005) 112.

11 Forsyth (2005) 105.

12 E Mota "Harmonization of Private International Law in Europe and Application of Foreign Law: The 'Madrid Principles' of 2010" 2011 *Yearbook of Private International Law* 273 275.

13 Mota (2011) 275.

14 Girsberger, Kadner Graziano and Neels "General Comparative Report" in Girsberger *et al* (2021) 18 par 1.41 stating that "[i]t is one of the quasi-universally recognized

law plays an instrumental role in "increasing legal certainty for the parties in cross-border transactions and reducing incentives for (the harmful version of) forum shopping".[15] These advantages of certainty, predictability and prevention of forum shopping weaken when the application of the foreign law would ultimately depend on the uncertainty of its procedural status.

Given the crucial nature of party autonomy in enhancing certainty and predictability and in line with Prof Forsyth's cherished ideal of "uniformity of decision", this paper argues for the inclusion in the African Principles of a provision dealing with the application of foreign law in international commercial contracts. To substantiate this proposal, the paper will proceed as follows: section 2 will succinctly describe the position of African legal systems on the status of foreign law. Section 3 will then briefly elaborate on the need to adopt a harmonised position on this matter. Thereafter, section 4 will present the author's proposal, together with a concise commentary. Finally, section 5 will offer some concluding remarks.

2 Foreign Law before African Courts

2.1 General Remarks

Although it has been acknowledged that the application of foreign law is "an object directed by consideration of justice, convenience [and] the necessity of international intercourse between individuals",[16] the question of the treatment of foreign law often raises various theoretical and practical issues. These include (1) the obligation of the courts to apply foreign law *ex officio*; (2) the interpretation and correct application of the foreign law; (3) methods of proof of foreign law; (4) consequences of the misapplication of the foreign law, etc. For the sake of brevity, only issue (1) will be addressed here.

In this regard, a general distinction is made between jurisdictions which regard foreign law as "law" (hereinafter the "foreign-law-as-law approach") and those which regard foreign law as "fact" (hereinafter the "foreign-law-as-fact approach").[17] Traditionally, civil law jurisdictions are associated with the former, while common law jurisdictions are associated with the latter, though

principles of private international law that parties can make use of their autonomy in an international setting". *Cf* S C Symeonides "The Story of Party Autonomy" in Girsberger *et al* (2021) 129 par 2.02 describing party autonomy as "a universal principle of private international law".

15 A Mills *Party Autonomy in Private International Law* (2018) 75.

16 International Court of Justice, Judgment of 28 November 1958, 1958 *ICJ Report* 94.

17 C Espulgues "General Report on the Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe (Project JLS/CJ/2001-1/03)" in C Espulgues, J L Iglesias and G Palao (eds) *Application of Foreign Law* (2011) 8; and C Esplugues and G Palao "Foreign Law, Application and Ascertainment" in J Basedow, G Rühl, F Ferrari and P D M Asensio (eds) *Encyclopedia of Private International Law* Vol I (2017) 796.

exceptions and considerable variations exist within these categories.[18] Under the foreign-law-as-law approach, the obligation to raise the question of the application of the foreign law and to establish its content, primarily lies with the judge. Under the foreign-law-as-fact approach, on the other hand, the application of the foreign law depends on it being pleaded by the parties and having its content ascertained by them.

These two different approaches have some important legal and procedural consequences. Under the foreign-law-as-law approach, the judge is mandated to raise this issue *ex officio* and to decide the case in application of the law designated by the choice of law rule, even if the parties do not invoke the application of the foreign law. Conversely, under the foreign-law-as-fact approach, not only is the onus on the parties to plead the application of the foreign law, but its application also depends on the parties establishing the content of the foreign law to the satisfaction of the court.[19]

2.2 Situation in Africa – A Preliminary Comparative Overview

In Africa, although legal systems are marked by their diversity and legal pluralism,[20] they can be broadly categorised for the purpose of this paper into three categories: civil law jurisdictions, common law jurisdictions and mixed (common law and civil law) jurisdictions.[21] As demonstrated below, the majority of African jurisdictions examined here follow the foreign-law-as-fact approach, making it the predominant one across the continent.

2.2.1 *Jurisdictions that follow the foreign-law-as-fact approach*

i. It is admitted in common law jurisdictions such as Ghana[22] or Nigeria[23] that foreign law is a question of fact that must be pleaded and proved by the parties invoking its application, failing which the *lex fori* applies. This rule is similarly followed in other common law jurisdictions such as Gambia, Sierra Leone, Uganda, Kenya, Tanzania, Malawi and Zambia.[24]

18 Y Nishitani "Treatment of Foreign Law: Dynamics towards Convergence? – General Report" in Y Nishitani (ed) *Treatment of Foreign Law: Dynamics towards Convergence?* (2017) 11.

19 Nishitani (2017) 17-20.

20 *Cf* U Kischel *Comparative Law* (2019) 631.

21 Herbert Smith Freehills (ed) *Dispute Resolution in Africa – A Multijurisdictional Guide* (2022) 8-9. *Cf* Neels (2023) who uses the same classification for SADC countries.

22 See *eg* R F Oppong "Ghana" in J Basedow, G Rühl, F Ferrari and P D M Asensio (eds) *Encyclopedia of Private International Law* Vol III (2017) 2112 2114; and R F Oppong *Private International Law in Ghana* (2012) 29.

23 Oppong "Nigeria" in Basedow, Rühl, Ferrari and Asensio (2017) 2378 2380; and C Okoli and R F Oppong *Private International Law in Nigeria* (2020) 18.

24 See R F Oppong "Commonwealth Africa: Foreign Law in Commonwealth Courts" in Nishitani (ed) (2017) 601; and R F Oppong *Private International Law in Commonwealth Africa* (2013) 12-23.

ii. The foreign-law-as-fact approach is also followed in many African mixed jurisdictions such South Africa,[25] as well as in the other Roman-Dutch common law jurisdictions including Botswana, Eswatini, Lesotho, Namibia and Zimbabwe.[26] Similarly, in Cameroon, it is generally admitted that foreign law is considered as a fact, and unless one of the parties invokes its application, the judge will disregard it.[27]

iii. In several African civil law jurisdictions, particularly in francophone African countries, it is recognised that foreign law is generally treated as a matter of fact and that national judges are not permitted to *ex officio* raise the question of its application.[28] In some jurisdictions, the status of the foreign law as fact is determined by legislation, such as Article 850 of the Senegalese Family Code, which places the burden to invoke the application of the foreign law on the parties[29] Similar provisions are found in the Republic of Congo (*Congo Brazzaville*)[30] and Togo.[31] In other jurisdictions, such as Côte d'Ivoire[32] and the Central African Republic,[33] in the absence of a statutory rule on the status of foreign law, some published decisions suggest that the courts will not address the issue if the parties do not raise it. In Egypt,[34] the Supreme Court has consistently declared that "the foreign law is no more than a material fact" that has to be proved before the court. The burden of

25 Although the traditional position has been altered significantly by statute. See E Schoeman "South Africa" in Basedow, Rühl, Ferrari and Asensio (2017) 2515 2517; and E Schoeman, C Roodt and M Wethmar-Lemmer *Private International Law in South Africa* (2014) 44-45. For details, see, Forsyth (2012) 108-120.

26 See Oppong (2017) 601; and Oppong (2013) 12-23.

27 See J D Tchunkam "Le Juge Camerounais et l'Application de la *Lex Fori*" 2011 *Revue Africaine des Sciences Juridiques* 9 10 referring to the "unfortunate trend" in Cameroonian law to systematically apply the *lex fori*.

28 See *eg* A A Diouf "Libres Propos sur le Statut Personnel dans le Droit International Privé des Etats d'Afrique Noire" 2019 *Revue Critique de Droit International Privé* 723 729.

29 Art 850 of Senegalese Family Code (Law No 72-61 of 12 June 1972) states as follows: "[1] The content of foreign law is established before Senegalese courts, by any means, by the litigant who invokes it and, if necessary, at the judge's discretion. [2] Judges may refer to their personal knowledge of a foreign law considered as a general fact accessible to all. [3] Trial Judges (*juges du fond*) shall verify the meaning and scope of foreign laws. [4] In the event of failure to apply foreign law because its content cannot be established, or if the parties waive its application, Senegalese law is applied."

30 Art 828 of Congolese Family Code (Law No 073/84 of 17 October 1984).

31 Arts 728-729 of Togolese Persons and Family Code (Ordinance No 80-16 of 31 January 1980, as subsequently amended).

32 V L Idot "Chronique de Jurisprudence de Côte d'Ivoire" 1990 *Clunet* 1009 1011.

33 Central African Supreme Court, Ruling of 9 November 1989, 1989 *Recueil Penant* 348.

34 See *eg* K El Chazli "Recognition and Enforcement of Foreign Decisions in Egypt" 2013/2014 *Yearbook of Private International Law* 387 392-393 and I Shehata *Arbitration in Egypt* (2021) 9, both considering that foreign law is treated as fact. *Cf* N Yassari "Egypt" in Basedow, Rühl, Ferrari and Asensio (2017) 2053 2057 indicating that "it remains unclear … whether the parties must plea and prove foreign law."

proof usually lies on the party who invokes its application.[35] In Ethiopia, the Supreme Court has taken the extreme position of considering that the private international law treatment of a given case brought before Ethiopian courts depends on pleading the foreign law by the parties; otherwise the case would be treated as purely domestic.[36]

2.2.2 *Jurisdictions that follow the foreign-law-as-law approach*

In other jurisdictions, primarily classified as belonging to the civil law group, the foreign law-as-law approach prevails. For example, countries such as Angola[37] and Mozambique[38] empower their courts to apply foreign law *ex officio* and to determine its content even in the absence of pleadings by the parties.[39] Similarly, the law in Burkina Faso[40] and Tunisia[41] requires judges to raise and apply foreign law *ex officio* in disputes involving more than one legal order. This requirement is explicitly stated in article 1004 of the Burkina Faso Persons and Family Code[42] and

35 See *eg* Supreme Court, Appeal No 9139 of 22 June 2015; Appeal No 6216 of 11 February 2002; and Appeal No 2317 of 8 February 1996. However, according to the Supreme Court, the judges may have a certain role to play if they have or are supposed to have knowledge about the content of the foreign law.

36 For Ethiopia, see *Global Hotel plc v Mr Nicolas As Papachat Zis* [2009] Federal Supreme Court Cassation Division, File No 28883, Vol 5, 375-377, cited and critically discussed in M T Setgen "Legislative Inaction and Judicial Legislation under the Ethiopian Private International Law Regime: An Analysis of Selected Decisions of the Federal Supreme Court's Cassation Division" 2020 *Journal of Private International Law* 112 127-131.

37 M Vicente "Angola" in Basedow, Rühl, Ferrari and Asensio (2017) 1864 1865

38 M Vicente "Mozambique" in Basedow, Rühl, Ferrari and Asensio (2017) 2053 2054.

39 See Art 348 of the Angolan and Mozambican Civil Code (enacted in Portugal by the Decree-Law No 47.344 of 25 November 1966 as extended to Portuguese Overseas Provinces [including Angola and Mozambique] by Ordinance No 22.869 of 4 September 1967), which states as follows: "1) It lies on the party who pleads customary, local or foreign law to prove its existence and content; but the court must seek knowledge of it in its own motion. 2) The court shall also take notice of local and foreign law in its own motion where it had to decide on the basis of such law and neither party has invoked it or the adverse party has admitted its existence and content or has not opposed to its application. 3) In case of impossibility to determine the content of the applicable law, [the *lex fori* shall apply]."

40 See P Meyer *Droit International Privé Burkinabé et Comparé* (2017).

41 I Gallala-Arndt "Tunisia" in Basedow, Rühl, Ferrari and Asensio (2017) 2581 2584-85. For a detailed study, see L Chedly and B Elbalti "Tunisia: Treatment of Foreign Law in Tunisia" in Nishitani (ed) (2017) 583.

42 Art 1004 of the Persons and Family Code (Zatu An VII 13 of 16 November 1989) states as follows: "The court shall apply *ex officio* the rules of conflict of laws set out in the provisions of this chapter and the foreign law competent under those rules." According to Art 1008, "[1] The content of foreign law is established *ex officio*. To this end, the judge may order an expert appraisal or request the cooperation of the parties; he or she is sovereign in assessing the evidence provided. [2] The applicable provisions of foreign law are interpreted in accordance with the system to which they belong and

Article 28 of the Tunisian Code of Private International Law.[43] In other countries such as Algeria or Morocco, the same rule is generally accepted in literature and case law despite the absence of an explicit provision.[44]

3 The Need to Include a Principle on the Status of the Foreign Law

As mentioned earlier, the African Principles seek to establish a harmonised framework for determining the law applicable to international commercial contracts[45] "in light of the ideal of harmony of decision".[46] This is achieved primarily by: (i) assigning a central role to party autonomy (Article 3), (ii) allowing the parties to choose also non-state law under some conditions (Article 4), (iii) clarifying the modalities of choice of law (Article 5), and (iv) determining which law applies in the absence of choice of law (Article 6).[47]

The crucial question, however, is whether this comprehensive and detailed harmonised framework could help achieve uniformity of decision across the continent if implemented by African jurisdictions. In the jurisdictions that adhere to the foreign-law-as-law approach, achieving uniformity of decision

in accordance with the rules of interpretation laid down by that system. [3] Where the content of foreign law cannot be established, Burkina Faso law is applied."

43 Art 28 of the Tunisian Code of Private International Law (Law No 98-97 of 27 November 1998) reads as follows: "The conflict-of-laws rule is *imperative* when its object is a category of rights over which the parties cannot dispose freely (par 1). In other cases, the conflict-of-laws rule *is binding upon the judge unless the parties expressly manifest their willingness to preclude its application* (par 2)" (emphasis added).

44 For Algeria, see *eg* Zarūtī *Al-Qānūn al-Duwalī al-Khāṣ ʿilman wa ʿamalan [Algerian Private International Law in Theory and Practice]* (2010) 13. Some Supreme Court decisions, without being explicit, do suggest that Algerian judges are bound by the choice of law rules. See *eg* Ruling No 48855 of 10 April 1988; Ruling No 107604 of 27 April 1994. For Morocco, see M Loukili "L'ordre public en droit international privé marocain de la famille" in N Bernard-Maugiron and B Dupret (eds) *Ordre public et droit musulman de la famille: en Europe et en Afrique du Nord* (2012) 127 134.

45 *Cf* T E Coleman "Re-Assessing the African Principles on the Law Applicable to International Commercial Contracts through the Prism of African Traditional Values" 2024 *TSAR* 75 76.

46 Neels (2023). See n 9.

47 The other provisions deal with other fundamental issues including *inter alia*: the material scope of application (Art 1); the existence and material validity of the contract (Art 8); formal validity (Art 9); *renvoi* (or its exclusion unless the parties agree otherwise, Art 10); overriding mandatory rules (Art 11); public policy (Art 12); and the scope of the applicable law (Art 13). For details, see references cited in n 8. For a devoted comment on the African Principles, see C S A Okoli and R F Oppong "Enhancing the Draft African Principles on the Law Applicable to International Commercial Contracts: Innovations for the African context" 2024 *Rabels Zeitschrift* 694. For a reassessment of the African Principles from the point of view of the so-called "African traditional philosophy and values", see Coleman (2024).

may be more feasible, as the courts would apply the same law regardless of whether the parties raise the issue of its application. However, the situation differs in the jurisdictions that adhere to the foreign-law-as-fact approach. Here, the foreign law applicable under the instrument (which may be the law chosen by the parties) would be automatically supplanted by the *lex fori* if the parties fail to raise its application. Consequently, the principles of party autonomy, predictability, and the pursuit of uniformity of decision through harmonisation, as promoted by the Principles, can be significantly compromised under the existing systems, hence the need to include an additional principle in the African Principles that addresses the status of the foreign law.

4 Proposed Principle on the *Ex Officio* Application of the Foreign Law

Based on the foregoing, the present author proposes the inclusion of the following provision:

> *Article 16*bis – Ex officio *application of the law applicable by virtue of this instrument*
>
> 1. The law applicable to the dispute by virtue of this instrument shall be binding on the judge, who shall apply it *ex officio*, unless the parties expressly or impliedly manifest their intention to decline its application.
> 2. The law applicable to the contract by virtue of this instrument shall be applied irrespective of the nationality of the party invoking or claiming its application, subject to articles 11 and 12.[48]
> 3. The judge shall determine, within the limits of its knowledge and within a reasonable time, the content of the law applicable by virtue of this instrument. Where necessary, the judge can request the assistance of the parties, in particular the party whose claim is based on the law applicable by virtue of this instrument.
> 4. The ascertainment of the content of the foreign law is governed by the procedural rules of the court seized. The parties may submit affidavits, expert opinions or any other reliable sources to prove the content of the applicable law.
> 5. If it is not possible to determine the law applicable by virtue of the present instrument, the *lex fori* shall apply.

The proposed provision addresses the principle of *ex officio* application of the law applicable to international commercial contracts by virtue of the African

48 Arts 11 and 12 deal respectively with overriding mandatory rules and public policy.

Principles. This is in line with the general trend observed in similar proposed instruments.[49]

i) Paragraph 1 provides that the law applicable by virtue of this instrument is binding on the judge. This means that the judge cannot simply ignore the application of the *lex contractus* under the cover of its procedural status as a fact. At this stage of the process, even if the parties fail to invoke the foreign law's application, the judge should raise the issue *sua sponte*.

However, the parties are entitled to decline the application of the *lex contractus* by expressing their intention to do so either explicitly or implicitly.[50] For example, if the parties include in their contract a choice of law clause designating the law of State X, nothing prevents them from subsequently agreeing on the application of the *lex fori*. The parties' procedural behaviour, especially in the absence of an *express* choice of law agreement, may indicate their intention to decline the application of the *lex contractus*. For example, if the parties base their claims and arguments on the *lex fori*, irrespective of the law applicable to the contract, the non-application of the *lex contractus* can be regarded as based on the implied agreement of the parties.[51]

The purpose of the proposed principle is to ensure that the *lex contractus* is respected and applied. This is particularly important where the parties have agreed on the law governing their contract. It also provides flexibility to take into account the procedural convenience of the parties who, depending on the circumstances of the case, may seek to avoid the application of the *lex contractus.*

ii) Paragraph 2 provides that the law applicable by virtue of this instrument shall be applied irrespective of the nationality of the parties. In some jurisdictions, the application of the *lex contractus* may depend – directly or indirectly – on the nationality of the parties invoking or relying on the foreign law. For example, if party A sues party B for breach of contract in State Y (State of party B) and bases

49 See Principle IV of the Madrid Principles 2010, in Mota (2011) 297, reproduced in Espulgues, Luis Iglesias and Palao (eds) (2011). Also see art 7 of the Asian Principles of Private International Law in W Chen and G Goldstein "The Asian Principles of Private International Law: Objectives, Contents, Structure and Selected Topics on Choice of Law" 2017 *Journal of Private International Law* 411 428.

50 This part is a modified version of Art 28 of the Tunisian Code of Private International Law (n 43), which allows the parties to elude the applicability of the foreign applicable law by means of what is called a "procedural agreement" in the common law. However, Tunisian law does not allow that the law normally applicable be set aside on the basis of an implied or presumed agreement of the parties. See Chedly and Elbalti (2017) 587-588. In this regard, Art 28 can be regarded as too rigid in the sense that it does not sufficiently take into account the procedural convenience of the parties.

51 As a possible example of this approach, see the Bahraini High Court, Case No 5/11341/2023/02 of 4 January 2024. In this case, the High Court held that there was an implied agreement to apply Bahraini law in lieu of the law chosen by the parties (Cayman Islands law in casu) because both parties based their claim on the provisions of Bahraini law and relied on relevant Bahraini Supreme Court decisions.

its claim on the law of that State in disregard of the choice of law agreement designating the law of State X (State of party A), the court hearing the case in State Y cannot refuse to apply the chosen law on the ground, for example, that party A in whose favour the choice of law was made, has waived the application of the law that serves its interests and preferred the application of the law of the State of party B. In other words, it cannot be considered that party B has no legal interest in resisting the application of its "national law" by invoking the foreign law applicable under the Principles. The same rule should apply in a case where the applicable law is objectively determined in the absence of a choice of law by the parties.[52]

iii) Paragraph 3 clarifies the role of the parties and the judge in determining the content of the applicable law. Since the application of the foreign law is binding on the judges by virtue of the proposed provision, they will be required, within the limits of their knowledge and within a reasonable time, to ascertain its content. However, considering the practical difficulties that can be associated with the application of foreign law, the judges may, if they deem it necessary, request the assistance of the parties, in particular the party invoking the application of the foreign law.[53]

iv) Paragraph 4 deals with the method of proving the foreign law. While the procedural rules of the forum regarding evidence should be observed in principle, the proposed provision facilitates the proof of the foreign law. Indeed, the courts should avoid placing insurmountable hurdles for establishing the content of the applicable law. The parties should be entitled to use reliable (but not necessarily official or officially authenticated) sources to prove the content of the foreign law. For example, the parties may also rely on textbooks, law journals and reviews. In addition, the parties may submit affidavits, expert opinions or court decisions showing the application or interpretation of the

52 The facts of this scenario are taken from the Tunisian Supreme Court Decision No 80352 of 9 February 2021. In this case, the court ruled that the Tunisian party had no interest in relying on the law objectively applicable according to the Tunisian choice of law rules. For the Supreme Court, "since X [Belgian seller] expressly manifested its intention to not to be subject to Belgian law despite the fact that it is the party assuming the obligation which is decisive for the characterization of the contract and preferred the application of Tunisian law, and [since] Y [Tunisian buyer] did not show that it has an interest in the non-application of its national law, therefore the conclusion reached by the court of appeal to exclude the application of Belgian law is correct and is consistent with the right and legal conclusion for the dispute".

53 This rule is found in a number of legal systems (Chen and Goldstein (2017) 429) including some African jurisdictions. See *eg* Tunisia (Art 32 *al* 3 of the Code of Private International Law); Burkina Faso (Art 1008 of the Persons and Family Code); Mozambique and Angola (Art 348(1) of the Civil Code); Senegal (Art 850 *al* 1 of the Family Code); Togo (Art 728 *al* 1 of the Persons and Family Code); and Congo Brazzaville (Art 828 *al* 1 of the Family Code).

applicable rules. In any case, the evidence submitted by the parties is subject to the court's assessment.

v) Paragraph 5 deals with the scenario where it proves impossible to determine the content of the foreign law. In this case, the *lex fori* shall apply.[54] The rule is in line with the general trend observed under domestic legislation in many African countries[55] and widely accepted in legal systems around the world.[56] It is also endorsed by some recently proposed similar instruments.[57]

5 Concluding Remarks

This paper argues for the inclusion of a principle that requires national judges to *ex officio* raise the question of the application of the foreign law designated under the African Principles. Given the clearly articulated objectives and goals of the Principles,[58] the application of foreign law should not be left to the vagaries of procedural status of the foreign law under domestic law. The absence of a common system governing the application of foreign law fosters forum shopping by the parties and promotes parochialism and recourse to the *lex fori* by national authorities.[59]

However, the present author acknowledges that implementing this proposal is far more challenging than proposing it. As Forsyth noted, the entrenched practice of treating foreign law as a matter of fact in legal systems where judges play a passive role[60] seems difficult to change without significant alterations to the existing legal framework.[61] Forsyth even suggests that there seems to be little point in debating an alternative view, dismissing

54 This is often referred to as the principle of subsidiary application of the *lex fori*.

55 Tunisia (Art 32 of the Code of Private International Law); Burkina Faso (Art 1008 of the Persons and Family Code); Mozambique and Angola (Art 348(3) of the Civil Code); Senegal (Art 850 *in fine* of the Family Code); Togo (Art 729 *in fine* of the Persons and Family Code); and Congo Brazzaville (Art 828 *in fine* of the Family Code).

56 See Chen and Goldstein (2017) 429.

57 See Principle IX of the Madrid Principles 2010 (n 49); and Art 7 of Asian Principles (n 49).

58 These include fostering "sustainable economic growth on a long-term basis" and establishing "a reliable transnational legal infrastructure in respect of international commercial law, including commercial private international law" as "a prerequisite for investor confidence, inclusive economic growth, sustainable development, and ultimately, the alleviation of poverty on the African continent". See Neels (2022) 10.

59 Mota (2011) 275.

60 Forsyth (2012) 109 defines a passive judge as "a judge who sees his task, in civil litigation … as the settlement of disputes between individuals" as opposed to the "active judge", who sees "interest in the proper application of the civil law". The former "does not concern himself with" the application of the foreign law if not raised and proved by the parties. The latter "may, *suo motu*, raise the question of foreign law, investigate it and apply it, even against the will of the parties": Forsyth (2012) 109 fn 8.

61 Forsyth (2012) 109.

"strident proponents" who argue that foreign law should be treated as law.[62] However, such statements may oversimplify Forsyth's position, as he himself acknowledges that "[t]here is nothing inherent in the nature of foreign law that ordains how it is to be treated", and that adjustments can be made.[63] This is evidenced by legislative changes, such as South Africa's Law of Evidence Amendment Act 45 of 1988, which,[64] in Forsyth's words, has "markedly" changed the common law, and now "obviously dominates the law in this area".[65]

Finally, along with the proposal to include the principle of the *ex officio* application of the foreign law, the present author considers it essential to create an institution of comparative law at the continental level. The main role of this institution would be to assist judges in deciding cases involving the application of foreign law,[66] and to provide an adequate framework that facilitates academic research in order to contribute in fostering "international uniformity".[67] The Research Centre for Private International Law in Emerging Countries at the University of Johannesburg can play a leading role in this regard.[68] Fostering judicial cooperation and information-sharing mechanisms among African countries by way of international conventions should be also be considered.[69] The African Union can serve as an appropriate forum for discussing and implementing such initiatives.

In any event, it is hoped that this proposal will stimulate insightful discussions to ensure that the pursuit of "uniformity of decision" translates into concrete outcomes rather than remaining a hollow slogan, as it should always be borne in mind that "[t]he ideal of … uniformity is not an aesthetic caprice of academics: it is … a requirement of justice".[70]

62 Forsyth (2012) 109.

63 Forsyth (2012) 110 remarks: "[a]lthough a passive judge – who does not *suo motu* raise the applicability of foreign law – seems to go hand in hand with the requirement that foreign law be proved, this need not necessarily be so".

64 According to sec 1 of the Law of Evidence Amendment Act, "[a]ny court may take judicial notice of the law of a foreign state … in so far as such law can be ascertained readily and with sufficient certainty". As Forsyth puts it, "now it is no longer necessary to prove foreign law in every case; where the foreign law 'can be ascertained readily and with sufficient certainty' judicial notice can be taken of the foreign law": Forsyth (2012) 108.

65 However, the common law continues to have some role to play, especially when the statutory framework does not apply. See Forsyth (2012) 108.

66 The models of the Swiss Institute of Comparative Law, or the Max Planck Institute for Comparative and International Private Law can be considered for guidance.

67 On the "values" of comparative law for both judges and jurists, and the important role it can play in achieving "international uniformity", see Forsyth (1989) 153.

68 The Research Centre has already been playing this role. See Neels (2023) under section 2.

69 On these aspects from a Tunisian perspective, see Chedly and Elbalti (2017) 599-600.

70 Forsyth (2012) 73, approvingly citing Sir Otto Kahn-Freund (1976) 323.

Enforcing Trade-Related Contractual Claims in South Africa

*Gerhard Erasmus**

1 Introduction: International Trade and the Protection of Private Parties

International trade agreements are concluded by sovereign States. Once these agreements have entered into force, the State parties must comply with their obligations to liberalize trade and to regulate trade-related matters in the manner agreed upon.

Many essential aspects of these agreements are implemented through domestic measures. Tariffs on imports are, for example, listed in schedules annexed to trade agreements but are levied and collected by national customs officials. They are guided by the National Tariff Book. International health and safety standards are checked by local inspectors before shipment or in final destinations. Certificates of origin are issued by national authorities before exporters can benefit from preferential rates in Free Trade Area (FTA) agreements or under preferential arrangements such as the Generalized System of Preferences (GSP) or the African Growth and Opportunity Act (AGOA). Intellectual property rights of foreigners are protected through national legislation, while trade in services is regulated via permits or guidelines issued by national regulators.

This is the practical side of trade governance. How are private parties protected when governments' trade regulating measures impinge on their rights or entitlements as traders, service suppliers or investors? The brief answer is that it depends on the type of measure complained about, the kind of protection sought, the nature of the rights invoked, and whether specific national procedures have been followed. It also depends on whether remedies are sought under municipal or international law.

International trade agreements provide, in certain instances, for remedies which may benefit private parties. Trade remedies,[1] safeguard measures[2] and investor-state dispute settlement mechanisms[3] are examples. However, standard

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1 In the form of anti-dumping or countervailing duties on imported goods.

2 Safeguard measures can be imposed when there is a sudden upsurge in imported goods as a result of trade liberalization commitments. They are conditional and are justified in order to provide domestic industries with temporary protection.

3 Bilateral investment treaties allow private investors to act directly against host States, usually through international arbitration.

international dispute settlement systems, such as the Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO) and dispute settlement procedures in FTAs, provide for inter-State dispute settlement only. These trade arrangements are member-driven. Private parties do not have standing before adjudicating bodies established under such arrangements.

It is only in "deep integration" regional arrangements, such as the European Union (and some African Regional Economic Communities (RECs))[4] that private parties will enjoy standing to bring their own claims. This is possible because the relevant inter-State agreements so provide. Claims by private parties must then be based on the relevant "community law" provisions. (International human rights agreements constitute a specialized body of law which may also guarantee private rights and claims, as agreed by the State parties, or when adopted in an international organization with the necessary powers. They are not discussed here.)

Under traditional member-driven trade arrangements, governments may act in response to requests by affected private parties with whom they have linkages in the form of nationality or domestic commercial presence. They may litigate in the available fora to settle claims about alleged violations of treaty obligations. When doing so, the objective is to enforce and protect the rights of the relevant State parties, not of private parties. Such proceedings start with consultations between the parties concerned. Most WTO disputes are resolved during the consultation phase. When consultations are unsuccessful, the DSU allows for the formation of a panel to hear and decide the matter. The Appellate Body (AB) will hear appeals against panel reports.[5]

Municipal law remedies may be available to private parties engaged in trade and commerce across borders. Firms and individuals affected by trade-related executive measures may petition national courts to review such measures to ensure rights to fair and reasonable administrative action are protected and that *ultra vires* exercises of official powers are set aside.[6] A typical example would be when an import or export permit is refused, or domestic trade restrictions are imposed.[7] In the African context (where governments never litigate against each other over trade issues) these remedies are of growing importance.

4 Examples are COMESA, the EAC and ECOWAS. The SADC Tribunal was abolished in 2011 after a ruling against Zimbabwe in a matter concerning the expropriation without compensation of private land. All 15 SADC members agreed to this step. They then adopted a new Protocol on a SADC Tribunal with jurisdiction to hear inter-State disputes only. This Protocol is not yet in force.

5 Since December 2019, the AB of the WTO cannot hear new appeals. The US refuses to agree to the appointment of new AB members.

6 The right to administrative justice is a standard provision in most modern constitutions. It requires officials to act fairly and reasonably and comply with the principles associated with the rules of natural justice.

7 See e.g. the Namibian case of *Matador Enterprises (Pty) Ltd (A 352/2013) and Clover Dairy Namibia (Pty) Ltd (A386/2013) v The Minister of Trade and Industry.* The High Court of

Other remedies may be available under specific national laws. Intellectual property and competition law afford protection against certain kinds of unfair private behaviour. Criminal sanctions may also be possible.[8]

In countries where the rule of law applies, domestic courts can be approached for orders to protect the rights of private parties. Rules-based trade governance is characterized by due process, transparency, accountability and the availability of effective judicial remedies.

Private parties (including foreigners with a local "commercial presence")[9] may invoke, where appropriate, the protection offered by a Bill of Rights. The fundamental rights therein are granted to "all persons" and serve as a check on all State action.[10] Private parties and firms can invoke the protection so provided if they have standing and the resources to petition the local courts.

How do private parties enforce trade-related contractual claims against other private parties incorporated in foreign jurisdictions? The contract in question will, as a rule, specify the applicable *lex contractus*, as well as how and where disputes under the contract in question will be heard.

In a judgment in 2019 by Fabricius J in the High Court of South Africa (Pretoria Gauteng Division),[11] the requirements of a unique piece of South African legislation, the Protection of Businesses Act 99 of 1978, were analysed in the context of a dispute between two private firms engaged in cross-border commercial transactions. It deals with the procedures (including Ministerial permission) for enforcing certain foreign judgments in South Africa. The Court had to examine the nature of the relevant ministerial discretion and whether administrative justice principles (e.g. rationality and reasonableness) had been complied with. In the course of the judgment the question arose whether this piece of legislation still belongs on the statute book.

Namibia heard two applications to review a notice issued by the Namibian Minister of Trade and Industry to restrict the importation of dairy products into Namibia. These measures were issued in terms of a government policy to protect the Namibian dairy industry, which, so it was argued, would otherwise suffer serious injury. The private applications (involving South African companies and their subsidiaries) succeeded.

8 Criminal sanctions are available against trademark counterfeiting and copyright piracy, as well as in the regulation of services (such as telecommunication services) for which licences are required. Legislation on import and export permits will include provisions on criminal offences. For further examples, see Arts 54 and 55 of the South African International Trade Administration Act 71 of 2002.

9 Mode 3 of the General Agreement on Trade in Services (GATS) of the World Trade Organization covers services provided by a locally established affiliate, subsidiary, or representative office of a foreign-owned and controlled company like a bank, hotel group, construction company or retailer. See https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s3p1_e.htm.

10 See e.g. sec 8 of the Constitution of the Republic of South Africa, 1996.

11 *Trademore (Pty) Ltd v Minister of Trade and Industry* (49321/2017) [2019] ZAGPPHC 591 (14 November 2019).

2 The Facts of the *Trademore* Case

The applicant, Trademore (Pty) Ltd, is a private company with its registered place of business in Sandton, South Africa. It trades in raw materials, grain and oil seeds for the animal feed markets of Southern Africa. The first respondent in this matter was the South African Minister of Trade and Industry, the Minister now responsible for certain decisions under the South African Protection of Businesses Act. The second respondent, NWK Agri-Services (Pty) (Ltd), is a private company registered in Zambia.[12]

The litigation history goes back to a contractual dispute between Agri-Services and Trademore. Agri-Services sued Trademore in the courts of Zambia for a loss suffered with regard to cotton seed sold to Trademore. Agri-Services claimed that Trademore had defaulted on an agreement concluded between them. On 23 May 2016, the Zambian High Court ruled in favour of the applicant. Trademore had to pay the amount claimed, with interest thereon.

It is this judgment which Agri-Services then sought to enforce in the South African courts. In order to start proceedings, it first had to obtain the permission of the South African Minister of Trade (the Minister) under the Protection of Businesses Act. This Act requires a prior decision by the Minister to allow the enforcement of a foreign judgment in respect of certain international commercial transactions. The Minister granted the required permission.

Trademore objected to the enforcement of the Zambian judgment in South Africa and sought a local court order to set aside the decision of the Minister. It argued that the ministerial permission given to Agri-Services had been granted irregularly. A successful application by Trademore would have prevented Agri-Services from enforcing its contractual claim in South Africa.

In November 2016 Agri-Services wrote to the South African Minister and sought permission to enforce the Zambian judgment in the South African courts. In March 2017, the Minister wrote to both parties and asked them to make written submissions as to whether such permission should be granted. Trademore requested the Minister to deny permission, claiming that the Zambian judgment is not enforceable under South African law (it argued that the Zambian court lacked the necessary jurisdictional competence), that enforcement would be against public policy, and that administrative law requirements had been ignored.

Since Trademore was unable to ascertain from the Act what factors should guide the Minister when exercising his discretion, it requested him to make these facts available and to explain his decision whether to grant the permission sought by Agri-Services.

Agri-Services submitted arguments to the effect that the Zambian judgment did not involve "multiple or punitive damages" as prohibited by the

12 The first respondent, the South African Minister of Trade and Industry, elected not to participate in these proceedings.

Act, and that jurisdictional issues are for the courts to decide. The Minister should therefore grant his consent.

In May 2017, the Minister informed the parties that he had decided to grant permission to Agri-Services to proceed. He was of the opinion that the Zambian judgment involved a transaction falling within the scope of the Act, that the Act was silent as to what specific factors had to be considered when deciding requests for local enforcement, and that Trademore's objections concerned factors which are subject to determination by a court of law. Because the Act was silent as to what aspects should guide the Minister, he was entitled to rely on the submissions of the parties. Having considered them, he found no reason to refuse the requested permission.

The judgment by the South African High Court discussed here concerns the application by Trademore for setting aside the decision by the Minister to allow Agri-Services to apply for the enforcement of the Zambian judgment in the South African courts. The applicant invoked administrative and constitutional law principles and argued that the Minster had failed to exercise his statutory discretion correctly, and that he had acted irrationally and unreasonably.

3 The South African Protection of Businesses Act and its Background

How did the Minister enter the picture and why is his decision necessary when foreigners apply for the enforcement of judgments against local firms? The answer goes back to the late 1970s when the then South African government adopted a very specific piece of legislation, the Protection of Businesses Act, in order to counter the enforcement of American anti-trust decisions. Relying on the "effects doctrine", the US courts gave American anti-trust laws extraterritorial effect and exercised jurisdiction over monopolistic agreements governing trade and commerce abroad.[13] Several countries objected to this American practice and enacted legislation to prevent the enforcement of these judgments. The United Kingdom, Canada, Australia and South Africa were among the states that adopted such laws.[14]

South Africa enacted the Protection of Businesses Act 99 of 1978 in order to protect local businesses. Section 1 thereof provides that, except with the permission of the Minister of Economic Affairs, "no judgment, order, direction, arbitration award, interrogatory, commission rogatoire, letters request or any other request delivered, given or issued or emanating from outside the Republic" shall be enforced in South Africa if it arises from an act "connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature,

13 Based on objective territoriality. See John Dugard *International Law. A South African Perspective* (2005) 152ff.

14 Dugard (2005) 153. South African companies (e.g. Anglo American) counted under the foreign uranium producers sued in the US for price fixing.

whether within, outside, into or from the Republic". This Act is still part of South African law.

4 Arguments and Findings

Trademore (the applicant in the matter) argued that the nature of the discretion conferred by the Act on the Minister was a wide one, not a narrowly defined one. Such discretions are bound by the principle of legality and must therefore be narrowed down by the purpose of the legislation in question.[15] It was contended that the Minister's decision was irrational in that there was no rational connection between his decision and the purpose of the empowering provision in the Act.

It was further claimed that the Minister had failed to apply his mind properly or adequately, in that he took irrelevant considerations into account and failed to consider relevant ones. He should have considered the purpose of the Act and its objectives. A material error of law had occurred in as much the Minister applied the wrong test, by concluding that permission is to be granted unless there is a reason not to do so.[16]

The crux of the matter turned out to be the essential purpose of the Protection of Businesses Act and what its text provides for. The Court ruled that the purpose of the Act is "to grant permission as a first step for enforcement proceedings in a Court of law, unless the act prohibited such".[17] The rationale behind the Act was to protect South Africans from the enforcement of foreign laws or judgments permitting the payment of punitive or multiple damages and from the overreach of US anti-trust legislation during the protectionist apartheid area. It further noted:

> This protectionist legislation was enacted at the time when an isolated apartheid regime was anxious to shield domestic businesses from foreign interferences. It is questionable whether its provisions are justified in the current era and in view of the safeguards which our law recognizes in the recognition and enforcement of foreign judgments in general.[18]

It was in this context that the court also referred to certain earlier judgments and relied on Forsyth's *Private International Law*,[19] where it was stated that

15 See e.g. *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) par 42–56 and *Janse van Rensburg v Minister of Trade and Industry* 2001 1 SA 29 (CC) par 25.

16 At par 36.

17 Par 39.

18 See par 42 and the authorities cited there.

19 C F Forsyth *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012) 466; see E Kahn "Conflict of Laws" 1984 *Annual Survey of South African Law* 566 567.

the Protection of Businesses Act was enacted "to protect South African companies from the far-reaching tentacles of American anti-trust legislation".[20]

The judgment added the following:

> It is important to note, as was submitted, that the granting of permission in terms of s 1(1) of the Act, does not limit any constitutional right of the party against whom execution was sought. Decisions in terms of s 1(1) must today therefore be exercised in favour of access to Courts, and not against it. The constitutional dispensation fundamentally changes the circumstances in which a Minister can be said lawfully to withhold permission to enforce a foreign judgment. The conclusion was therefore that there is in particular no lawful interpretation or exercise of discretion in terms of s 1(1) of the Act that prevents the execution of foreign judgments debt in ordinary commercial transactions….[21] If Trademore was entitled to any relief at all, it would lie in challenging the Act and not the Minister's decision-making in terms of the Act. As a result, the relief sought by Trademore cannot be granted.[22]

With respect to the administrative law requirement of rationality, the following was found:

> It is by now established law that rationality requires both of the Minister's process and the decision itself to be rational…. On the facts of the case, the Minister's decision was the only rational outcome in the circumstances of this case and again I agree with this contention. The process in my view was also rational and it was not concerned whether there were any better means to achieve the purpose but only whether the means actually employed were rationally related to the purpose for which the power was conferred…. In any event, it was not for the Court to replace the Minister's decision for its own preferred process. The means chosen to achieve a particular purpose must only reasonably be capable of accomplishing that purpose and need not be the best or only means….[23] The absence of guidelines in the Act alone does not render the Minister's decision irrational.[24]

With respect to the reasonableness requirement, the court observed that the test for reasonableness is "whether the Minister's decision is one that a

20 in par 43.
21 Par 48.
22 Par 52.
23 Par 55.
24 Par 56.

reasonable decision-maker could not reach. What is reasonable depends on the circumstances of the case…."[25]

The Court dismissed Trademore's application with costs:

> It is my view that the Minister acted rationally, reasonably and that the process he followed was fair. As I have mentioned, it is not for a Court to put its preferred process into the place of the Minister's. The end result is that I agree with Second Respondent's Counsel that the Act must be interpreted and applied in the context of the present constitutional dispensation and that one was quite entitled to say, as I do, that there was no reason for the Minister not to grant permission.[26]

5 Conclusion

Under apartheid rule South Africa was an isolated State and the target of international sanctions. The 1970s were also a different time; multilateral trade was conducted under the somewhat rudimentary rules of the General Agreement on Tariffs and Trade (GATT) of 1947. Fundamental changes occurred in the post-apartheid era. South Africa no longer faces economic sanctions and is a founding member of the WTO, which came into existence on 1 January 1995. The WTO established a unique rules-based multilateral trade regime. WTO agreements provide for safety valves and exceptions, as well as a dispute settlement system based on the *single undertaking* feature of that system.[27]

South African businesses no longer need the intricate and outdated mechanism of the Protection of Businesses Act, which was considered necessary in the 1970s. Local firms are active traders and investors in Africa and elsewhere.[28] They enjoy the benefits of many trade arrangements, which allow for preferential access to foreign markets. They should not be allowed to escape the consequences of normal commercial practice (such as the enforcement of contractual claims) by being allowed to invoke the archaic and outdated remedies of the Protection of Businesses Act. The application brought in the present case looks like an attempt to engineer a "remedy" which is not only unnecessary but also incompatible with contemporary law, conditions and logic.

25 Par 57.

26 Par 59.

27 In WTO negotiations, nothing is agreed until everything is agreed. The Member States must accept all the negotiated outcomes, including the obligations contained in the different WTO Agreements. This includes the jurisdiction of the Dispute Settlement Body over disputes between the Member States.

28 The Southern African Development Community and the Southern African Customs Union account for more than 70% and more than 50%, respectively, of all intra-African trade. South Africa is the dominant economy and exporter in sub-Saharan Africa (https://www.imf.org/external/pubs/ft/fandd/2018/09/sub-saharan-africa-regional-integration-arizala.htm).

The original Zambian judgment was about a business transaction relating to the sale of cotton seed between two commercial enterprises from different countries. It should be enforced. The fact that the two companies had originally been incorporated in different jurisdictions and that their transaction was a cross-border one does not change the basics: the need for legal certainty and the ability to enforce contractual claims.

International commerce needs the protection of the law as agreed by the parties when they concluded an agreement. As far as the enforcement of contractual claims is concerned, it is ultimately a matter of enforcement and access to the relevant courts. As the judgment states: "The relevant judgment relates to an ordinary business transaction relating to the sale of cotton seed between two companies. The only constitutional exercise of discretion in terms of s 1(1) of the Act must favour access to Courts and not *vice versa*."[29]

This is an important judgment. It provides guidance on the nature of judicial review of ministerial discretions and decisions: whether they have been exercised in a rational and reasonable manner and in conformity with the South African Constitution[30] and the Promotion of Administrative Justice Act.[31] It also clarifies a first-order issue: the meaning of the Protection of Businesses Act in the contexts of contemporary conditions, needs and constitutional values. This judgment will strengthen the rights and expectations of private parties engaged in cross-border commerce with firms based in South Africa. They enjoy more clarity, legal certainty and predictability now. However, they should be spared the inconvenience and delay associated with drawn-out litigation when grappling with this relic from a former era. The Protection of Businesses Act belongs to a period on which the book should be closed.

29 Par 53.

30 Constitution of the Republic of South Africa, 1996.

31 3 of 2000.

Contractual Capacity in South African Private International Law

*Eesa A Fredericks**

1 Introduction

This contribution investigates the contractual capacity of natural persons in South African private international law. A discussion of the views of the common-law authors is followed by an exposition of the legal position in this regard in contemporary South African law, including case law and the opinions of authors. There is authority in the South African conflict of laws for the application of legal systems such as the *lex situs*, the *lex domicilii*, the *lex loci contractus* and the proper law of the contract. The content of the relevant connecting factors is discussed first.

2 The Content of Relevant Connecting Factors in South African Private International Law

2.1 Introduction

According to South African private international law, the content of a connecting factor must be established by the *lex fori*.[1] Contractual capacity in South African private international law may be governed by the *lex rei sitae*, in which case the location (*situs*) of the property would be the connecting factor. It may be governed by the *lex loci domicilii*, where the domicile of the relevant individual

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1 *Ex Parte Jones: In re Jones v Jones* 1984 4 SA 725 (W); *Chinatex Oriental Co v Erskine* 1998 4 SA 1087 (C) 1093H; A E Edwards and E Kahn "Conflict of Laws" in W A Joubert *et al* (eds) *The Law of South Africa* (2003) par 284; C F Forsyth *Private International Law. The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (2012) 135-137; H R Hahlo and E Kahn *The South African Law of Husband and Wife* (1975) 529-674; E Kahn "Conflict of Laws" in M M Corbett, G Y S Hofmeyer and E Kahn *The Law of Succession in South Africa* (2001) 599; and E Schoeman, C Roodt and M Wethmar-Lemmer *Private International Law in South Africa* (2014) par 24. But the connecting factor of nationality or citizenship should rather be determined by the law of the country of nationality: Forsyth (2012) 11; Schoeman, Roodt and Wethmar-Lemmer (2014) par 24; and F Vischer "Connecting Factors" in K Lipstein (ed) *International Encyclopedia of Comparative Law* (1999) 22. Also see sec 13(1)(a) of the Divorce Act 70 of 1979. However, nationality is not a connecting factor in respect of contractual capacity in South African law.

(*locus domicilii*) would be the connecting factor. Also, it may be governed by the *lex loci contractus* and then the place of conclusion of the contract (*locus contractus*) would be the connecting factor. In addition, the putative objective proper law may be applicable as governing law. This legal system will be determined by reference to a variety of connecting factors.[2] The content of the most important connecting factors is discussed below.

2.2 *Situs*

The connecting factor of the *situs* or the *locus rei sitae* is utilised, in as far as contractual capacity is concerned, only in the context of immovable property. The *situs* refers to the country where the immovable property is situated.

2.3 *Locus domicilii*

Domicile is an important connecting factor in South African private international law in general and in the context of contractual capacity in particular. An individual's domicile has to be determined according to the provisions of the Domicile Act.[3] The most important provisions of the Act are the following:

> Every person who is over the age of 18 years … shall be competent to acquire a domicile of choice, regardless of such a person's sex or marital status.[4]
>
> A domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period.[5]
>
> [A child is] domiciled at the place with which he is most closely connected.[6]
>
> If in the normal course of events, a child has his home with his parents or with one of them, it shall be presumed, unless the contrary is shown, that the parental home concerned is the child's domicile.[7]
>
> No person shall lose his domicile until he has acquired another domicile, whether by choice or by operation of law.[8]

2 See par 4 on the legal system(s) applicable to contractual capacity in positive South African private international law.

3 3 of 1992.

4 Sec 1(1).

5 Sec 1(2).

6 Sec 2(1).

7 Sec 2(2).

8 Sec 3(1).

Section 4 of the Domicile Act[9] excludes *renvoi* when domicile is a connecting factor. Section 5 determines that the acquisition or loss of a person's domicile shall be determined by a court on a balance of probabilities.

The Act entered into force on 1 August 1992 and, in terms of section 8(2), does not have retrospective effect. If, for example, the domicile of a contractant who concluded a contract in 1990 has to be determined, the common-law rules apply in this regard.[10]

2.4 *Locus contractus*

In South African law, the information or communication theory is in general applied to determine the time and place of the formation of a contract. In terms of this theory, the contract is concluded when and where the offeror is informed that the offeree has accepted his or her offer.[11] The acceptance of the offeror's offer must be communicated, as opposed to merely received by him or her.

This rule applies to instantaneous contracts. A contract may be instantaneous where parties are either actually or presumed to be in each other's presence. Actual presence refers to the situation where the parties are physically in each other's presence when the offer is accepted, while presumed presence refers to an acceptance by way of, for instance, telephone or Skype. The expression of acceptance and its communication to the offeror thus either occurs at the same place and time or at least at the same time.[12] An example of the application of this theory would be where a seller in Johannesburg telephonically accepts an offer from a buyer in Istanbul to buy certain goods from him or her. According to South African law, the contract of sale between them would be concluded in Istanbul as that is where the acceptance of the offer was communicated to the offeror. Of course, the opposite is also true, should, for example, the Turkish party telephonically accept an offer emanating from the South African party, the contract is concluded in Johannesburg.

Where the acceptance of the offer and its communication to the offeror is not instantaneous, as in the case of postal communications, the expedition theory is applied.[13] In terms of this theory, the contract is concluded when and where the acceptance was signified and sent, not where the offeror received and read the acceptance.[14] In other words, the contract is concluded when and where

9 3 of 1992.

10 For discussions of the law of domicile in the context of private international law, see Edwards and Kahn (2003) pars 296-304; Forsyth (2012) 129-166; and Schoeman, Roodt and Wethmar-Lemmer (2014) pars 25-36.

11 For a discussion on offer and acceptance in domestic South African law, see J P Van Niekerk and W G Schulze *The South African Law of International Trade: Selected Topics* (2011) 67-69.

12 Van Niekerk and Schulze (2011) 70.

13 Van Niekerk and Schulze (2011) 70.

14 as it is in terms of the information theory.

the letter of acceptance was written and posted. An example of the application of this theory would be where a seller in Johannesburg makes a postal offer to sell certain goods to a buyer in Istanbul. The Turkish buyer then accepts the offer by way of a letter of acceptance. According to South African law, the contract was then concluded in Istanbul at the time the letter was posted there.[15]

The application of the expedition theory, however, is based on a waiver of the information theory by the offeror, in that he or she tacitly indicates that the post should be used for the purposes of acceptance. This theory will thus not apply where the offeror neither expressly nor tacitly authorised acceptance by post,[16] or where the offeree utilised a different method of communicating his or her acceptance in relation to that requested by the offeror, or where the offeror specifically stated that he or she will only be bound subsequent to an actual receipt of the offeree's acceptance.[17]

In respect of communication via electronic means, the provisions of the Electronic Communications and Transactions Act[18] would have to determine the *locus contractus* under South African private international law. In terms of this Act, an electronic contract is concluded where acceptance of the offer is received by the offeror.[19] In this regard, acceptance must be considered to have been received at the offeror's place of business or residence.[20] The application of the provisions of the Act could be illustrated by assuming that the seller in Johannesburg e-mails an offer to the buyer in Istanbul for the selling of certain goods. The Turkish buyer e-mails his acceptance of the offer to the offeror, which is received in the offeror's inbox. The contract is concluded in Johannesburg as the message was received there in the offeror's information system. Were the South African seller to read the acceptance message while he was on vacation in Mauritius, the answer would remain the same as the message is regarded as having been received at the addressee's usual place of business or habitual residence.

However, there is uncertainty in South African law on where and when a contract is concluded if the contractants have utilised telegram or telefax as a method of communication.[21] The answer would depend on whether the communiqué between the contractants may be regarded as instantaneous. Should this be the case, the information theory shall apply. Regard must,

15 Van Niekerk and Schulze (2011) 70.

16 where (s)he, for example, requested a telephonic acceptance.

17 Van Niekerk and Schulze (2011) 70.

18 25 of 2002.

19 Sec 22(2).

20 Sec 23(c). The description of "received", in terms of sec 23(b), is "when the complete data message enters an information system designed or used for that purpose by the addressee".

21 Van Niekerk and Schulze (2011) 71.

however, always be had to the facts of a particular case especially in the context of international trade.[22]

2.5 Objective Proper Law of Contract

There are two basic approaches in South African case law[23] on how to determine the law[24] applicable to a contract (the proper law of a contract)[25] in the absence

22 A message may, for example, be sent during office hours from one country and received instantaneously in another country outside office hours. The addressee may also be someone other than the operator of the machine. See also *Ex Parte Jamieson; In re: Jamieson v Sabingo* 2000 4 All SA 591 (W). *In casu* the seller in Johannesburg communicated with the buyer in Luanda (Angola) via telefax. Quotations were telefaxed from Johannesburg and the acceptance was telefaxed from Luanda. Van Niekerk and Schulze (2011) 71 submit that this case was decided incorrectly as the court failed to consider the facts appropriately and handed down judgment without offering detailed reasons. The court *in casu* held that "the principles relating to letters sent by post rather than agreements concluded by telephone should more appropriately apply to determine the place where the agreement was concluded". As such, the contract was held to be concluded in Luanda, where the acceptance of the offer was sent to the offeror.

23 No legislation exists in this field and case law therefore constitutes the primary source of the law.

24 It has been submitted that this may be a national legal system or another system of rules and principles of law. See E A Fredericks and J L Neels "The Proper Law of a Documentary Letter of Credit" (part 1) 2003 *South African Mercantile Law Journal* 63 64–66; and J L Neels and E A Fredericks "Revision of the Rome Convention on the Law Applicable to Contractual Obligations (1980): Perspectives from International Commercial and Financial Law" 2004 *Revue de européenne de droit bancaire et financier/European Banking and Financial Law Journal (EUREDIA)* 173 175–178 and 190. See art 3 of the Hague Principles on Choice of Law in International Commercial Contracts (2015): "The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise". Also see *Van Zyl v Government of the Republic of South Africa* 2005 4 All SA 96 (T) par 75 on the choice of "international law" as the governing law. On the question whether a religious or traditional legal system may be chosen, see K Bälz "Islamic Law as Governing Law under the Rome Convention. Universalist *lex mercatoria* v Regional Unification of Law" 2001 *Uniform Law Review/Revue de droit uniforme* 37; K Bälz "Das islamische Recht als Vertragsstatut?" 2005 *Praxis des Internationalen Privat- und Verfahrensrechts* 44; and Neels and Fredericks (2004) 178–179. See, in general, E Jayme "Die kulturelle Dimension des Rechts – ihre Bedeutung für das Internationale Privatrecht und die Rechtsvergleichung" 2003 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 211.

25 either as the presumed intention of the parties (*Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171 185) or the legal system of closest connection (*Improvair (Cape)(Pty) Ltd v Establissements Neu* 1983 2 SA 138 (C) 146–147; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 3 SA 509 (D) 526D–H and 530H–I;

of an express or tacit[26] choice of law.[27] The first is found in *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd*[28] and in two decisions of the Labour Court.[29] In terms of this approach, the proper law is determined by weighing[30] all

Ex Parte Spinazze 1985 3 SA 633 (A) 665H; *Kleinhans v Parmalat SA (Pty) Ltd* 2002 9 BLLR 879 (LC) pars 19 and 29; *Parry v Astral Operations Ltd* 2005 10 BLLR 989 (LC) par 40; and *The Society of Lloyd's v Romahn* 2006 4 SA 23 (C) par 82). In *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 5 SA 393 (SCA) the court refers to the law of the closest and most real connection in the context of gap in the classification of liberative prescription rules (see pars 14, 26, 28 and 32). Support for the law of the closest and most real connection as the proper law may be found in par 28: "It seems logical that English law [the proper law of the contract] is also the legal system which has the closest and most real connection with the question of the extinction or non-enforceability of such rights because of the expiry of a prescription / limitation period ...." The *dictum* may be read to suggest that the proper law is the law closest related to the contract. *Cf Herbst v Surti* 1991 2 SA 75 (Z) 79C; and *Henry v Branfield* 1996 1 SA 244 (D) 249E-F. See S F du Toit "International Funds Transfers and Private International Law" 2006 *South African Mercantile Law Journal* 53 60 n 56; Edwards and Kahn (2003) pars 328 and 330; Forsyth (2012) 329-330; E A Fredericks "The Proper Law of the International Contract of Employment: Interpreting the *Kleinhans* Decision" 2006 *South African Mercantile Law Journal* 75 77; Fredericks and Neels (2003) 66-67; and Schoeman, Roodt and Wethmar-Lemmer (2014) pars 92-102.

26 See *Ex Parte Spinazze* (n 25) 665; *Kleinhans v Parmalat SA (Pty) Ltd* (n 25) pars 25-29; *Parry v Astral Operations Ltd* (n 25) pars 81-83; and Neels and Fredericks (2004) 179-180.

27 See J L Neels "Die Voorlopige Regsoordeel in die Internasionale Privaatreg" 1994 *Stellenbosch Law Review* 288 289-292; and Fredericks (2006) 78-80. The following exposition is primarily based on Fredericks and Neels (2003) and Neels and Fredericks "The Music Performance Contract in European and Southern African Private International Law" (part 2) 2008 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg/Journal of Contemporary Roman-Dutch Law* 529 533. Also see J L Neels "South African Perspectives on the Hague Principles" in D Girsberger, T Kadner Graziano and J L Neels (gen eds) *Choice of Law in International Commercial Contracts. Global Perspectives on the Hague Principles* (2021) 350.

28 *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) per Booysen J. See the discussion by C F Forsyth "Enforcement of Arbitral Awards, Choice of Law in Contract, Characretrization and a New Attitude to Private International Law" 1987 *South African Law Journal* 4.

29 *Kleinhans v Parmalat SA (Pty) Ltd* (n 25) pars 20-21, 85 and 105; and *Parry v Astral Operations Ltd* (n 25). See the discussions of the Kleinhans case by Fredericks (2006) and by C Roodt "Jurisdiction of the South African Labour Court: Employer Identity and Party Autonomy" 2003 *South African Mercantile Law Journal* 135.

30 The factors cannot merely be counted to determine the proper law as not all the factors have the same weight. See *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) 528G-H: "Whilst counting contacts or factors favouring one or the other country's law is an unsatisfactory way of deciding legal issues, a large number of important factors pointing one way is a strong indicator" (own italics). For instance,

relevant factors[31] that connect the contract and the parties to a legal system. These factors may include the following: the place of performance;[32] the place of conclusion of the contract;[33] the place of offer;[34] the place of acceptance;[35] the place of agreed arbitration;[36] a choice of jurisdiction;[37] the domicile of the

whereas the monetary unit of a contract was not deemed to be an important factor, the place of agreed arbitration was awarded more significant consideration: *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) 528–530. Also see *Kleinhans v Parmalat SA (Pty) Ltd* (n 25) par 21; Fredericks and Neels (2003) 69; Schoeman, Roodt and Wethmar-Lemmer (2014) par 100; *Ex Parte Jones: In re Jones v Jones* 1984 4 SA 725 (W); and *Chinatex Oriental Co v Erskine* 1998 4 SA 1087 (C) 1093H.

31 The content of the connecting factors must be determined according to the *lex fori*: see n 1.

32 See for example, *Hulscher v Voorschotkas voor Zuid-Afrika* 1908 TS 542 546; *Standard Bank of SA Ltd v Efroiken and Newman* (n 25) 185–186; *Shacklock v Shacklock* 1948 2 SA 40 (W) 51; *Guggenheim v Rosenbaum (2)* 1961 4 SA 21 (W) 31A and C–D; *Improvair (Cape)(Pty) Ltd v Establissements Neu* (n 25) 151H–152A; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) 528C–I, 529E–F and 530H–I; *Blanchard, Krasner & French v Evans* 2002 4 SA 144 (W) 149 n 5; *Kleinhans v Parmalat SA (Pty) Ltd* (n 25) pars 2.1, 36 and 85; and *Parry v Astral Operations Ltd* (n 25) par 85. *Cf Ex Parte Spinazze* (n 25) 665G and *Henry v Branfield* (n 25) 249E. See, however, the minority decision in *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 1 SA 842 (A) 864D–F.

33 See *Standard Bank of SA Ltd v Efroiken and Newman* (n 25) 185–186 (the interpretation of the Standard Bank case in *Van Zyl v Government of the Republic of South Africa* (n 24) par 75 is clearly incorrect); *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) 528G–H; *Henry v Branfield* (n 25) 249F; and *Kleinhans v Parmalat SA (Pty) Ltd* (n 25) par 31. See, however, Neels and Fredericks (2008, part 2) 536 n 132; the minority decision in *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* (n 32) 864D–F; and *Improvair (Cape)(Pty) Ltd v Establissements Neu* (n 25) 148E–H). *Cf Guggenheim v Rosenbaum* (n 32) 31D–E. Also see the text at n 18–20 on how to determine the *locus contractus* in the case of electronic contracts.

34 See *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) 528B E–F. One could add the place of negotiations: see J C W van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) 99.

35 See *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) 528B–C and F–G. Once again, one could add the place of negotiations: see Van Rooyen (1972) 99. In the *Laconian case*, the judge also refers to the place where the charterparty was drawn (528B and E–F).

36 See *Benidai Trading Co Ltd v Gouws and Gouws (Pty) Ltd* 1977 3 SA 1020 (T); and *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) 528D, 528G and 529F–G. The judge in the *Laconian* case also refers to the place where the arbitrators carry on business (528D). Forsyth (2012) 328–329 refers to the *adagium qui eligit iudicem elegit ius* in the context of a tacit choice of law. Also see J P van Niekerk "Aspects of Proper Law, Curial Law and International Commercial Arbitration" 1990 *South African Mercantile Law Journal* 117 especially 123–128.

37 Forsyth (2012) 328 n 78; and *Parry v Astral Operations Ltd* (n 25) par 81.

parties;[38] the place where the parties carry on business;[39] the domicile of the agents or mandatories of the parties;[40] the (habitual) residence of the parties;[41] the nationality of the parties;[42] the form, terminology[43] and language of the contract;[44] the currency in which the contractual obligation of payment is expressed;[45] and many others.[46] This approach makes it difficult to predict the judge's decision beforehand. It leaves much room for individual reasonableness and fairness but cannot be supported due to the lack of certainty.[47]

The second approach employs the default position that the law of the country of the performance (the *lex loci solutionis*) constitutes the proper law

38 See *Collisons (SW) Ltd v Kruger* 1923 PH A 78 (SWA); *Guggenheim v Rosenbaum* (2) (n 32) 31D–E; *Ex Parte Spinazze* (n 25) 665F–G; *Improvair (Cape)(Pty) Ltd v Establissements Neu* (n 25) 151G–H; and *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) 528A and E.

39 See *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) 528A.

40 See *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) 528A–B and E–F.

41 See *Ex Parte Spinazze* (n 25) 665F–G; and *Henry v Branfield* (n 25) 249F.

42 See *Kleinhans v Parmalat SA (Pty) Ltd* (n 25) par 32.

43 For example, contractual terms used in a technical sense. See Van Niekerk and Schulze (2011) 198–201 and cases referred to; *cf Improvair (Cape)(Pty) Ltd v Establissements Neu* (n 25) 145D–E ("concepts peculiar to a particular system").

44 See *Ex Parte Spinazze* (n 25) 665F. Also see the minority decision in *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* (n 32) 863–865. In determining the tacit intention of the parties in respect of the law applicable to a maritime insurance policy, the judge states: "In the instant case the contract was entered into in this country and the payment of premiums was to have been effected in South African currency. This, in my view, however, is not important. What is important is the form of the policy under consideration and the language in which it has been couched" (864E–F). See, however, *Improvair (Cape)(Pty) Ltd v Establissements Neu* (n 25) 148B–E. As the form of and terminology employed in a documentary letter of credit are internationally standardised, mainly due to the existence of the International Chamber of Commerce's Uniform Customs and Practice for Documentary Credits (UCP), the same weight cannot be attached to this connecting factor in the context of letters of credit. *Cf* J P van Niekerk "The Proper Law of a Marine Insurance Contract: the *Al Wahab* Case" 1984 *Modern Business Law* 87 92–93; and *Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd* 1983 2 SA 630 (T).

45 See *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) 528C, 528F and 529H–I; and *Kleinhans v Parmalat SA (Pty) Ltd* (n 25) par 36. *Cf Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* (n 32) 865D–E (tacit agreement).

46 See, further, Fredericks and Neels (2003) 67–69; *Kleinhans v Parmalat SA (Pty) Ltd* (n 25); and *Parry v Astral Operations Ltd* (n 25). The location of payment of taxes was held not to be a very strong connecting factor in the Parry case (n 25). But see J L Neels and E A Fredericks "The Music Performance Contract in European and Southern African Private International Law" (part 1) 2008 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg/Journal of Contemporary Roman-Dutch Law* 351 363 n 61.

47 Also see Neels (1994) 291–292; and Fredericks (2006) 80.

of the contract, unless specific circumstances[48] clearly indicate that another legal system has to be applied.[49] However, the *locus solutionis* in respect of the characteristic performance[50] of the contract may differ from the *locus solutionis* in respect of payment. In this type of scenario there are two possibilities: application of either the scission principle or the unitary principle. There is authority for both principles in South African case law.[51] In terms of the scission principle, each obligation has its own proper law.[52] In terms of the unitary principle, however, the same proper law governs both (or all) the obligations.[53] As the obligations of the parties are, naturally, always closely connected, their contractual relationship should indeed be governed by one proper law.[54] The scission principle complicates matters by making more than one legal system applicable to the same contract. It comes as no surprise that the unitary principle is the standard approach in comparable modern legal systems. The two most recent decisions on choice of law in contract in South Africa fortunately seem to adopt the unitary principle.[55]

Proceeding, then, from the unitary principle, which legal system should be applied if the *locus solutionis* in respect of the characteristic performance

48 For instance, in *Collisons (SW) Ltd v Kruger* (n 38), the concurring *lex domicilii* of the parties to the contract was applied in preference to both the *lex loci solutionis* and the *lex loci contractus*.

49 See Fredericks (2006) 80; Fredericks and Neels (2003) 69; Neels (1994) 289; Van Rooyen (1972) 104; *Hulscher v Voorschotkas voor Zuid-Afrika* (n 32) 546; *Standard Bank of SA Ltd v Efroiken and Newman* (n 25) 185 (but also see 186); *Shacklock v Shacklock* (n 32) 51; and *Guggenheim v Rosenbaum (2)* (n 32) 31A. Also see *Blanchard, Krasner & French v Evans* (n 32) 149 n 5; and C Visser "Choice of Law in Internet Copyright Disputes" 1999 *South African Mercantile Law Journal* 268 277.

50 Terminology from art 4(2) of the Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) (Rome Convention) and art 4(2) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I). The characteristic performance is usually the performance for which payment is due. This is not found in the convention or regulation but is generally accepted – see M Giuliano and P Lagarde "Report on the Convention on the Law Applicable to Contractual Obligations" (1980) as referred to by J J Fawcett and J M Carruthers *Cheshire, North & Fawcett Private International Law* (2008) 712.

51 See the cases in n 52 (scission principle) and n 53 (unitary principle).

52 See *Standard Bank of SA Ltd v Efroiken and Newman* (n 25) 188; and *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) 528I–529E and 530H–I. Also see Forsyth (2012) 333.

53 See *Improvair (Cape)(Pty) Ltd v Establissements Neu* (n 25) 147B–G; *Kleinhans v Parmalat SA (Pty) Ltd* (n 25) as interpreted by Fredericks (2006) 80; and *Parry v Astral Operations Ltd* (n 25). Also see Forsyth (2012) 333–334; Fredericks (2006) 80; Fredericks and Neels (2003) 69–70; and Du Toit (2006) 62.

54 Forsyth (2012) 333–334.

55 *Kleinhans v Parmalat SA (Pty) Ltd* (n 25) (interpreted by Fredericks (2006) 80); and *Parry v Astral Operations Ltd* (n 25).

differs from the *locus solutionis* in respect of payment? It is suggested that the choice between the two legal systems should be made in the light of all the other connecting factors.[56] In South African private international law there is support for each of the following three approaches for the situation that the other factors do not provide a clear answer:

a. Van Rooyen[57] supports the unitary principle but is of the opinion that in these particular circumstances, the only option a court has is to apply the scission principle. The present author submits, however, that it would in all circumstances be desirable that one legal system governs the whole contract.[58]

b. The decision in *Maschinen Frommer GmvH & Co KG v Trisave Engineering & Machinery Supplies (Pty) Ltd*[59] concerned a CIF[60] contract. The judge applied the rule in the *Standard Bank* case[61] in favour of the law of the country of performance and interpreted this to mean the law of the country where the bill of lading had to be delivered in terms of the contract[62] – that is: the law of the country of the characteristic performance. This approach has the advantage of harmony with the approach in the Restatement (Second) in respect of contracts of sale of movables,[63] which is by far the single most important approach (perhaps the majority approach) in the United States of

56 Fredericks (2006) 81; Fredericks and Neels (2003) 70; and J L Neels "C F Forsyth Private International Law (1990)" 1990 *Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law* 553 554–555. See above (n 32–46) for a list of thirteen factors that could be taken into consideration. Forsyth states that, in the above circumstances, the different *loci solutionis* would be of little use in assigning a governing law to the contract: Forsyth (2012) 334. This will often mean that the *lex loci contractus* must play the role of proper law, as the author also states: "The *locus contractus* and *locus solutionis* are the most important factors weighing with the courts in assigning a governing law" (Forsyth (2012) 334); and "The central rule generally followed in the older cases in assigning the appropriate law is that the *lex loci contractus* governs unless the contract is to be performed elsewhere, in which case the *lex loci solutionis* applies" (Forsyth (2012) 331).

57 Van Rooyen (1972) 200 n 29.

58 Fredericks and Neels (2003) 70 n 98.

59 2003 6 SA 69 (C). Also see the discussion by E A Fredericks "Which Court Shall Hear Your Case? Submission as a Ground for International Jurisdiction" 2003 *Juta's Business Law* 208.

60 Costs, insurance, freight. CIF is one of the standard Incoterms drafted by the International Chamber of Commerce in Paris. See, in general, International Chamber of Commerce *ICC Rules for the Use of Domestic and International Trade Terms: Incoterms* (2020).

61 *Standard Bank of SA Ltd v Efroiken and Newman* (n 25).

62 *Standard Bank of SA Ltd v Efroiken and Newman* (n 25) 77H–78C.

63 § 191 of the Restatement (Second) contains a presumption in favour of the law of the country of agreed delivery.

America.[64] This is a factor of some significance as the USA is usually listed as the second most important trading partner of South Africa.[65]

c. The final approach is based on an *obiter dictum*[66] in the *Laconian* case[67] where the judge seemed to suggest that in the type of circumstances under discussion the place of payment has priority over the place of the characteristic performance.[68] Such an approach will often have the same result as application of the Rome I Regulation[69] as payment would usually have to take place (at a bank) in the country of habitual residence or business of the party that has to effect the characteristic performance.[70] This is a factor of great significance because the European Union is by far the most important trading partner of South Africa[71] and harmony of decision

64 See S C Symeonides *The American Choice-of-law Revolution: Past, Present and Future* (2006) 64-65 and 88-91; S C Symeonides "Choice of Law in the American Courts in 2010: Twenty-fourth Annual Survey" 2011 *The American Journal of Comparative Law* 300; and L L McDougal, R L Felix and R U Whitten *American Conflicts Law* (2001) 513-517.

65 See n 71.

66 The judge indeed applied the scission principle (see Neels and Fredericks (2008, part 2) 536 n 128). It is possible, though, that the *dictum* was not intended to be *obiter*, and that the judge came to the conclusion on the basis of both the scission and the unitary principles, without choosing between them: see *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) 528-529 and 530H-I.

67 "Be that as it may, the *lex loci solutionis* of all payments is English law whereas the performance of applicant's obligations of carriage and delivery had to take place in Argentine, upon the high seas and in Columbia. If I have to strike a balance it seems to tilt towards English law from amongst the *leges loci solutionis*" (*Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 25) 529E-F (per Booysen J).

68 *Cf Kleinhans v Parmalat SA (Pty) Ltd* (n 25), interpreted by Fredericks (2006) 81; *Mendelson-Zeller Co Inc v T & C Providores Pty Ltd* 1981 1 NSWLR 366, as discussed by E I Sykes and M C Pryles *Australian Private International Law* (1991) 607; *First National Bank of Chicago v Carroway Enterprises Ltd* [1990] 2 HKLR 10, as discussed by G Johnston *The Conflict of Laws in Hong Kong* (2005) 194 and 196; and Forsyth (2012) 334: "It may be in such cases that the place of payment enjoys some preference over the place of delivery or other performance other than payment." In *Parry v Astral Operations Ltd* (n 25), the judge refers to the fact that, although payment took place in Malawi and the Isle of Man, the applicant was on the payroll of the respondent's South African head office (par 81 read with par 26). But J Fawcett, J Harris and M Bridge *International Sale of Goods in the Conflict of Laws* (2005) 705 n 294 suggest that the place of payment should not be an important connecting factor in the context of art 4(5) of the Rome Convention.

69 See art 4 of the Rome I Regulation (n 50).

70 Of course, payment need not take place there (see Forsyth (2012) 334 n 113), but in the usual scenario it probably will.

71 Exports to and imports from the EU account for approximately 40% of South Africa's total foreign trade. The top ten trading partners of South Africa are (in order of importance): Germany, the United States of America, the United Kingdom, Japan,

remains one of the primary aims of private international law.[72] The approach under discussion is therefore supported for purposes of contemporary positive law,[73] not necessarily based on its inherent merits[74] but merely on the ideal of international harmony of decision.[75]

It is unclear in which direction South African private international law of contract will develop and severe uncertainty remains in respect of the determination of the proper law of a contract. But steps are taken to remedy the situation in a broader context. One of the stated objectives of the Research Centre for Private International Law in Emerging Countries at the University of Johannesburg is the drafting of model laws (or legislative instruments) in the field of private international law for utilisation by the African Union and its Member States.[76] The first project of the research centre in this context is the drafting of the African Principles on the Law Applicable to International Commercial Contracts.[77] The Hague Principles on Choice of Law in International

Saudi Arabia, Italy, the Netherlands, China, France and Belgium. See D Burger (ed) *South African Yearbook* 2003/04 (2003) 171–172.

72 According to Forsyth (2012) 72–73, uniformity of decision should be the guiding principle in the development of private international law. Also see the case law referred to by Forsyth (2012) 71 n 278.

73 But see the next paragraph on the intended codification of private international law of contract in the African context.

74 See the critical discussions of the Rome Convention (n 50) in J Blom "Choice of Law Methods in the Private International Law of Contract" 1980 *The Canadian Yearbook of International Law* 161 186–188; F K Juenger "The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons" 1994 *The American Journal of Comparative Law* 381 384–386; F K Juenger "Contract Choice of Law in the Americas" 1997 *The American Journal of Comparative Law* 195 204–206; and P M Patocchi "Characteristic Performance: A New Myth in the Conflict of Laws? Some Comments on a Recent Concept in the Swiss and European Private International Law of Contract" in C Dominicé, R Patry and C Reymond (eds) *Études de Droit International en l'Honneur de Pierre Lalive* (1993) 195. But also see the equally critical discussion of the *lex loci solutionis* as an alternative by P Mankowski "Die Ausweichklausel des Art 4 EVÜ und das System des EVÜ" 2003 *Praxis des Internationalen Privat- und Verfahrensrechts* 464 467–468.

75 Fredericks (2006) 81; Fredericks and Neels (2003) 70–71; Neels (1990) 554–555; and Du Toit (2006) 62 n 69.

76 See www.african-union.org.

77 See J L Neels and E A Fredericks "An Introduction to the African Principles of Commercial Private International Law" 2018 *Stellenbosch Law Review* 347; J L Neels and E A Fredericks "The African Principles of Commercial Private International Law and the Hague Principles" in D Girsberger, T Kadner Graziano and J L Neels (gen eds) *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague Principles* (2021) 239; J L Neels "The African Principles on the Law Applicable to International Commercial Contracts – A First Drafting Experiment" 2020 *Uniform Law Review/Revue de droit uniforme* 426; J L Neels *African Principles on the Law Applicable to International Commercial Contracts* (2023).

Commercial Contracts (2015)[78] and the Rome I Regulation on the Law Applicable to Contractual Obligations (2008)[79] are the most important models in its creation.

3 The Common-law Authors[80]

Common-law authors as Rodenburg,[81] Paulus Voet,[82] Johannes Voet,[83] Huber[84] and Van der Keessel[85] were of the opinion that, in general, the *lex domicilii* should govern status and contractual capacity (at least as far as movable property is concerned).[86] Rules in this regard were namely seen to be personal in nature in terms of the then prevalent statute theory.[87] The applicable rules would determine, for example, "whether a woman or minor is or is not to be allowed to make a contract without the consent of husband or guardian".[88]

Van der Keessel provided the following examples. If a person from the Veluwe of 21 years old concluded a contract in Holland, he would be held to possess contractual capacity, although the majority age in Holland was 25 years.

78 www.hcch.net.

79 See n 50.

80 References to the recognition of foreign court orders in the common-law texts are excluded. However, some South African authors refer to instances of the recognition of foreign court orders in the context of the legal systems applicable to contractual capacity. See for example, Forsyth (2012) 338; E Kahn "International contracts – V. The general rule in South Africa, and the issue of capacity" 1991 *Businessman's Law* 126 126–127); Schoeman, Roodt and Wethmar-Lemmer (2014) par 109; and Van Rooyen (1972) 15–19.

81 C Rodenburg *Tractatus de Jure Conjugum cum Tractatione Praeliminaris de Jure quod Oritur ex Statutorum vel Consuetudinum Descrepantium Conflict* (1653) (*De Jure Conjugum*) 1.3.1 as referred to by Van Rooyen (1972) 15.

82 P Voet *De Statutis eorumque Concursu Liber Singularis* (1661) (*De Statutis*) 4.3.3 and 4.3.4.

83 J Voet *Commentarius ad Pandectas* (1829) (*Commentarius*) 4.1.29, 4.4.8 and 27.10.11.

84 U Huber *Heedendaegse Rechtsgeleertheyt, soo Elders, als in Frieslandt Gebruikelyk* (1768) (*HR*) 1.3.36, 1.3.37, 1.3.38, 1.3.40 and 1.3.41.

85 D G Van der Keessel *Praelectiones Iuris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam* (1961) (*Praelectiones*) 73 (*Th* 27); Van der Keessel (1961) *Praelectiones* 75 (*Th* 27); Van der Keessel (1961) *Praelectiones* 98 (*Th* 42); Van der Keessel (1961) *Praelectiones* 101 (*Th* 42); and Van der Keessel (1961) *Praelectiones* 102 (*Th* 42). Van der Keessel submitted that applying the law of domicile is sensible – a traveller could not be a minor (lacking contractual capacity) in one instance and a moment later be a major (possessing such capacity), depending on his or her geographical presence: (1961) *Praelectiones* 98 (*Th* 42).

86 See the text at notes 106–112 in respect of immovable property.

87 Voet (1661) *De Statutis* 4.3.3; Voet (1961) *De Statutis* 4.3.17; Voet (1829) *Commentarius* 1.4 App 2; and Van der Keessel (1961) *Praelectiones* 75 (*Th* 27). On the statute and comity theories and their influence in Roman-Dutch law, see Forsyth (2012) 30–45.

88 Voet (1829) *Commentarius* 1.4 App 2.

The reason is that the *lex domicilii*, the law of the Veluwe, provided that a male person became a major at age 20 and a female at 18. However, if a young man from Holland of 21 years old concluded a contract in the Veluwe, he would not have the required capacity to do so as his law of domicile regarded him as a minor.[89]

The author further employed the example of a 20-year old domiciliary from Holland who obtained majority status by marriage according to the law of that province. In Friesland, majority was not acquired by marriage. If the person from Holland concluded a contract in Friesland, he would be regarded as a major, as he had this status in Holland. The law of Holland *qua lex domicilii* applied.[90]

The *lex domicilii* was often said to apply on the basis of comity.[91] For instance, Johannes Voet stated that:

> the question whether one is a major or a minor … is to be decided by the law of the domicile, so that one who is a minor at the place of his domicile is to be deemed to be such anywhere in the world, and *vice versa* – whether you would have that to be the rule in strict law, or (more correctly) as a matter of comity.[92]

Huber was of the opinion that minors, married women and others with limited capacity, as determined under the relevant law of domicile, "enjoy the rights that persons of like capacities possess or are subject to in each place".[93] For instance, a young man of 20 or 21 years old, domiciled in Utrecht, could sell (immovable) property[94] in Friesland as he was recognised as a major in Friesland on the basis of the law of Utrecht (the *lex domicilii*) and a major, in terms of the law of Friesland (the *lex loci contractus*), of course, had the capacity to alienate property.[95]

89 Van der Keessel (1961) *Praelectiones* 102 (*Th* 42).

90 Van der Keessel (1961) *Praelectiones* 104 (*Th* 42).

91 Voet (1661) *De Statutis* 4.3.17; Voet (1829) *Commentarius* 4.1.29, 4.4.8 and 27.10.11; Van der Keessel (1961) *Praelectiones* 98 (*Th* 42); Van der Keessel (1961) *Praelectiones* 102 (*Th* 42); and Van der Keessel (1961) *Praelectiones* 104 (Th 42).

92 Voet (1829) *Commentarius* 4.1.29. In another text, the author also draws a distinction between the *ius strictum* and *comitas* (*Commentarius* 27.10.11). Although the text involves the declaration of a foreign court with regard to prodigality, it is apparent that Johannes Voet was of the opinion that the *lex domicilii* applied out of comity and not in accordance with the *ius strictum*. *Cf* Rodenburg (1653) *De Jure Conjugum* 2.1, as referred to by Van Rooyen (1972) 15, who saw the application of the *lex domicilii* as a legal duty, a *necessitas iuris*.

93 Huber (1768) *HR* 1.3.38; Huber (1768) *HR* 1.3.40); and Huber (1768) *HR* 1.3.41.

94 Some of the authors would apply the *lex situs* in respect of immovable property: see the text at notes 108–114. Also see Huber (1768) *HR* 1.3.40.

95 Huber (1768) *HR* 1.3.40. Of course, a major would also have that capacity in terms of the law of Utrecht. See the example at note 104 which more clearly illustrates

Various authors therefore suggest that Huber distinguished between status, governed by the law of domicile, and the consequences of that particular status, governed by the *lex loci contractus*.[96] A distinction between status and its consequences was supported by Van der Keessel, referring to the work of Huber in this regard.[97] However, Van der Keessel added that individuals could not obtain a wider capacity than they would have possessed in terms of the *lex domicilii*.[98] It seems that Van der Keessel proposed a cumulative reference rule in this regard:[99] an individual would be held to have capacity only if he or she had this capacity in terms of both the *lex domicilii* and the *lex loci contractus*.

An example involving the *Senatusconsultum Macedonianum*,[100] as provided by Van der Keessel,[101] is useful in illustrating the different views of Huber and Van der Keessel in this regard. A young man of 25 from Friesland concluded a contract of loan in Holland. His father was still alive. In terms of Frisian law, where the *Senatusconsultum* was received and applied unabridged, the son, although a major, would have a perpetual exception at his disposal against a claim for repayment of the loan (unless, of course, his father was already deceased at the conclusion of the contract of *mutuum*). In terms of the law of Holland, the *Senatusconsultum* was a defence only available to minors (persons under 25).[102] If one were to apply Huber's view[103] here, one would recognise the status as major of the son on the basis of the law of domicile (the law of Friesland). However, the consequences of that status would be governed by the *lex loci contractus*, the law of Holland, where the defence was not available to majors. Van der Keessel, again, was of the opinion that the son would nevertheless be able to invoke the *Senatusconsultum Macedonianum* as he would be able to do so in terms of the law of Friesland. He required the son to have capacity in terms of both the law of Holland and that of Friesland before being liable.[104]

Huber's view and that of Van der Keessel.

96 Forsyth (2012) 338; Schoeman, Roodt and Wethmar-Lemmer (2014) par 109. However, Huber elsewhere unequivocally and repeatedly states that capacity is governed by the *lex domicilii*: see Huber (1768) *HR* 1.3.36, 1.3.37, 1.3.38, 1.3.40 and 1.3.41.

97 Van der Keessel (1961) *Praelectiones* 104 (*Th* 42).

98 Van der Keessel (1961) *Praelectiones* 104 (*Th* 42).

99 On this terminology, see J L Neels "Substantiewe geregtigheid, herverdeling en begunstiging in die internasionale familiereg" 2001 *Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law* 692 707.

100 *Digesta* 14.6.

101 Van der Keessel (1961) *Praelectiones* 104 (Th 42).

102 See J H A Lokin, F Brandsma and C Jansen *Roman Frisian Law of the 17th and 18th Century* (2003) 38-39; and R Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (1992) 177-181.

103 See the text at notes 93-96.

104 Van der Keessel (1961) *Praelectiones* 104 (*Th* 42). Another example may be provided, not based on any common-law authority: In terms of the *lex domicilii* (the law of

Van Bijnkershoek proposed the application of the *lex loci contractus* as the general rule. A certain case, which was presented before the *Hoge Raad*, involved a minor Dutch domiciliary who effected a donation in Austria, where he would have been a major. The court decided that Dutch law should govern, but Van Bijnkershoek advocated the application of Austrian law *qua lex loci contractus*.[105]

With regard to contracts relating to immovable property, Johannes Voet[106] and Van der Keessel[107] in principle supported the application of the *lex situs*.[108] Voet referred to the Flemish author Burgundius in this regard:

> [A] man of[109] Ghent who has passed the twentieth year of his age can sell and solemnly transfer feudal properties in Hainault … because in Hainault anyone is deemed a major who has completed his twentieth year, though at Ghent it is only the fulfilment of the twenty-fifth year which brings majority.[110]

A) a minor does not possess contractual capacity whatsoever. In terms of the *lex loci contractus* (the law of B) a minor between 7 and 18 years of age, in general, does not have the capacity to conclude contracts, but he or she is able to conclude contracts in respect of essential goods (*cf* par 15 [2] and [3] of the Hungarian Private International Law Code (1979)). Natural person X, aged 20 and domiciled in country A, is a minor in terms of the law of A but would be a major in terms of law of B. Assume that X concludes a contract for essentials in country B. According to the distinction between status and the consequences of that status, as ascribed to Huber, X is, for the purposes of the law of B (including its private international law), recognised as a minor as the *lex domicilii* applies in respect of status. However, the law of B applies in respect of the consequences of the incapacity of minors. As such, X will be bound to the contract in respect of essential goods. However, according to Van der Keessel, X will not be bound as he or she does not have the capacity to conclude such contracts in terms of the *lex domicilii*.

105 C van Bijnkershoek *Observationes Tumultuariae* in E M Meijers *et al* (eds) (1926) *Obs Tum* no 71. There is, however, evidence to suggest that Van Bijnkershoek did not regard the *lex loci contractus* to be applicable in all situations. This is deduced from Van Bijnkershoek's commentary on another decision of the Hoge Raad (*Obs Tum* no 1523), as referred to by Van Rooyen (1972) 21. Although the case concerned a declaration of *venia aetatis* (emancipation) by a foreign court, it is clear that he would prefer the application of the *lex domicilii* in certain circumstances.

106 Voet (1829) *Commentarius* 4.4.8.

107 Van der Keessel (1961) *Praelectiones* 103 (*Th* 42).

108 One text of Huber (1768) *HR* 1.3.45 may be cited in favour of the *lex situs* but another (Huber (1768) *HR* 1.3.40) in favour of the *lex domicilii* as the governing law in respect of immovable property.

109 Read "domiciled in".

110 N Burgundius *Ad Consuetudines Flandriae aliarumque Gentium, Tractatus Controversiarum* (1634) Treatise 1, nn 7 and 8, as referred to by Voet (1829) *Commentarius* 4.4.8.

Van der Keessel, however, submitted that the application of the *lex situs* could not confer a wider capacity than the *lex domicilii*.[111] An individual therefore had capacity only if he or she had this capacity in terms of both the *lex domicilii* and the *lex situs*. Van der Keessel clearly advocated a cumulative reference rule also in the context of immovable property.[112]

Johannes Voet, Huber and Van der Keessel all proposed exceptions to the primarily applicable rules in favour of the *lex loci actus/contractus*. Examples of these are found only in cases where foreign court orders were involved. However, the same principle would probably have applied to determine the applicable legal system in cases where no such court order was relevant.

In this regard, Johannes Voet[113] and Van der Keessel[114] required fraud on the part of the incapable party (having brought the contract assertor under the impression that he or she did possess contractual capacity) for the *lex loci contractus* to be applicable. Voet,[115] in addition, required the ignorance (or good faith) of the contract assertor but also that the ignorance was reasonable in the circumstances.[116] He provided the following example:

> Of course if a person who is altogether ignorant of an order of court, and who lives in another country where the order has not been published, has made a contract with a prodigal who craftily conceals that he has been formally interdicted from his property, it would be just for the person who has been so cozened by the prodigal to be relieved on the ground of just mistake, so that he has just as effective an action as if he had contracted with another who had not been interdicted from his property. This assumes that the ignorance is quite reasonable, and that, if it is demanded, he shall himself confirm his good faith by the scruple of an oath.[117]

Van der Keessel also required the *bona fides* of the contract assertor[118] but, in addition, that the fraud of the incapable contractant would have prejudiced the first-mentioned party.[119]

111 Van der Keessel (1961) *Praelectiones* 103 (*Th* 42).

112 See note 99 *supra*.

113 Voet (1829) *Commentarius* 27.10.11.

114 Van der Keessel (1961) *Praelectiones* 103 (*Th* 42).

115 Voet (1829) *Commentarius* 27.10.11.

116 This was the position where the incapable individual fraudulently concealed his incapacity and, while the other contractant was in good faith, he was deceived by the other party. See Voet (1829) *Commentarius* 27.10.11.

117 Voet (1829) *Commentarius* 27.10.11.

118 Van der Keessel (1961) *Praelectiones* 103 (*Th* 42).

119 Van der Keessel (1961) *Praelectiones* 104 (*Th* 42).

Huber formulated a more general approach, namely that the primary applicable legal system may be excluded "for reasons of equity".[120] He provided an example in terms of which the contract assertor "had been kept in ignorance of the fact" of the incapacity, referring to his or her *bona fides*, as well as the fraud of the incapacitated party.[121]

According to Van Rooyen, it is difficult to get a clear picture from the works of the common-law authors.[122] Forsyth agrees, stating that the old authorities "spoke with an uncertain voice on the question of capacity", recognising "the need for flexibility" in this regard.[123]

As will be discussed,[124] the application of the *lex domicilii*, the *lex loci contractus* and the *lex situs* were received in South African case law. This is not the case with the differentiation between status and its consequences, ascribed to Huber and advocated by Van der Keessel, as it never formed part of the argumentation of any of the courts involved.[125] The cumulative reference rules proposed by Van der Keessel[126] have never been considered. The exceptions to the general rules are also not referred to in the South African decisions. It nevertheless remains important, as formulated by Huber in a general statement, that the primary applicable legal system(s) may be excluded "for reasons of equity",[127] leaving the door wide open for possible future developments in this field.[128]

4 The South African Courts

4.1 Introduction

The legal position in positive South African private international law in respect of contractual capacity is not entirely clear.[129] Not many reported cases are available in this regard. *Ferraz v d'Inhaca*[130] is the only South African decision in

120 Huber (1768) *HR* 1.3.39.
121 Huber (1768) *HR* 1.3.39.
122 Van Rooyen (1972) 23.
123 Forsyth (2012) 338.
124 See paragraph 4 below.
125 See the text at notes 96-104. However, according to Forsyth (2012) 339, the distinction could provide an explanation for the decision in *Kent v Salmon* 1910 TPD 637.
126 See the text at notes 97-99 and 111-112.
127 Huber (1768) *HR* 1.3.39.
128 For a discussion on the views of the common-law authors, see E A Fredericks "The Common-Law Authors on Contractual Capacity in Private International Law" 2015 *Obiter* 762.
129 See in general, Forsyth (2012) 292-295 and 337-341; Schoeman, Roodt and Wethmar-Lemmer (2014) pars 107-115; Edwards and Kahn (2003) pars 308 and 333; and Van Rooyen (1972) 120-126.
130 1904 TH 137.

which the court addressed capacity in respect of contracts relating to immovable property. This case will be investigated first, followed by a discussion of the five cases dealing with other types of contracts.

4.2 *Ferraz v d'Inhaca*[131]

In casu the plaintiff agreed to sell immovable property situated at Matolla Bay in Lourenço Marques in Mozambique, then a Portuguese colony, to the defendant. The contract was concluded in Johannesburg (South Africa) but both parties were Portuguese nationals domiciled in Delagoa Bay (Mozambique). Since the transfer had to be completed at Delagoa Bay and the purchase price[132] was payable simultaneously at or after registration, it is clear that Delagoa Bay was the *locus solutionis*.[133] The relevant deposit was duly paid upon the signing of the contract but the defendant committed breach of contract by refusing to complete the purchase.

The court *inter alia* had to address the issue of whether or not contractual capacity was governed by Portuguese law (the colonial law of Mozambique). Under this law, the contract would be void because of a lack of contractual capacity as it was not co-executed by the plaintiff's wife to whom he was married in community of property. In addressing the issue, Bristowe J stated:

> I apprehend, no doubt that according to the law of this country … the *lex situs* must govern all questions with regard to the capacity to enter into a contract for the alienation of immovable property, or with regard to the interpretation of such contract or the respective rights and obligations of the parties under it.[134]

Accordingly, Portuguese law was applicable to the issue of contractual capacity since the property in question was situated in Portuguese Delagoa Bay. Bristowe J further stated that even if Dicey's proper law approach[135] was applied to the matter, the result would be the same: "[I]t can hardly be doubted that, seeing that both the plaintiff and the defendant are domiciled Portuguese subjects, the law with reference to which they intended to contract and conceive themselves to be contracting was their own, *viz*, the law of Portugal."[136] The proper law

131 *Ferraz v d'Inhaca* (n 130).

132 and compensation monies.

133 *Ferraz v d'Inhaca* (n 130) 140.

134 *Ferraz v d'Inhaca* (n 130) 142-143.

135 The court refers to A V Dicey *The Conflict of Laws* (undated edition: 769 *et seq*). At p 143 of the *Ferraz* case, Bristowe J states that, according to Dicey's approach, the proper law of the contract is "not the law of the *locus contractus*, but the law with reference to which the parties intended to contract".

136 *Ferraz v d'Inhaca* (n 130) 144.

referred to is a subjectively ascertained proper law, the application of which is a possibility which Bristowe J in any event expressly rejects.[137]

Bristowe J does not refer to direct authority in arriving at his decision[138] and his discussion of the various legal sources,[139] the present author submits, holds no relevance to contractual capacity; it merely illustrates divergent approaches to private international law of contract in general.[140] Nevertheless, the decision provides clarity on the issue of contractual capacity in respect of immovable property: the *lex rei sitae* is applicable.[141]

4.3 *Hulscher v Voorschotkas voor Zuid Afrika*[142]

The respondent sued the appellant for an amount outstanding in terms of a contract of loan entered into by his wife before her marriage and when she was still a minor. The parties were married in community of property. The appellant's defence was that his wife lacked the necessary capacity at the time of contracting, as she was a minor at that stage.

Innes CJ refers to authority in favour of the *lex domicilii* and authority in favour of the *lex loci actus*.[143] It was, however, not necessary to choose between the possibilities as the *lex domicilii* and the *lex loci contractus* coincided *in casu*.[144]

In a subsequent passage, however, only the *lex loci contractus* is mentioned as the applicable legal system:

> But of course that assumes that the parties to the contract are capable, *at the place where they contract*, of entering into a binding contract at all. If

137 *Ferraz v d'Inhaca* (n 130)143. Also see van Rooyen (1972) 120.

138 *Ferraz v d'Inhaca* (n 130) 143. It may be assumed that he consulted Dicey on the English legal position as he refers to the author in the context of determining the proper law of a contract (Dicey (undated edition: 769 *et seq*)).

139 The judge refers to *Digesta* 44.7.21; Voet (1829) *Commentarius* 4.1.28; *Stewart v Ryall* 1887 5 SC 154; W Burge *Commentaries on Colonial and Foreign Law Generally, and in Their Conflict with Each Other, and with the Law of England* (1838b) 843; *Jacobs v Credit Lyonnais* (1884) 12 QBD 589; *Hamlyn v Talisker Distillery* 1894 AC 202; *Spurrier v La Cloche* [1902] AC 446 (Bristowe J *in casu* (*Ferraz v d'Inhaca* (n 130) 143 incorrectly referred to the respondent as "Clarke"); and Dicey (undated edition: 769 *et seq*).

140 The cases and authors discussed in the case do not refer to immovable property directly; they all support the application of the *lex loci solutionis* instead of the *lex loci contractus* as the proper law of the contract. The issue is not relevant with regard to the matter in question.

141 The majority of the South African authors agree with this rule and offer no alternative approaches in this regard. See Forsyth (2012) 338; Schoeman, Roodt and Wethmar-Lemmer (2014) par 114; and Van Rooyen (1972) 120. Kahn (1991) 128 refers to the *Ferraz* decision as authority for applying the *lex situs*, his fourth testing law. Also see Edwards and Kahn (2003) par 333.

142 1908 (TS) 542.

143 *Hulscher v Voorschotkas voor Zuid Afrika* (n 32) 545.

144 *Hulscher v Voorschotkas voor Zuid Afrika* (n 32) 545–546.

> either of them is incapable of contracting at the time, he is incapable of agreeing that any other law than that of the place where the contract is *made* should regulate the validity and extent of his obligation.[145]

But in a quotation from *Cooper v Cooper*,[146] reference is again made to both the *lex domicilii* and the *lex loci contractus*.[147]

Edwards and Kahn refer to the above quotation from the *Hulscher* case as follows: "In respect of commercial dealings especially, modern textwriter opinion favours the test of the putative proper law, namely an objectively ascertained one, which would accord with the *dictum* of Innes CJ in *Hulscher v Voorschotkas voor Zuid Afrika.*"[148] In a footnote it is then stated: "It cannot be selected by the parties."[149] Kahn[150] and Forsyth[151] read the *dictum* as a rejection of a subjective proper law approach to the determination of contractual capacity.

The present author suggests that the passage merely states that the *lex loci contractus* governs contractual capacity and that contractual capacity is a prerequisite for choosing a legal system to govern the contract.[152] The case cannot be read as support for a putative proper law approach to contractual capacity, nor for rejection of the application of the subjective proper law of the contract.

In casu Innes CJ decided that the law of the Netherlands was to be applied to the matter.[153] This legal system was both the *lex domicilii* and the *lex loci contractus*. It is therefore not clear whether the judge made a choice between the two approaches. As such, this case only holds limited value in determining the law applicable to contractual capacity in South Africa today.

4.4 *Kent v Salmon*[154]

Kent, the appellant, a married woman, concluded a contract of sale with Salmon, the respondent in the Transvaal (South Africa). At the time, in terms of the law

145 *Hulscher v Voorschotkas voor Zuid Afrika* (n 32) 546) (italics added). Van Rooyen (1972) 120 therefore interprets this case as support for the *lex loci contractus*. The judge, however, at 546–547 expressly leaves the question open. See Forsyth (2012) 338–339.

146 (1888) 13 App Cas 88 at 106.

147 *Hulscher v Voorschotkas voor Zuid Afrika* (n 32) 546–547.

148 Edwards and Kahn (2003) par 333.

149 Edwards and Kahn (2003) par 333 note 9.

150 Kahn (1991) 128.

151 Forsyth (2012) 339.

152 Strangely enough, it is implied that a party without contractual capacity is still able to choose the *lex loci contractus* as the proper law of the contract. Perhaps the reference to the *lex loci contractus* is here employed to denote that the proper law objectively determined will then govern.

153 *Hulscher v Voorschotkas voor Zuid Afrika* (n 32) 547.

154 1910 TPD 637.

of Transvaal, married women lacked contractual capacity except where they acted as the agents of their husbands, they were public traders, their separate property was excluded from the community by antenuptial contract, the marital power was excluded or the contract concerned household necessities.[155] The appellant apparently breached the contract by only effecting partial payment of the purchase price. In the court *a quo*, the respondent successfully sued the appellant as a married woman assisted by her husband. This case is the appeal against the decision of the latter court.

On appeal, the respondent argued that the appellant was liable on the ground that she was married in England and this country remained her country of domicile since there was no evidence to suggest that she changed it. She consequently possessed the same rights and liabilities as a married woman in England, including the capacity to be sued on a contract in terms of the Married Woman's Property Act of 1893. The court therefore had to pronounce on the issue of whether contractual capacity is regulated by the *lex domicilii* or by the *lex loci contractus*.

Smith J held that the appellant's domicile was that of her husband, who was resident in South Africa. Due to a number of factors (such as: residence in South Africa since 1907; the conducting of business there; and the acquisition of interests in South Africa), the court arrived at the conclusion that Mrs Kent was domiciled in the Transvaal (South Africa).[156] The only factor in favour of a domicile in England, on the other hand, was the fact of a residence there for an unknown period of time before the parties relocated to the Transvaal.[157]

In respect of the question of capacity, Smith J stated that authority[158] suggests the application of the *lex loci contractus* in the case of commercial contracts instead of the *lex domicilii*. He stated:

> [T]here are strong grounds for holding that in the case of ordinary commercial contracts, such as the one in question, the contractual capacity of the person entering into them is to be decided not by the law of domicile, but by that of the place where the contract is made.[159]

In this context, he cited a passage by the editor of von Bar,[160] commenting on Lord Fraser's opinion on Scottish private international law, to the effect that the status of a natural person is governed by the *lex domicilii*.[161] According to the editor, this rule must be qualified in cases of the capacity to contract.

155 *Kent v Salmon* (n 154) 640.
156 *Kent v Salmon* (n 154) 638–639.
157 *Kent v Salmon* (n 154) 639.
158 Story, Dicey, Burge and von Savigny.
159 *Kent v Salmon* (n 154) 639.
160 L von Bar *Theorie und Praxis des Internationalen Privatrechts* translated and edited by G R Gillespie *The Theory and Practice of Private International Law* (1892) 310.
161 *Kent v Salmon* (n 154) 639.

The question will then be whether the capable contractant was aware of the incapacity of his or her counterpart at the time of contracting or whether he lacked knowledge thereof as a result of negligence. If the capable contractant acted "prudently and with reasonable care, and if there was nothing in the appearance of the other party, or the nature of the transaction, to raise inquiry, justice requires that the *lex loci contractus* should govern the rights of the parties".[162] In these circumstances, the counterpart would not be allowed to rely on his or her incapacity in terms of the *lex domicilii*.[163]

Smith J then cites the author Burge,[164] who states:

> The obstacles to commercial intercourse between the subjects of foreign states would be almost insurmountable, if a party must pause to ascertain, not by means within his reach, but by recourse to the law of domicile of the person with whom he is dealing, whether the latter has attained the age of majority, and consequently, whether he is competent to enter into a valid and binding contract.[165]

It is therefore the present author's view that Smith J preferred the application of the *lex loci contractus* to capacity in all cases involving commercial contracts, without the requirement of the absence of fault. The fact that it was not Mrs Kent who attempted to rely on her English domicile for the purposes of escaping contractual liability, but rather Salmon who asserted the existence of such liability in order to bind her contractually, was inconsequential; capacity was governed by the *lex loci contractus*, the law of the Transvaal (South Africa), in terms of which she lacked capacity. The court held: "In my opinion, the capacity of the defendant to enter into this contract, even if her English domicile were established, is dependent upon the local law, and not upon the English Statute of 1893."[166] As a result, in contrast to the decision of the court *a quo*, Smith J held that Mrs Kent was not liable for the balance of the purchase price of the goods sold to her.

The decision has been interpreted in various ways. According to Forsyth, Smith J adopted an approach similar to that advanced by Huber and Van der Keesel.[167] In terms of this approach, one should distinguish between status and

162 *Kent v Salmon* (n 154) 639.

163 *Kent v Salmon* (n 154) 640.

164 W Burge *Commentaries on Colonial and Foreign Law Generally, and in Their Conflict with Each Other, and with the Law of England* (1838a).

165 Burge (1838a) 132.

166 *Kent v Salmon* (n 154) 640.

167 Forsyth (2012) 339 in this regard refers specifically to Huber (1768) *HR* 1.3.36, 1.337, 1.3.38, 1.3.39) and Van der Keessel (1961) *Praelectiones* 131 ff (Th 42). See also Forsyth (2012) 293); E Kahn "Conflict of laws" 2000 *Annual Survey of South African Law* 871 875; and Van Rooyen (1972) 121. For a discussion of the views of Huber and Van der Keessel, see paragraph 3.

the consequences thereof. Status is determined by the *lex domicilii* while the consequences of status are determined by the *lex loci actus* (*lex loci contractus*).[168]

According to Kahn, the decision shows that, since some aspects of a wife's contractual capacity are so closely related to the proprietary consequences of her marriage, they should be governed by the legal system determining those consequences.[169] In the absence of an antenuptial contract, this system would be the *lex domicilii* of the husband at the time of the marriage.[170] Without further discussion, the author adds that he is not convinced that fairness dictates that local contracting parties are entitled to assume that the personal law of a married woman gives her the same contractual capacity that would be yielded by local law as the *lex loci contractus*.[171]

According to Sonnekus,[172] Smith J *in casu* arrived at the conclusion that contractual capacity in commercial contracts should be governed by the *lex loci contractus* by strongly relying on the fairness approach advocated by von Bar, rather than the views of Huber.[173] It would be fair for a contractant, intending to rely on the validity of an agreement, to expect that only the legal position as applied locally should be taken into consideration when dealing with a matter concerning capacity. The reason is that it would be difficult for this contractant to ascertain the particular legal position applicable in the foreign system to which his or her counterpart may be subject.[174] There could, however, according to the court (as interpreted by the author), be a deviation of this principle where a reasonable person in the position of a contractant had reason to be more cautious regarding a specific limitation of his or her counterpart's contractual capacity.[175]

According to Van Rooyen, it should be questioned whether it was fair to apply the *lex loci contractus* where the woman already had contractual capacity in terms of her *lex domicilii*.[176] In addressing this question, he refers to Huber[177] and Van der Keesel[178] who, according to him, both favoured applying the *lex loci*

168 Also see Schoeman, Roodt and Wethmar-Lemmer (2014) par 111.

169 Kahn (1991) 128.

170 This was the common-law rule. See for the position in South Africa today: J L Neels "The law applicable to the proprietary consequences of marriage in South Africa – the influence of German private international law" in C Hugo, and M J Möllers (eds) *Transnational Impacts on Law: Perspectives from South Africa and Germany* (2017) 115.

171 Kahn (1991) 128.

172 J C Sonnekus "Handelingsbevoegdheid van Getroudes en die Norme van die Internasionale Privaatreg" 2002 *Tydskrif vir Regswetenskap/Journal for Juridical Science* 145 146.

173 Sonnekus (2002) 146.

174 Sonnekus (2002) 146.

175 Sonnekus (2002) 146.

176 Van Rooyen (1972) 121.

177 Huber (1768) *HR* 1.3.36, 1.3.37, 1.3.38, 1.3.41 and 1.3.44.

178 Van der Keessel (1961) *Praelectiones* 104 (*Th* 42).

contractus to contractual capacity. He then submits that *in casu* they would have arrived at the same conclusion as Smith J.[179] On the other hand, Van Bijnkershoek favoured the application of the *lex loci contractus* only where a contractant lacked capacity according to his or her *lex domicilii*.[180] *In casu* he would not have applied the *lex loci contractus*, as the contractant would then lack capacity, but probably the *lex domicilii*.[181]

Van Rooyen is of the opinion that the purpose of the application of the *lex loci contractus* with regard to capacity is the protection of the contract assertor and must be seen as an exception to the generally applicable *lex domicilii*.[182] Reliance on this protection must, however, be realistic and necessary.[183]

The author refers to the French *Lizardi* rule in this context. The rule emanates from the decision in *Lizardi v Chaize*[184] where a foreigner (a Mexican national), lacking capacity in terms of his personal law, concluded a contract of sale with a French national in France where he would have possessed such capacity. The court held that in such a case his incapacity should not be upheld if the French national acted "sans légèreté, sans imprudence et avec bonne foi". This means that the French national, the contract assertor, must have acted without carelessness, without imprudence and with good faith.

Smith J refers[185] to a statement by the editor of von Bar,[186] supporting the principle in *Lizardi*[187] in terms of which the *lex loci contractus* applies only where the prejudiced contractant acts reasonably.[188] The citation by Smith J of the text of the editor of von Bar[189] has led to some confusion.[190] In the light of statements made elsewhere in the case, as referred to above,[191] the quotation from Burge[192] and the fact that the judge does not discuss the issues that would be relevant if a qualified *lex loci contractus* approach were followed (for instance, whether the contract assertor exercised reasonable care), it seems clear that the decision should be read as unconditionally in support of the *lex loci contractus* to govern contractual capacity in a commercial context.

179 Van Rooyen (1972) 121. As indicated earlier, they draw a distinction between status and capacity as a consequence thereof.
180 Van Bijnkershoek (1926) *Obs Tum* no 71; and Van Rooyen (1972) 21.
181 Van Rooyen (1972) 122.
182 Van Rooyen (1972) 123.
183 Van Rooyen (1972) 123.
184 Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.
185 *Kent v Salmon* (n 154) 640–641.
186 Von Bar–Gillespie (1892) 310.
187 *Lizardi v Chaize* (n 184).
188 Van Rooyen (1972) 122–123.
189 Von Bar–Gillespie (1892).
190 See Sonnekus (2002) 146.
191 *Kent v Salmon* (n 154) 639–640.
192 Burge (1838a).

4.5 *Powell v Powell*[193]

The *Powell* decision is subject to considerably dissimilar interpretation. A proper reading of *Powell* is important not only in view of the scarcity of case law in this regard but also because it formed the basis for the decision in *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd*,[194] which is the most recent case on the topic.

The Powells were domiciled in England at the time of their marriage. The couple subsequently settled in South Africa where they acquired domicile. Mr Powell (the applicant) purchased a motor vehicle which was registered in the name of his wife, Mrs Powell (the respondent), and it was common cause that he paid for it. It is therefore clear that the motor vehicle was a gift from the applicant to the respondent. The contract of donation was concluded in South Africa when they were domiciled in there and during the subsistence of their marriage. After the parties became estranged, the applicant informed the respondent that he revoked the gift and that it should be returned to him. The respondent refused to return it, insisting that she was entitled to possess it as the owner. The question that arose was which legal system applied to the conclusion of the contract of donation? If it was English law (the law of the matrimonial domicile), then the gift was valid, but if it was South African law, the applicant could revoke it.[195]

Ludorf AJ decided that the issue was not one of the patrimonial consequences of marriage,[196] which are governed by the *lex domicilii matrimonii*,[197] but one of the contractual capacity of the spouses.[198] The reason for the judge's decision in this regard is to be found in the following *dictum*: "I think its retention [the prohibition against donations between spouses] in modern law is for the protection of creditors. Exceptions to the rule which were introduced by the Insolvency Act,[199] strengthen me in this view."[200]

193 1953 4 SA 380 (W). Also see the discussion by E A Fredericks "Contractual Capacity in Private International Law: Interpreting the *Powell* case" 2006 *Tydskrif vir Hedendaagse Romeins-Holandse Reg/Journal of Contemporary Roman-Dutch Law* 279–286.

194 2000 1 SA 167 (W).

195 Contracts of donation between spouses are valid in South African law today: see sec 22 of the Matrimonial Property Act 88 of 1984.

196 *Contra Mair's Trustee v Mair* 1928 PH C14 (SR): see Van Rooyen (1972) 123–124 note 160.

197 This denotes the legal system of the country where the husband was domiciled at the time of conclusion of the marriage. This rule is now clearly in conflict with sec 9 of the Constitution of the Republic of South Africa, 1996. See for reform proposals the references in Neels (2017).

198 *Powell v Powell* 1953 4 SA 380 (W) 382H–383A and 383H–384A. See Edwards and Kahn (2003) par 308; Forsyth (2012) 294; and Schoeman, Roodt and Wethmar-Lemmer (2014) pars 195–196. *Cf* the discussion of *Guggenheim v Rosenbaum (2)* 1961 4 SA 21 (W) in par 4.6 below.

199 24 of 1936.

200 *Powell v Powell* (n 198) 383G.

Edwards and Kahn[201] read *Powell* as support for the *lex domicilii* in the context of contractual capacity. So do Schoeman, Roodt and Wethmar-Lemmer, but they add: "There are, however, indications that the judge applied the *lex domicilii* as the (putative) proper law of the contract."[202] Forsyth[203] writes as follows: "Ludorf AJ purported to apply the proper law,[204] and came to the conclusion that the *lex domicilii* at the time the gift was made governed...."[205] Elsewhere,[206] Forsyth quotes from the *Powell* case[207] to the effect that the proper law is applicable to contractual capacity; but it should be noted that the judge in the cited passage merely states the argument of the applicant. Van Rooyen emphasises the reference by the judge to the objective proper law.[208] Wunsh J, in the *Tesoriero* case,[209] interprets the *Powell* decision as providing support for the proper law approach in respect of contractual capacity.[210] Which of these interpretations is the most plausible?

Ludorf AJ first listed the relevant authorities on the issue of contractual capacity. He cited Cheshire[211] as follows:

> If the woman is capable by the 'proper law' of the contract (which is generally the law of the place where the contract is made)[212] though incapable by the law of her domicile, the contract will be valid: The proper law is the legal system with which the contract has the most real connection and is usually though not always the *lex loci contractus*. The surrounding circumstances of the contract show which is the proper law. To decide therefore which is the 'proper law', one asks such questions as:

201 Edwards and Kahn (2003) par 333 with note 4; Hahlo and Kahn (1975) 626.

202 Schoeman, Roodt and Wethmar-Lemmer (2014) par 112.

203 Forsyth (2012) 294 and 340.

204 with reference to *Powell v Powell* (n 198) 382D.

205 with reference to *Powell v Powell* (n 198) 384A. Also see R F Oppong *Private International Law in Commonwealth Africa* (2013) 143.

206 Forsyth (2012) 337 note 129.

207 *Powell v Powell* (n 198) 382E-F.

208 Van Rooyen (1972) 124 and 126.

209 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 1 SA 167 (W).

210 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (n 209) 172B-G.

211 G C Cheshire *Private International Law* (1947) 297.

212 This is not the position in English private international law today: see art 4 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I). In this regard, see Neels and Fredericks (2004) 173. It is also not the position in South African private international law: see Edwards and Kahn (2003) pars 328 and 330; Forsyth (2012) 329-336; Fredericks and Neels (2003) 63; Neels (1994) 289-291; Neels and Fredericks (2008b) 533; Schoeman, Roodt and Wethmar-Lemmer (2014) pars 92-102; and Van Rooyen (1972) 101-106.

> Where was the contract made? Where is it to be executed? Where are the parties domiciled at the time of the contract?, and the like.[213]

The judge stated that if he were to apply this test, South African law should determine the validity of the donation.[214] He based this conclusion on the following factors: the parties were domiciled in South Africa at the time the gift was made;[215] the motor vehicle was to be used there; the creditors of the parties, if any, were probably in South Africa; and there were no aspects of the contract (of donation) that demonstrated a connection to England (the *locus domicilii matrimonii*) whatsoever.[216]

It is clear that the judge had an *objective* putative proper law in mind, as he did not refer to the intention of the parties. The judge, however, continued to refer to other authority indicating that the *lex domicilii*[217] or the *lex loci contractus*[218] should govern. He then came to the following conclusion:

> After considering the arguments and authorities, I have come to the conclusion that the rule prohibiting gifts between spouses is a part of the local law affecting the contractual capacity of the spouses in relation to contracts of donation. It does not seem to me to be a matter which affects the proprietary rights of the spouses or the rights created at the time of the marriage in relation to property. *I think it is a local rule which prohibits donations between husband and wife while they are domiciled in South Africa*, and in these circumstances the applicant in the present case was entitled to revoke the donation as he has done.[219]

Although the court also refers to authorities with other views, the italicised part in the quotation above, in the present author's view, clearly indicates that the legal system that is finally applied to contractual capacity is the *lex domicilii* (and neither the proper law nor the *lex loci contractus* which are also referred to in the listed authority).[220] In any event, the objective putative proper law, the *lex loci contractus* and the *lex domicilii* were all South African law *in casu*.[221]

213 *Powell v Powell* (n 198) 383 A–C.

214 *Powell v Powell* (n 198) 383C.

215 Domicile is here merely one of the relevant factors whilst under the *lex domicilii* approach it is obviously the sole connecting factor. The judge does not seem to emphasise the role of domicile above the other factors.

216 *Powell v Powell* (n 198) 383C–D.

217 with reference to *Lee v Abdy* (1886) 17 QBD 309 at 383D–E.

218 with reference to *Kent v Salmon* 1910 TPD 637 at 383G–H.

219 *Powell v Powell* (n 198) 383H–384A) (italics added).

220 Edwards and Kahn (2003) par 333; Forsyth (2012) 340; Hahlo and Kahn (1975) 626; Schoeman, Roodt and Wethmar-Lemmer (2014) par 112; and Van Rooyen (1972) 124 and 126.

221 Fredericks (2006b) 285.

4.6 *Guggenheim v Rosenbaum (2)*[222]

This case dealt with the inherent validity of a contract of engagement.[223] Trollip J applied the proper law of the contract,[224] South African law, to the issue of validity but added:

> Even if I am wrong in my above approach to the problem that it is the proper law of the contract that must be regarded, and that the correct approach is simply and directly to say that according to our law, as the *lex fori*, the validity of the contract to marry is merely dependent on either (i) the plaintiff's capacity to contract, or (ii) her status at the time it was entered into, I think that, although the path I must then tread is much less clearly defined, the result would be the same.[225]

The judge then distinguishes between contractual capacity and status. The *lex domicilii* is the law that applies in respect of status.[226] The systems applicable to contractual capacity are either the *lex loci contractus* or the *lex domicilii*.[227] "In either case the law applicable would be that of the State of New York …."[228] It was therefore not necessary to choose between the possibilities.[229] Trollip J, however, cited a passage by Dicey,[230] "worth quoting in full",[231] stating that capacity in respect of an engagement contract "should … be governed by the law of his or her domicile, no matter where the promise is made".[232] The present author thus submits that if the *lex loci contractus* and the *lex domicilii* did not coincide, the judge would probably have favoured the *lex domicilii*.

4.7 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd*[233]

The appellant, who was married in community of property in terms of Argentinean law, entered into a contract of suretyship with the respondent without the consent of her husband. When sued by the respondent, the

222 *Guggenheim v Rosenbaum (2)* (n 32). Only Van Rooyen (1972) 125-126 and Edwards and Kahn (2003) par 333 refer to this case in the context of contractual capacity.

223 On inherent validity and legality of contracts in private international law, see Edwards and Kahn (2003) pars 336-337; Forsyth (2012) 343-349; Neels (1991) 694; Schoeman, Roodt and Wethmar-Lemmer (2014) pars 120-125; and Van Rooyen (1972) 145-175.

224 *Guggenheim v Rosenbaum* (n 32) 29H-33A.

225 *Guggenheim v Rosenbaum* (n 32) 33A-B.

226 *Guggenheim v Rosenbaum* (n 32) 32D-E and 33E-F.

227 *Guggenheim v Rosenbaum* (n 32) 33B-C.

228 *Guggenheim v Rosenbaum* (n 32) 33D-E.

229 See also Van Rooyen (1972) 126.

230 J H C Morris et al (eds) *Dicey and Morris on the Conflict of Laws* (1958) 770.

231 Morris *et al* (eds) (1958) 770.

232 *Guggenheim v Rosenbaum* (n 32) 33D.

233 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (n 209).

appellant raised the defence of incapacity and the court had to decide whether she possessed the necessary contractual capacity at the relevant stage and was thus liable in terms of the contract.

After rejecting the relevance of Argentinean law to the issue at hand,[234] Wunsh J refers to *Kent v Salmon*[235] as authority for the *lex loci contractus* to be applied to contractual capacity in the context of ordinary commercial contracts. "A deed of suretyship signed by one of two equal members of a trading close corporation who is involved in its business … is an ordinary commercial contract."[236] The judge, however, remarks that the *locus contractus* "could be a matter of pure chance, especially if it is made by letter or telefax or over the telephone"[237] or – it could be added – electronically (for instance by e-mail).[238]

The judge, with approval, then refers to Dicey and Morris[239] as support for "the law of the country with which the contract is most closely connected" or the proper law or *lex causae* of the contract to govern contractual capacity.[240] He adds that this approach is consistent with the views of Ludorf AJ in the *Powell* case[241] and quotes extensively from that decision.[242] Wunsh J concludes as follows: "In any event, in the present matter the *lex loci contractus*, the only country with which the contract was connected, and the country according to the law of which the merits of the case had to be decided (the *lex causae* …) are the same."[243] According to the present author, this *dictum* should be read as follows: The only legal system the contract was connected to is South African law and this legal system is both the *lex loci contractus* and the proper law. It was therefore not necessary for the court to choose between the *lex loci contractus* and the proper law. South African law governed the appellant's contractual capacity. The *lex domicilii* is not mentioned but it is probable on the facts that the appellant was domiciled in South Africa. If that were the case, the *lex loci actus*, the proper law and the *lex domicilii* all coincided.

Forsyth reads this case as support for the application of the *lex loci contractus*,[244] but "[s]ome support for the proper law may be drawn from"

234 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (n 209) 171 H: "In my view, the evidence and discussion about the law of Argentina was unnecessary."
235 *Kent v Salmon* 1910 TPD 637.
236 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (n 209) 171H-I.
237 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (n 209) 172A-B.
238 See the text at note 18-20.
239 L Collins et al (eds) *Dicey and Morris on the Conflict of Laws* (1993) 1271-1275.
240 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (n 209) 172B-C.
241 *Powell v Powell* 1953 4 SA 380 (W).
242 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (n 209) 172C-G.
243 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (n 209) 172G-H.
244 Forsyth (2012) 339 note 138. Also see Oppong (2013) 142.

the decision.[245] However, it is suggested by the present author that the judge identifies with the proper law test rather than that of the *lex loci actus*.[246]

Sonnekus believes that the judgment corresponds with the fairness approach advocated by von Bar.[247] According to this approach, the claimant of the close corporation, for which Tesoriero stood surety, could certainly not have been expected to first familiarise itself with the legal position in terms of Argentinean law. It was surely both parties' obvious intention that the suretyship was a binding agreement between them.[248]

It may be remarked here that the reference by the court to the proper law of a contract is inaccurate in the context of contractual capacity. It presumes that a contract exists; yet contractual capacity – a prerequisite for the existence of a contract – still has to be ascertained. One should rather refer to the putative proper law: the legal system that would have been the proper law if the parties indeed had contractual capacity. More specifically, reference should be made to the putative objective proper law because it is unacceptable for parties to choose a legal system that would grant them capacity which they otherwise lack.[249]

4.8 Summary

There is thus authority in South African case law for the following legal systems to govern the contractual capacity of an individual: in contracts involving immovable property, the *lex rei sitae* or *lex situs*;[250] in respect of all other contracts: the *lex domicilii*,[251] the *lex loci contractus*[252] and, the (putative) (objective) proper law of the relevant contract.[253] A clear choice between these systems has not yet crystallised. There is neither a Supreme Court of Appeal nor a Constitutional Court decision in this regard and therefore no nationally binding authority.

245 Forsyth (2012) 340 note 142.

246 Sonnekus (2002) 150 indeed interprets the case as support for the proper law approach.

247 Sonnekus (2002) 146 with reference to von Bar-Gillespie (1892) 310.

248 Sonnekus (2002) 151.

249 See Edwards and Kahn (2003) par 333; *cf* Forsyth (2012) 337, 338, 340 and 343; Kahn (1991) 128; Schoeman, Roodt and Wethmar-Lemmer (2014) pars 102 and 108; Van Rooyen (1972) 126; *Ferraz v d'Inhaca* 1904 TH 137 and 143; and *Hulscher v Voorschotkas voor Zuid Afrika* 1908 (TS) 542 at 546-547.

250 *Ferraz v d'Inhaca* 1904 TH 137.

251 *Powell v Powell* 1953 4 SA 380 (W).

252 *Kent v Salmon* 1910 TPD 637.

253 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 1 SA 167 (W). *Cf Guggenheim v Rosenbaum (2)* 1961 4 SA 21 (W).

5 The Contemporary South African Authors

5.1 Forsyth

According to Forsyth, contractual capacity, as an incident of status, ought in principle to be governed by the *lex domicilii*.[254] He further states, however, that this rule is "highly inconvenient" in ordinary commercial contracts, considering the impracticality of consistent enquiries into the domicile of contractants.[255] Although the law is unclear and not settled on the issue,[256] he adds that it does appear that the *lex rei sitae* will govern contractual capacity in respect of immovable property.[257]

The author then considers the possibility of the objective proper law governing the issue, namely, the law with which (irrespective of a choice between the parties) the contract would be most closely connected if a contract were in existence.[258] However, he does not support this approach without reservation as the determination of the objective proper law is unpredictable (in terms of South African private international law) and this undermines certainty, the main concern in commercial contracts.[259]

The *lex loci contractus* is also not preferred as the sole legal system to govern.[260] Contracts that are closely connected to the personal life of the parties should be governed by the *lex domicilii* rather than the fortuitous *lex loci contractus*.[261] In these types of contracts, there should be no uncertainty in respect of incapacity as the parties would presumably be aware of each other's domiciles and contract accordingly.[262]

Forsyth therefore supports the approach advocated by Anton for the purposes of Scots private international law.[263] According to this approach, a distinction is drawn between ordinary commercial (mercantile) contracts and other (non-mercantile) contracts. The *lex loci contractus* would govern capacity in the case of mercantile contracts while the *lex domicilii* would prevail in

254 Forsyth (2012) 337.
255 Forsyth (2012) 337.
256 Forsyth (2012) 338.
257 with reference to *Ferraz v d'Inhaca* 1904 TH 137 at 142-143. Also see Forsyth (2012) 338 note 132.
258 as advocated by Van Rooyen (1972) 126; and see Forsyth (2012) 340 note 146.
259 Forsyth (2012) 340 states that predictability will not improve even if the suggested exception by Van Rooyen (1972) 126 is taken into consideration that "whatever the proper law might hold if the capacity exists by the *lex domicilii*, then the contract is valid".
260 Forsyth (2012) 340.
261 Forsyth (2012) 340 mentions marriage settlement contracts as examples of these types of contracts.
262 Forsyth (2012) 340.
263 A E Anton *Private International Law* (1967) 199 *ff*; and see A E Anton and P R Beaumont *Private International Law* (1990) 276-279.

respect of non-mercantile contracts. According to Forsyth, this approach is "clear, relatively certain, and it avoids the injustices of either extreme".[264] "[E]ither extreme" refers to the impractical approach that in all cases (without any distinction drawn between mercantile and non-mercantile contracts) capacity is governed exclusively by either the *lex loci contractus* or the *lex domicilii*.

The author therefore suggests that in the case of immovable property the *lex rei sitae* governs capacity; in respect of non-mercantile contracts the *lex domicilii* prevails; and where mercantile contracts are involved, the *lex loci contractus* should be the governing law.[265] According to the author, if this approach is followed, all the South African cases were decided correctly,[266] except *Powell* "as it suggests that the South African law applied as *lex domicilii* rather than as *lex loci contractus*".[267] The author further states that in *Hulscher* the court did not decide which law were to apply had the *locus contractus* and the *domicilium* not coincided.[268]

Forsyth, then, with particular reference to *Kent v Salmon*,[269] states that even where the *lex rei sitae* or the *lex loci contractus* is applied, it may be necessary to utilise the *lex domicilii* to determine the status of one of the contracting parties, although the *lex loci contractus*[270] is employed to determine the incidents of this status.[271]

Forsyth finally mentions Kahn's suggestion that a party should, in respect of movables, be held to have capacity if he or she had such under his domiciliary law, the *lex loci contractus* or the objective proper law,[272] but does not express an opinion on this proposal.[273]

5.2 Hahlo and Kahn

Hahlo and Kahn, who only consider contractual capacity in the context of marriage law, characterise contractual capacity as a personal and not a patrimonial (proprietary) consequence of marriage.[274] The relevance thereof is that personal consequences are, as a general rule, governed by the *lex domicilii* of the spouses at the time of the relevant juristic act, while patrimonial

264 Forsyth (2012) 341.
265 Forsyth (2012) 341.
266 Forsyth (2012) 341 states that "all [the cases] concerned commercial contracts and in all the *lex loci contractus* was applied".
267 *Cf* the interpretation of *Powell v Powell* 1953 4 SA 380 (W) in paragraph 4.5 above.
268 *Hulscher v Voorschotkas voor Zuid Afrika* 1908 (TS) 542 at 545.
269 *Kent v Salmon* 1910 TPD 637.
270 One could perhaps add: the *lex situs* in respect of immovable property.
271 Forsyth (2012) 341. Also see Huber (1768) *HR* 1.3.36, 1.3.37, 1.3.38, 1.3.40, 1.3.41 and 1.3.44 and Van der Keessel (1961) *Praelectiones* 104 (*Th* 42).
272 Kahn (1991) 128; and Kahn (2000) 876.
273 Forsyth (2012) 341.
274 Hahlo and Kahn (1975) 623.

consequences are governed by the *lex domicilii matrimonii*.[275] There are, according to the authors, two exceptions to the rule that the *lex domicilii* governs where a wife's capacity to conclude legal transactions or to bind her husband's credit is in question. The first is the situation where certain aspects of the wife's contractual capacity are so closely connected to the proprietary consequences that they should rather be governed by the *lex domicilii matrimonii* at the time of the marriage. The second concerns the position where an application of the *lex domicilii*, as governing the contractual capacity of the wife, leads to a third party being prejudiced as a result of this legal system allowing for less extensive contractual capacity than the *lex loci contractus*. In these situations, the authors suggest a "compromise view",[276] namely that the *lex domicilii* of the wife should be applied and third parties are entitled to assume that this does not give her less extensive contractual capacity than the *lex loci contractus*. Third parties would thus be protected as they could assume that a woman contractant domiciled in another country has the legal capacity equivalent to a woman married at common law.[277] In effect, the authors argue for the alternative application of the *lex domicilii* and the *lex loci contractus*. According to the authors, the capacity of a wife to create a real right in respect of immovable property should be governed by the *lex situs*.[278] Reference to women in this regard should be understood in the context of the previous matrimonial property law where a wife was in a weaker position *vis-à-vis* her husband.

5.3 Kahn

Kahn is not in favour of the *lex loci contractus* as the sole legal system to govern capacity.[279] In this context, he concurs with Wunsh J in *Tesoriero*[280] that the place of contracting might be absolutely fortuitous, especially where the contract is concluded by letter or telefax or over the telephone or as a means of evading the law.[281] He does, however, support Forsyth's submission[282] that neither the *lex loci contractus* nor the objective proper law consistently offers a satisfactory answer.[283] He suggests that, in general, a party should be held to have capacity to conclude a commercial contract relating to movables, if he has capacity at the time of contracting according to his domiciliary law or the *lex loci contractus* or

275 See note 170 supra.
276 Hahlo and Kahn (1975) 624.
277 Hahlo and Kahn (1975) 624.
278 Hahlo and Kahn (1975) 625.
279 Kahn (2000) 875.
280 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 1 SA 167 (W) at 172A-C.
281 Kahn (2000) 875.
282 C F Forsyth *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the Supreme Court* (1996) 295-296. See for today, Forsyth (2012) 340-341.
283 Kahn (2000) 876.

the objective proper law.[284] Where an immovable is involved, capacity, according to the author, should be governed by the *lex situs*.[285]

5.4 Schoeman, Roodt and Wethmar-Lemmer

It appears that Schoeman, Roodt and Wethmar-Lemmer, with reference to *Ferraz v d'Inhaca*,[286] accept the application of the *lex rei sitae* to contractual capacity in respect of immovable property.[287] In respect of other contracts, they are of the opinion that the exclusive application of the *lex domicilii*,[288] the *lex loci contractus* and the putative proper law of the contract all present problems. For example, if a minor was allowed to raise his or her incapacity in terms of the *lex domicilii* as a defence, it could be unfair to storekeepers who are in any event not expected to have knowledge of the minor's domicile. The *locus contractus* may be fortuitous. Therefore, it would be unfair to allow contractual capacity to be governed by this legal system.[289] The authors also submit that, since contractual capacity pertains to the formation of a contract, the objective proper law cannot be used to ascertain whether the parties were capable of concluding the contract.[290] The proper law subjectively determined is also not preferred as it is unacceptable for parties to intentionally elect a particular legal system for the purposes of attaining contractual capacity, which they would not otherwise have had.[291]

They refer to the approach advocated by Anton for purposes of Scots private international law, where a distinction is drawn between commercial and non-commercial contracts.[292] In the case of the former, the *lex loci contractus* shall apply whereas in respect of the latter, the *lex domicilii* shall prevail. They suggest that under this approach the determining factor would be the involvement of third parties in a contract (that is, additional to the spouses themselves).[293] The authors also mention the approach by Kahn as another possibility,[294] but do not

284 Kahn (1991) 128; and Kahn (2000) 876.

285 Kahn (1991) 128; and Edwards and Kahn (2003) par 333.

286 1904 TH 137 at 142-143.

287 Schoeman, Roodt and Wethmar-Lemmer (2014) par 114.

288 Although capacity is closely linked to status, it is not governed by the *lex domicilii* (as is status) (Schoeman, Roodt and Wethmar-Lemmer (2014) par 109). In support of this argument, the authors refer to the approach by Huber that status is governed by the *lex domicilii* while capacity, an incident of status, is governed by the *lex loci contractus*: Huber (1687) *De Conflictu Legum* s 12.

289 Schoeman, Roodt and Wethmar-Lemmer (2014) par 114.

290 Schoeman, Roodt and Wethmar-Lemmer (2014) par 107.

291 Schoeman, Roodt and Wethmar-Lemmer (2014) par 107.

292 Schoeman, Roodt and Wethmar-Lemmer (2014) par 115. See Anton and Beaumont (1990) 276-279.

293 Schoeman, Roodt and Wethmar-Lemmer (2014) par 115.

294 Schoeman, Roodt and Wethmar-Lemmer (2014) par 115 note 282 with reference to Kahn (1991) 128.

offer any commentary. The authors therefore, with the possible exception of the position relating to immovable property, refrain from suggesting any possible legal systems to govern contractual capacity and they do not identify with any of the approaches of the other authors.

5.5 Sonnekus

Sonnekus agrees with Forsyth that the application of the *lex loci contractus* and the proper law may yield unsatisfactory answers in certain circumstances.[295] He views the approach favoured by the English authors Dicey and Morris,[296] that capacity is governed by the law of the country with which the contract has its closest connection, as too rigid: it may be unsatisfactory in some situations and would clearly lead to unfair results.[297]

The author identifies with the approach advocated by Kahn. As far as possible, one should give effect to the evident intention of the parties: to be bound to the agreement which they apparently concluded. This would best be achieved if it were accepted that a contracting party has capacity if, at the time of contracting, he or she indeed had such capacity under the *lex domicilii*, the *lex loci contractus*, the subjective proper law or the objective proper law.[298] With this approach, the proverbial net is cast wide enough to intercept all possible technical defences which a contractant may attempt to utilise to escape liability.[299] According to the author, the most striking feature of an approach that seizes technical evasive-manoeuvres is the obvious fairness that it provides.[300]

5.6 Van Rooyen

Van Rooyen's approach of the issue of contractual capacity[301] may be interpreted as follows: A contractant should be held to have contractual capacity if he or she is capable under the objective proper law or under the *lex domicilii*. The subjectively ascertained proper law does not play a role. The objective proper law is not applied where the contract assertor knew, or reasonably should have

295 Sonnekus (2002) 147. See also Edwards and Kahn (2003) par 333; and Kahn (2000) 875.

296 Collins *et al* (eds) (1993) 1271-1275.

297 Sonnekus (2002) 147-148.

298 Sonnekus (2002) 147-148.

299 Sonnekus (2002) 147-148.

300 Sonnekus (2002) 147-148.

301 Van Rooyen's approach reads (Van Rooyen (1972) 126): "Aangesien die objektiewe *lex causae*-benadering al toegepas is in Kanada en in 'n mate hier by ons ook erken is en dit strydig met die sosiale funksie van die beskermende maatreël sou wees om 'n regskeuse toe te laat, word hier aan die hand gedoen dat die objektief bepaalde lex causae in die eerste plek moet geld. Derdelandsreg kan egter in die volgende gevalle hier inwerk: (1) waar 'n kontraktant bevoeg is volgens sy *lex domicilii* is die *lex domicilii* toepaslik; (2) waar die ander kontraktant weet of redelikerwys behoort te weet van sy onbevoegdheid, geld die *lex domicilii* ook."

known of his counterpart's incapacity under the *lex domicilii*.[302] In this case only the *lex domicilii* governs. (The determination of reasonableness involves a substantive-law standard but the author does not state which system is applicable to ascertain the reasonableness of the prejudiced contractant's conduct.)

Van Rooyen's support for the objective *lex causae* (proper law) approach is based on the fact that it was already applied in Canada[303] and recognised in South African law.[304] The subjectively ascertained proper law is rejected because it would be in conflict with the social function of the protective measures of the *lex fori* if a choice of law was allowed in this context.[305] The exception to the application of the objective proper law is clearly inspired by the French decision of *Lizardi v Chaize*.[306]

According to the author, the *lex domicilii* is excluded in the specified circumstances as its application would greatly hinder international trade. Where parties have chosen a legal system, the application of the objectively determined proper law could be regarded as a third country's legal system which overrides the chosen *lex causae*. The *lex domicilii* could also be regarded as a third country's legal system, the author concludes, where, in the absence of a choice of law, it is applied and does not correspond with the objectively applicable *lex causae*.[307] The term "third country" is used by the author to denote a country the law of which is neither the proper law of the contract nor the *lex fori*.

Finally, in respect of immovable property, the author submits that the *lex rei sitae* would "usually" be applicable as the objectively applicable legal system.[308]

6 Summary

The common-law law authors utilised the *lex domicilii* and the *lex loci contractus*[309] with some flexibility, taking into account the need for an equitable outcome in the particular case.[310]

There is no binding judicial authority in South Africa in this regard. The *Hulscher* case refers to the *lex domicilii* and the *lex loci contractus* as possible systems to govern contractual capacity, without choosing between them.[311]

302 Also see Forsyth (2012) 340 note 145.
303 *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240.
304 with reference to *Powell v Powell* 1953 4 SA (W) 380 at 383.
305 Van Rooyen (1972) 126.
306 *Lizardi v Chaize* (n 184); and Van Rooyen (1972) 114.
307 Van Rooyen (1972) 126.
308 Van Rooyen (1972) 126 with reference to *Ferraz v d'Inhaca* 1904 TH 137 at 142-143.
309 and some the *lex situs* in respect of immovable property.
310 See paragraph 3; and Forsyth (2012) 338.
311 *Hulscher v Voorschotkas voor Zuid Afrika* 1908 (TS) 542.

Kent v Salmon[312] is clear authority in favour of the *lex loci contractus* and *Powell v Powell*[313] should be read as support for the *lex domicilii*. The court in *Guggenheim v Rosenbaum (2)*[314] refers to authority in favour of the *lex loci contractus* and the *lex domicilii* but it is clear that the *lex domicilii* would have been favoured if the two did not coincide *in casu*. The court in *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd*[315] is critical about the application of the *lex loci contractus* and clearly favours the proper law of the contract to govern capacity. *In casu* no choice had to be made as these legal systems were the same on the facts. *Ferraz v d'Inhaca*[316] is the only case dealing with immovable property; here it was decided that the *lex rei sitae* should apply.

Forsyth[317] identifies with the proposal of Anton and Beaumont[318] that the *lex loci contractus* applies in respect of mercantile and the *lex domicilii* in respect of non-mercantile contracts. The author is in favour of the *lex rei sitae* applying in respect of contracts involving immovable property.[319] Schoeman, Roodt and Wethmar-Lemmer[320] also refer to the proposal of Anton and Beaumont[321] and accept the *lex situs* as the governing law in respect of immovable property.[322] Hahlo and Kahn[323] seem to be in favour of the alternative application of the *lex domicilii* and the *lex loci contractus* where third parties are involved. The *lex situs* should apply in respect of immovable property.[324] Kahn[325] proposes an alternative reference rule involving the *lex domicilii*, the *lex loci contractus* and the objective proper law of the contract. Where the contract involves immovable property, the *lex situs* should apply.[326] Sonnekus[327] identifies with the proposal by Kahn,[328] while Schoeman, Roodt and Wethmar-Lemmer[329] merely refer to it.[330] Van Rooyen is in favour of the alternative application of the *lex domicilii* and the objective proper law – but the proper law should not be applied where the contract assertor knew, or reasonably should have known, of his counterpart's

312 1910 TPD 637.
313 1953 4 SA 380 (W).
314 1961 4 SA 21 (W).
315 2000 1 SA 167 (W).
316 1904 TH 137.
317 Forsyth (2012) 341.
318 Anton and Beaumont (1990) 276-279.
319 Forsyth (2012) 338.
320 Schoeman, Roodt and Wethmar-Lemmer (2014) par 115.
321 Anton and Beaumont (1990) 276-279.
322 Schoeman, Roodt and Wethmar-Lemmer (2014) par 114.
323 Hahlo and Kahn (1975) 624-625.
324 Hahlo and Kahn (1975) 625.
325 Kahn (1991) 128; and Kahn (2000) 876.
326 Kahn (1991) 128. Also see Edwards and Kahn (2003) par 333.
327 Sonnekus (2002) 147-148.
328 Kahn (1991) 128; and Kahn (2000) 876.
329 Schoeman, Roodt and Wethmar-Lemmer (2014) par 115.
330 Also see Edwards and Kahn (2003) par 333.

incapacity under the *lex domicilii*.[331] The *lex situs* will usually be applied in respect of immovable property.[332]

Forsyth[333] and Schoeman, Roodt and Wethmar-Lemmer[334] refer to the distinction made by some common-law authors between status (governed by the *lex domicilii*) and the consequences thereof (governed by the *lex loci contractus*) in passing. It is, however, clear that this distinction has not been received by the South African courts. The same applies to the exceptions advocated by Johannes Voet,[335] Huber[336] and Van der Keessel.[337] These exceptions are also not echoed by contemporary South African authors. The proposal by Van Rooyen[338] contains the exception that the objective proper law will not be applied (and therefore only the *lex domicilii* will be applicable) if there is fault on the part of the capable party. The common-law exceptions, on the other hand, deal with the application of the *lex loci contractus* as primary applicable legal system to capacity (and therefore not the *lex domicilii*) in the absence of fault on the part of the capable contractant.[339]

7 Reform

This contribution constitutes an overview of the current legal position in South African private international law in respect of the contractual capacity of natural persons. It is clear that there is much scope for development and increased certainty. In a recent comparative study, the current author made some suggestions in this regard, including the following: employment of two personal laws as primary applicable legal systems (the law of domicile and the law of habitual residence); making use of the law of the principal place of business instead of the *lex domicilii* or the law of habitual residence where a natural person acts in the course of his or her business activities; certain prerequisites for the application of the law of the country where the contract was concluded; the application of the *lex situs* together with the law of domicile and habitual residence in respect of immovable property; utilisation of the putative objective proper law of the contract as a primary applicable legal system; certain exceptions in the context of the employment of the *lex loci contractus* and the putative objective proper law of the contract; and special rules for contracts of a recurrent nature in respect of reasonably essential goods.[340] The specific

331 Van Rooyen (1972) 126. *Cf Kent v Salmon* (n 154) 639-640; Forsyth (2012) 340 note 145; and Sonnekus (2002) 146.
332 Van Rooyen (1972) 126.
333 Forsyth (2012) 337 and 338 note 131.
334 Schoeman, Roodt and Wethmar-Lemmer (2014) par 109.
335 J Voet (1829) *Commentarius* 27.10.11.
336 Huber (1768) *HR* 1.3.39.
337 Van der Keessel (1961) *Praelectiones* 103 (Th 42).
338 Van Rooyen (1972) 126.
339 See the discussion in paragraph 3.
340 See Fredericks *Contractual Capacity in Private International Law* (2016) 247-249.

proposals and the line of argumentation informing them will be clarified in future contributions.

Mixed Dispute Resolution Clauses in International Commercial Transactions

*Daniel Girsberger**

1 Introduction: Recent Trends in Regulating International Commercial Dispute Resolution

International commercial dispute resolution is on the move everywhere, including in South Africa. This trend is reflected, for example, in the fact that the South African State has recently reformed its arbitration law, by implementing the UNCITRAL Model Law on International Commercial Arbitration[1] in the form of the International Arbitration Act 15 of 2017, thereby adding to the Arbitration Act No 42 of 1965 (which now mainly applies to domestic arbitration only). Moreover, South Africa's most prominent arbitral institution, the Arbitration Foundation of Southern Africa (AFSA), is currently working on a revision of its arbitration rules.

This article deals with so-called "mixed" and "multi-tier" dispute resolution clauses in international commercial transactions. Recent surveys have shown that more than half of the respondents have opted for such clauses in their international business transactions.[2] They have in common that the parties may only resort to arbitration or litigation if a negotiation or mediation between them fails. Courts of various jurisdictions, such as the Swiss Federal Supreme Court[3] and Belgian courts[4] have found that the pre-arbitration or pre-

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1 https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

2 P Friedland and L Mistelis *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015) 2 *ff*; P Friedland and S Brekoulakis 2018 *International Arbitration Survey: The Evolution of International Arbitration* (2018) 5 *ff*. Compare D Nigmatullina "The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study" 2016 *Journal of International Arbitration* 37 50 *ff*, who reached less optimistic results with regard to hybrid clauses in her survey of 2014.

3 Swiss Federal Supreme Court, Decision of 16.3.2016 Nr. 4A_628/2015, Bundesgerichtsentscheid (BGE) 142 III 296, consideration 2.3; issue left open in BGE 4A_18/2007, 4A_46/2011 and 4A_124/2014.

4 See C Lévy "La sanction de l'inexécution d'une clause de conciliation et de médiation" 2016 *Schweizerische Zeitschrift für Zivilprozessrecht* 467-474.

litigation negotiation (or mediation) phase may be enforced, and the arbitration or court proceedings stayed, until the first-tier dispute resolution has been initiated and terminated without reaching a settlement.[5]

The vast majority of these clauses combine negotiation or mediation with *arbitration*.[6] There can be little doubt that the main success factor for the choice of arbitration instead of State court litigation has been the success of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[7] The fact that the New York Convention has been ratified by most States across the globe has made it the most popular treaty in the field of private international law. While similar endeavors to establish an international convention on the recognition and enforcement of State court judgments had failed for many decades, such a convention was finally concluded in the Hague in July 2019 under the auspices of the Hague Conference on Private International Law, called the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH Judgments Convention).[8] In the year 2005 already, the Hague Choice of Court Convention was concluded, on the basis of which court decisions may be enforced in a Member State if the jurisdiction of the court arises from a forum selection clause.[9] This Convention entered into force in 2015 but only a few States have ratified it in the two decades of its existence.[10] Whether the more recent HCCH Judgments Convention will share this fate, or find as many supporters as the New York Convention, remains to be seen. It is realistic to estimate that, if at all, a similar success as the New York Convention will not be reached for many years to come.

5 According to the Swiss Federal Supreme Court, multi-tier dispute resolution clauses can be enforced in that the arbitral tribunal must stay its proceedings until it is established that the negotiation or mediation has been initiated and unsuccessfully terminated. BGE Nr. 4A_628/2015, cons. 2.3. This presupposes an unequivocal wording. *Id.* See also D Girsberger and J T Peter *Aussergerichtliche Konfliktlösung: Kommunikation – Konfliktmanagement – Verhandlung – Mediation – Schiedsgerichtsbarkeit* (2019) 189 fn 331; Domitille Baizeau and A Loong "Multi-tiered and Hybrid Arbitration Clauses" in M Arroyo (ed) *Arbitration in Switzerland – The Practitioner's Guide: Commentary* (2018) 2781 2787 *ff* par 29 *ff*; P Kobel "Clauses multi-tiered et la fenêtre de médiation" in L Hirsch and C Imhoos (eds) *Arbitrage, médiation et autres modes pour résoudre les conflits autrement* (2018) 143 *ff*. As to a similar practice in Australia, Singapore, England and the USA, see Baizeau and Loong (2018) par 56.

6 Friedland and Brekoulakis (2018) 6 *ff*.

7 Friedland and Brekoulakis (2018) 7; Friedland and Mistelis (2015) 2.

8 See https://www.hcch.net/de/instruments/conventions/specialised-sections/judgments.

9 https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court.

10 https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court.

Nevertheless, in the past years, various international commercial courts have been established all over the globe. The majority of these courts combine elements of the State court system with those of arbitration, such as autonomy and flexibility of the parties regarding procedure; the right of foreign counsel to act in the respective court or tribunal; English as the language of the proceedings; increased confidentiality; and inclusion of experienced foreign judges and arbitrators.[11] This recent development[12] began in South East Asia, specifically in Hong Kong and Singapore,[13] continued in the United Arab Emirates,[14] and later in China,[15] Australia,[16] and Europe,[17] in countries such

11 See, *eg*, G F Bell "The New International Commercial Courts—Competing with Arbitration? The Example of the Singapore International Commercial Court" 2018 *Contemporary Asia Arbitration Journal* 193 194 *ff*; S Wilske "International Commercial Courts and Arbitration — Alternatives, Substitutes or Trojan Horse?" 2018 *Contemporary Asia Arbitration Journal* 153 157 *ff*. L Reed "International Dispute Resolution Courts: Retreat or Advance – The 10th John E.C. Brierley Memorial Lecture" 2017–2018 *McGill Journal of Dispute Resolution* 129 142 calls these courts the result of a "marriage between international arbitration and litigation".

12 For a comparative analysis of such courts, see, *eg*, Bell (2018) 194 *ff*, 207; Reed (2017–18) 137 *ff*; F Tiba "The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia" 2016 *Loyola University Chicago International Law Review* 31 43*ff*; J Walker "Specialised International Courts: Keeping Arbitration on Top of Its Game" 2019 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 2 *ff*; Wilske (2018) 155 *ff*.

13 See, *eg*, A Godwin, I Ramsay and M Webster "International Commercial Courts: The Singapore Experience" 2017 *Melbourne Journal of International Law* 219 *ff*; S Menon "International Commercial Courts: Towards a Transnational System of Dispute Resolution", Opening Lecture for the DIFC Courts Lecture Series (2015); H H Teh and J Yeo "The Singapore International Commercial Court in Action" 2016 *Singapore Academy of Law Journal* 692 *ff*; M Yip "The Resolution of Disputes before the Singapore International Commercial Court" 2016 *International and Comparative Law Quarterly* 439 *ff*.

14 See M Hwang "Commercial Courts and International Arbitration – competitors or partners?" 2015 *Arbitration International* 193–212.

15 See D Holloway "The New Chinese International Commercial Court and the Future of Dispute Resolution in the Belt and Road Initiative" 2018 *Vindobona Journal of International Commercial Law & Arbitration* 96 *ff*; Bell (2018) 198 *ff*; S Lin "China's International Commercial Court under the 'Belt and Road Initiative'" 2018 *International Company and Commercial Law Review* 664 *ff*; Wilske (2018) 174 *ff*, each with further references.

16 See, *eg*, L Trakman and H Montgomery "The 'Judicialization' of International Commercial Arbitration: Pitfall or Virtue?" 2017 *Leiden Journal of International Law* 405 *ff*.

17 Bell (2018) 194 *ff*; S A Kruisinga "Commercial Courts in the Netherlands, Belgium, France and Germany – Salient Features and Challenges" 2019 *IPRax* 277 *ff*; Walker (2019) 3; Wilske (2018) 169 *ff*.

as France,[18] the Netherlands,[19] and Germany.[20] Similar courts are planned to be established for example in Belgium[21] and Switzerland,[22] and they are even

18 E Gaillard, Y Banifatemi and C Vialard "The International Chambers of Paris Courts and Their Innovative Rules of Procedure (unofficial English translations available)" in *Sherman and Sterling Perspectives*, available at https://www.shearman.com/perspectives/2018/04/paris-courts-and-their-innovative-rules-of-procedure 1 *ff*; M Huertas "Paris' Proposal for a Specialist Court Post-Brexit: A Tale of Two Cities" 2017 *Journal of International Banking Law and Regulation* 502 *ff*; Kruisinga (2019) 279 *ff*; R Reece and G Hannotin "A Critical View of the Protocols Relating to Proceedings Before the International Chambers of the Commercial Court of Paris and the Paris Court of Appeal" 2018 *International Business Law Journal* 363 *ff*.

19 A Scholten "An International Netherlands Commercial Court?" in *NYU Law Blogs – Transnational Notes* of 28 February 2017, available at https://blogs.law.nyu.edu/transnational/2017/02/an-international-netherlands-commercial-court/ 1 *ff*; Kruisinga (2019) 278 *ff*; G Ruehl "Netherlands Commercial Court: English Proceedings in the Netherlands" in *Conflict of Laws*, 25 Oct 2018, available at: conflictoflaws.net/2018/netherlands-commercial-court-english-proceedings-in-the-netherlands/ 1 *ff*.

20 (German) Bundesrat, Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen (KfiHG) vom 2. März 2018, Drucksache 53/18 (Beschluss); J Curschmann "Justizstandort Deutschland stärken!" in *Zeitschrift für Internationales Wirtschaftsrecht* (2018) 242 *ff*; Justizstandort Deutschland – Stärkung der Gerichte in Wirtschaftsstreitigkeiten "Diskussionspapier zum Symposium am 3.9.2018 in der Vertretung des Landes Nordrhein-Westfalen beim Bund" in *Zeitschrift für Internationales Wirtschaftsrecht* (2018) 238 *ff*; H Hoffmann "Von 'Law – Made in Germany' zu 'Commercial Litigation in Germany', Impulse für eine Verbesserung der Justiz im internationalen Handelsrecht" in *Zeitschrift für Internationales Wirtschaftsrecht* (2018) 56 *ff*; M Sonnentag "Justiz & Brexit: Frankfurt Chamber for International Commercial Disputes – Veranstaltung in Frankfurt am Main am 9. August 2018" 2018 *Zeitschrift für Europäisches Privatrecht* 966 *ff*; Kruisinga (2019) 280 *ff*.

21 *Projet de loi instaurant la Brussels* International Business Court of 15 May 2018, available at https://www.lexalert.be/fr/article/brussels-international-business-court; see Bell (2018) 197; G Croisant "The Belgian Government Unveils its Plan for Brussels International Business Court (BIBC)" *Kluwer Arbitration Blog*, 25 Jun 2018, available at: http://arbitrationblog.kluwerarbitration.com/2018/06/25/the-belgian-government-unveils-its-plan-for-the-brussels-international-business-court-bibc/; Kruisinga (2019) 280 *ff*.

22 Motion an den Regierungsrat des Kantons Zürich betreffend Errichtung eines "Zurich International Commercial Court" am Handelsgericht des Kantons Zürich, vom 24. September 2018, KR-Nr. 296/20, available at http://www.kantonsrat.zh.ch/Dokumente/D7efdbdf4-03ca-4385867d763bd697d537/K18296. pdf#View=Fit. A revised Code of Civil Procedure will enter into force on 1 January 2025, including an amended Article 6 which now allows the cantons to authorize their commercial courts to assume jurisdiction even if none of the parties have their domicile in Switzerland. See https://www.bj.admin.ch/bj/de/home/staat/gesetzgebung/aenderung-zpo.html.

discussed on a supranational level within the European Union.[23] The more than hundred years old London Commercial Court has served as a role model, whose success is intended to be copied.[24] Brexit has influenced the pace of establishing these new courts all over European states, which intend to get a piece of this cake.[25] Moreover, the Asian jurisdictions in particular, have begun to combine such courts with other dispute resolution service providers such as arbitration and mediation institutions,[26] irrespective of their perceived interdependence.[27] This situation carries the risk that those institutions will be overly influenced or even dominated by State authorities.[28]

Similarly, a Convention governing recognition and enforcement of settlement agreements following alternative dispute resolution (ADR), specifically mediation proceedings, was concluded in August 2019, under the auspices of UNCITRAL. This so-called Singapore Convention (United Nations Convention on International Settlement Agreements Resulting from Mediation) was immediately signed by as many as 46 States, and has entered into force in September 2020.[29] At the time of publication, nineteen States have ratified it.[30] However, whether it will prove to be quickly ratified by a great number of states in the near future and become even nearly as successful as the New York Convention, remains to be seen. So far, the Singapore Convention has been quite popular in Asia, but not in Europe – no single European Union member State (nor the EU itself) has signed the Convention yet.

23 See, *eg*, G Ruehl "Towards a European Commercial Court?" in *Conflict of Laws* 11 Aug 2018, available at http://conflictoflaws.net/2018/towards-a-european-commercial-court/; Wilske (2018) 173 *ff*, each with further references.

24 See M McIlwrath "An Unamicable Separation: Brexit Consequences for London as a Premier Seat of International Dispute Resolution in Europe" 2016 *Journal of International Arbitration* 451 *ff*.

25 See McIlwrath (2016) 451 *ff*; Sonnentag (2018) 966; Walker (2019) 22; Wilske (2018) 169 *ff*, who speaks about "wannabe profiteers".

26 One of the most typical examples is the China International Commercial Court, which was established in 2018. See Wilske (2018) 174 *ff*.

27 For example, Michael Hwang, the first chairman of the International Commercial Court of the Dubai International Financial Center (DIFC), was at the same time Chairman of the only arbitral institution there. Hwang (2015) 203; Demeter and Smith (2016) 462 n 145; D Demeter and K Smith "The Implications of International Commercial Courts on Arbitration" 2016 *Journal of International Arbitration* 441 462 n 145.

28 Demeter and Smith (2016) 462 n 145, 463, who refer to the supervisory role of the DIFC courts over the arbitral institution.

29 United Nations Convention on International Settlement Agreements Resulting from Mediation, available at https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements.

30 https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status.

The trend that corporate players in the international arena prefer a combination of ADR mechanisms with court litigation or arbitration, has been mirrored by recent activities of States and institutions to adapt their legislation and rules to become more attractive as dispute resolution hubs. Moreover, in a growing number of jurisdictions, institutions exist, or have been created, with experience in administering commercial arbitration combined with other ADR mechanisms.[31] This has led to an intensified promotion and marketing of such clauses by institutions worldwide. Singapore, Dubai and Switzerland, and their respective dispute resolution centers (SIAC, DIFC, and the Swiss Arbitration Centre) are only a few, but typical representatives of such states/regions and institutions.[32]

When commercial players adopt multi-tier or hybrid dispute resolution clauses in their contracts, they do it with the conviction that they have found an efficient and low-cost framework for their future disputes.[33] Where the combination of ADR is with arbitration, a further incentive is to achieve a settlement and thereafter a consent award, which comes with the benefit of recognition or enforcement based on the almost global New York Convention with its narrow exceptions. With respect to court-approved settlements, the same goal may be achieved in the distant future by selecting an appropriate State court forum, should the HCCH Judgments Convention be successful. However, a variety of specific new problems may come with the enforcement of court-approved settlements or consent awards based on mixed dispute resolution clauses.

2 Legal Issues Arising from "Hybridization"

The following problems are typical for court decisions and arbitral awards which are based on mixed and hybrid dispute resolution clauses:

- Regulation of the *lex fori* or the *lex arbitri* may not have been adjusted sufficiently to take account of the hybrid nature of such agreements;

31 See the Swiss Arbitration Centre (formerly Swiss Chambers' Arbitration Institution), available at https://www.swissarbitration.org/Mediation/Mediation-clauses; Suggested ICC Mediation Clauses, International Chamber of Commerce, available at https://iccwbo.org/publication/suggested-icc-mediation-clause-english-version/; Singapore International Arbitration Centre, available at http://www.siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause; Indian Institute of Arbitration and Mediation, available at http://www.arbitrationindia.com/clause.html; Cairo Regional Centre for International Commercial Arbitration, available at https://crcica.org/Mediation_ModelClauses.aspx.

32 See, *eg*, A Godwin, I Ramsay and M Webster "International Commercial Courts: The Singapore Experience" 2017 *Melbourne Journal of International Law* 219 *ff*; Menon (2015); Teh and Yeo (2016) 692 *ff*; Yip (2016) 439 *ff* n 66.

33 Nigmatullina (2016) 39 *ff*.

- courts or arbitral tribunals involved may not sufficiently manage, co-ordinate, or enforce the various dispute resolution mechanisms foreseen in the parties' agreements; and, finally,
- recognition and enforcement of decisions based on such agreements may be more difficult than if only one mechanism had been agreed upon.

2.1 Recognition and Enforcement Abroad

Generally, the results of proceedings which are based on multi-tier or other hybrid clauses are treated as if they were the results of single dispute resolution agreements.

As to State court proceedings within Europe, for example, neither the Brussels I Regulation (applicable among EU member States) nor the Lugano Convention (applicable between the EU and EFTA States) distinguish between judgments issued on the basis of a settlement and on a non-consensual basis. Rather, a court judgment based on a settlement does not change its nature only because there has been a prior negotiation or ADR. Where no treaty applies, the *lex fori recognitionis* will apply to the issue of whether or not to enforce a foreign judgment.[34] Regarding enforcement of foreign judgments, national laws do not distinguish as to whether the court proceedings leading to the judgment were preceded or interrupted by ADR proceedings.

Similar considerations apply to arbitral awards. Their enforcement does not depend on whether or not they have been reached on the basis of a settlement.[35] Specifically, the New York Convention does not distinguish between the effects of "ordinary" and "consent" awards, and the UNCITRAL Model Law on International Commercial Arbitration even expressly states that consent awards are treated the same way as "ordinary" awards.[36]

However, in international arbitration, it is widely accepted that only those awards may be recognized and enforced that are the result of a "dispute" or "difference", as the New York Convention calls it in article I paragraph 1. It is therefore highly uncertain whether arbitral awards that merely confirm, without a new assessment of facts, decisions of the DIFC Courts,[37] may be recognized

34 See, *eg*, Arts 281 and 282 of the Civil Procedure Law of the People's Republic of China; Sec 44A of the Indian Code of Civil Procedure; Arts 393-399 of the Albanian Code of Civil Procedure.

35 It is widely accepted that "consent awards" or "awards on agreed terms" have the same legal effects as awards issued without a settlement.

36 Art 30(2) of the Model Law. See also sec 51 of the English Arbitration Act which allows the parties to have the settlement recorded as an agreed award, or sec 20, 48 of the International Conciliation and Arbitration Act 1993 (Bermuda).

37 See Practice Direction No 2 of the DIFC Courts dated 27 May 2015 "on the Referral of Payment Judgment Disputes to Arbitration", available at https://www.difccourts.ae/2015/02/16/difc-courts-practice-direction-no-2-2015-referral-judgment-payment-disputes-arbitration/. The model clause proposed by the DIFC reads as

and enforced under the New York Convention.[38] Similar considerations apply to consent awards which merely ratify settlements arising from mediation, when the arbitral tribunal has been formed only for this ratification purpose.[39]

Conversely, an out-of-court settlement reached by parties in mediation or negotiation after court or arbitration proceedings have been initiated, and which is submitted to that same court or arbitral tribunal to be ratified by, or transformed into, a court decision or arbitral award, will be treated by many jurisdictions based on their *lex fori recognitionis* as if there had been no prior ADR proceedings, at least if all parties involved had an opportunity to present the facts, that are the basis of the dispute, to the court or arbitral tribunal.[40]

follows: "Any dispute arising out of or in connection with the enforcement of any judgment given by the Courts of the Dubai International Financial Centre, including any dispute as to the validity or enforceability of the said judgment, and satisfying all of the Referral Criteria … shall be referred to and finally resolved by arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be [one/three]. The seat, or legal place of the arbitration, shall be the Dubai International Financial Centre. The language to be used in the arbitration shall be English. This contract, including any provisions relating to the choice of forum, shall be governed and construed in accordance with the laws of the Dubai International Financial Centre."

38 Y Kryvoi "Enforcement of Settlement Agreements Reached in Arbitration and Mediation" *Kluwer Arbitration Blog*, 25 Nov 2015; Demeter and Smith (2016) 454 *ff*. These authors refer, among others, to the history of the New York Convention at 455, with further references in n 104 and n 108. See also Wilske (2018) 163 n 58. It is not surprising that authors who are affiliated with such courts, have a different opinion, see Hwang (2015) 205 *ff*, with references to English and Singapore decisions.

39 See E Sussman "The New York Convention Through a Mediation Prism" 2009 *Dispute Resolution Magazine* 10 *ff*; Kryvoi (2015); C Chern *The Commercial Mediator's Handbook* (2015) 285 *ff*.

40 For example, the model arb-med-arb clause given by the Singapore International Mediation Centre (SIAC) provides that "[a]ny settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms". Available at: http://simc.com.sg/dispute-resolution/arb-med-arb/. Art 36 (1) of the CRICA Arbitration Rules provides for the same, available at https://crcica.org/rules/arbitration/2011/cr_arb_rules_en.pdf. The key element to consider is whether the settlement was reached after the dispute was initiated under arbitration. In an American case, *Transocean Offshore Gulf of Guinea VII Ltd v Erin Energy Corp* No CV H-17-2623, 2018 WL 1251924, at *1 (SD Tex), the court allowed for the enforcement of a consent award under the New York Convention.

2.2 Independence, Impartiality, and the Duty of Confidentiality of "Mixed Neutrals"

It is an internationally accepted principle that a "neutral", that is, a judge, arbitrator, or mediator, must refuse to act, or may be challenged when there are reasonable doubts regarding his or her independence or impartiality.[41] A perceived lack of independence or impartiality is ordinarily challenged at the level of the initial proceedings, that is, by resorting to the competent courts or other authorities operating at the forum, or seat of the litigation, arbitration, or mediation. Even where such a first instance challenge has not been possible or successful, article V(1)(d) New York Convention offers a defence to prevent the recognition or enforcement of decisions taken by a tainted tribunal or neutral, by stating that recognition and enforcement may be refused if the challenging party offers proof that the "composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place".

While the Singapore Convention allows an explicit defence regarding a lack of independence of the mediator (article 5(1)(f) Singapore Convention), a similar provision has not been adopted in the recent HCCH Judgments Convention. However, a lack of independence may be challenged on the basis of the Convention's defence arising from a breach of the right to be heard (HCCH Judgments Convention, article 7(1)(a)(i)), or even public policy (HCCH Judgments Convention, article 7(1)(c)).

A particular problem of independence, impartiality and confidentiality arises when a judge has already acted as an arbitrator or mediator, or an arbitrator as mediator, in the same dispute. For a long time, the most popular hybrid dispute resolution mechanism which combined mediation with arbitration, was the so-called "Med-Arb" procedure.[42] It foresees that if a mediation does not lead to a (pre-defined) satisfactory result, it is followed by arbitration by the same person who has acted as mediator before (the so-called "Med-Arbiter").[43] The advantage of such procedures is obvious: They are deemed efficient because the "Med-Arbiter" knows the facts of the dispute from the beginning, thereby saving cost and (billable) time. However, if the parties

41 See, *eg*, International Bar Association *Guidelines on Conflicts of Interest in International Arbitration 2014*, available at https://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918; C Partasides, N Blackaby with A Redfern and M Hunter *Redfern and Hunter on International Arbitration* (2015) 260; G B Born *International Commercial Arbitration* (2014) 1907 *ff*.

42 See Nigmatullina (2016) 41 *ff*; J Klowait and U Glässer "Teil 1, Einführung" in J Klowait and U Glässer (eds) *Mediationsgesetz, Handkommentar* (2018) 43 *ff* with further references.

43 Nigmatullina (2016) 40 n 20; J Rosoff "Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings" 2009 *Journal of International Arbitration* 89–93.

know that the same person will decide their dispute who has assisted them as a mediator, they will most probably hold back information that may be important for an amicable resolution of the dispute, that is, in the mediation phase, but which may be used against them in the later adjudication phase.[44]

Moreover, the independence of "Med-Arbiters" will be specifically questioned where they hold individual and separate "caucus" meetings with the parties, something that is often practiced in mediation proceedings.[45] During such meetings, the Med-Arbiter will often obtain information which, in theory, cannot legally be used in the ensuing arbitration, but undoubtedly have psychological effects on the perception of the dispute by the Med-Arbiter. Outside caucus meetings, the parties may withhold important information for various reasons, such as to save face, or due to rather emotional reasons such as fear or shame. However, they will normally disclose such information during an individual caucus meeting with the neutral if, and only if, they are assured that this information will be kept confidential. Such confidentiality will be questioned when the Med-Arbiter has to issue, or participate in, an arbitral award on the same dispute.

Now, it may be argued that party autonomy has priority over any other rights of the parties to independence and impartiality as well as to confidentiality, with the consequence that there could be no breach of procedural rights arising from the identity of a mediator and later adjudicator if all parties to the dispute have consented to it. This argument is particularly important in view of the fact that the identity of the mediator/adjudicator has important advantages, specifically with respect to procedural efficiency and the amount of costs: No two persons have to acquaint themselves with the facts and the allegations of the parties.

The balancing of these interests is a difficult task. It is therefore not surprising that the question whether, to which extent, and from which point in time onwards the parties may waive their right to an independent and impartial adjudicator, as well as their right to be heard, including the right to learn what information the neutral was given by the other party in their individual meetings, has been answered differently by legislators, courts, and doctrinal voices.[46]

44 Rosoff (2009) 91 *ff*.

45 F Yeoh and D Ang "Reflections on Gao Haiyan – Of 'Arb-Med', 'Waivers', and Cultural Contextualisation of Public Policy Arguments" 2012 *Journal of International Arbitration* 285 *ff*, with references to the practice of the Hong Kong courts.

46 Rosoff (2009) 93 *ff*, with further references; C Kölz "Einzelgespräche an gerichtlichen Vergleichsverhandlungen" in *Zivilprozess, Schweizerische Zeitschrift für Zivilprozess- und Zwangsvollstreckungsrecht* (2016) 229 *ff*, 239 *ff*; *Spruce Envtl Techs, Inc v Festa Radon Techs Co* 370 F Supp 3d 275 (D Mass 2019); *Gao Haiyan v Keeneye Holdings Ltd* [2012] 1 HKRLD 627. See also Yeoh and Ang (2012) 286 *ff*.

It is submitted that the overarching principle of (procedural) justice cannot be achieved when the parties have given their consent to such an identity of mediator and adjudicator before a concrete dispute has arisen.[47]

In any event, the differences of approach to this problem lead to the risk that a decision by a "Med-Arbiter" who has conducted caucus meetings with the parties, may be challenged or refused to be enforced later, in jurisdictions that value the right to independence and impartiality and the right to be heard (which are enshrined in article V(1)(b) and (d) New York Convention) higher than party autonomy.[48]

Institutions worldwide have had a strong tendency lately to mitigate or avoid these problems by introducing hybrid clauses which foresee that a mediator cannot act as arbitrator in the same dispute, and *vice versa*, without the express consent of all parties.[49] For example, under the SIAC-SIMC Arb-Med-Arb Protocol, the arbitrator(s) and mediator(s) are separately and independently appointed.[50]

3 Conclusion

The practice and rules of international dispute resolution are developing constantly. Cost and efficiency considerations have led to new and innovative mechanisms that combine the traditional ways of resolving disputes, specifically

47 E Onyema "The Use of Med-Arb in International Commercial Dispute Resolution" 2003 *The American Review of International Arbitration* 415; J Elkinson "London: The Problems of Med-Arb – Should *Keeneye* Open Our Eyes?" *Global Arbitration Review*, 22 Sept 2011, available at: https://globalarbitrationreview.com/article/1030658/london-the-problems-of-med-arb---should-keeneye-open-our-eyes. Elkinson objects to this process because the nature of mediation and arbitration is contrary to each other, arguing that the use of caucusing is inconsistent with due process and would inevitably lead to conflict and challenges to awards.

48 Nigmatullina (2016) 41 *ff*; B A Pappas "Med-Arb and the Legalization of Alternative Dispute Resolution" 2015 *Harvard Negotiation Law Review* 157 166 *ff*. The response to this issue is not uniform, as has been noted by Michael E Schneider who wrote that it has a very significant link to different legal cultures. M E Schneider "Combining Arbitration with Conciliation" in *Report at the Seoul Conference of the International Council for Commercial Arbitration of 1996, ICCA Congress Series* No 8, available at https://lalive.habefast-maquettes.ch/wp-content/uploads/2017/07/mes_combining_arbitration_with_conciliation.pdf.

49 See Girsberger and Peter (2019) par 949 *ff*.

50 The SIAC-SIMC Protocol, available at http://simc.com.sg/dispute-resolution/arb-med-arb/. The CRCICA Guidance Note recommends parties to appoint a mediator other than arbitrator(s), available at https://crcica.org/PageDetails.aspx?Id=GdBvMGtFwW8=. Art 19 of the UNCITRAL Model Conciliation Rules prohibits a conciliator from acting as an arbitrator. An example of domestic legislation would be sec 35 of the Ontario Arbitration Act, which prohibits arbitrators from acting as mediators or conciliators, available at https://www.ontario.ca/laws/statute/91a17#BK42.

arbitration and court litigation, with mediation and other forms of ADR. This development has led more and more international commercial parties to question arbitration as the only effective means of resolving their disputes, and instead to choose clauses mixing arbitration or litigation with mediation or further ADR mechanisms.[51] However, new legal issues have resulted from these developments, and several of them have led to new legal uncertainties, especially with regard to recognition or enforcement abroad. It will be fascinating to observe how international practitioners, courts and academics will deal with them in the future.

51 See K P Berger and O Jensen "It Takes Pressure to Form Diamonds: The Changing Landscape of Dispute Resolution and its Implications for International Arbitration" *Kluwer Arbitration Blog*, 23 May 2016, http://arbitrationblog.kluwerarbitration.com/2016/05/23/the-changing-landscape-of-dispute-resolution-and-its-implications-for-international-arbitration/.

From Louisiana, to India, to Africa

The Strange Journey of India's Foreign Judgments Rules

*Christopher Jenkins**

1 Introduction

I will never forget the first question Professor Forsyth asked me: "Why India?" Like much of what he says, the question was reduced to its essentials. It was, no doubt, the result of some consideration. And it served more than one purpose. First, he wanted to understand my motivation for taking on a daunting and unresearched topic. Second, he wanted to put me at ease. It was my first supervision, and as I looked up at the shelves of doctoral dissertations he had shepherded to completion, perhaps he could see that I was nervous. I was expecting some difficult question on theory, or sources, or method. Instead, I was asked a simple question, which began a conversation that continued, on and off, for nearly four years. In that time, I came to appreciate Professor Forsyth's precision, his wide knowledge of theory and history, his ability to see things from another perspective, to ask the questions that are not always obvious; but above all, his kindness and patience.

I first encountered the Indian foreign judgments rules while researching the origins of the British Empire's enforcement regime. In comparison, the Indian rules seemed rather odd, and I wanted to find out why. Their story ended up being far more complicated than I could have imagined. And to Professor Forsyth's delight, there were some African connections. An abridged version of that story is told here.

Colonial India was a mosaic of jurisdictions, housing several British colonies and hundreds of "Princely States", each with their own courts and laws. The need to trade across this "mosaic" spurred on legal innovation. Lawmakers grappled with the problem of foreign judgments, which usually followed hot on the heels of merchants who had absconded from one jurisdiction to another, to avoid debts. The basic problem was that jurisdiction over the original dispute did not always match jurisdiction over the defendant's assets – which is why judgments, like merchants, had to cross borders. This

* Research Fellow, Clare Hall, Cambridge. I am grateful to Professor Forsyth for his comments on an earlier version of this chapter; and to my parents, André and Deborah Jenkins, for their support and encouragement.

meant that the rules on foreign judgments began developing sooner than they otherwise would have done, at a time when the approach to these questions was not settled in the United Kingdom (its rules would not be finalised until 1933). British Indian draftsmen had to look elsewhere for material. It also meant that the rules reached maturity sooner, namely in 1908. Around that time, the British began regularising the legal framework of many of their African colonies and protectorates. With so many connections to India – through trade, migration, and the careers of judges, lawyers, and administrators – it is little wonder that some of the earliest rules on foreign judgments to be applied in Africa came from India. Some remain to this day.

2 The Jurisdictional Mosaic

India is coloured pink on most 19th century maps. In truth, British rule was anything but monochromatic. It was a strange and unequal joint venture between British India and hundreds of Princely States, tied by treaty to the Crown. There were simply not enough colours to represent the number of jurisdictions involved.

The British-controlled area was made up of several separate jurisdictions, the oldest of which were known as "Presidencies" – centred on Bombay (Mumbai), Madras (Chennai), and Calcutta (Kolkata) in Bengal.[1] The judgments of one Presidency were "foreign" to the others. As Bombay's Advocate-General observed in 1836: "The three Presidencies are as three distinct territories as England, Ireland and Scotland", where "foreign" judgments "cannot be enforced … unless by means of an action upon a judgment".[2]

Intermingled with the Presidencies were over 600 Princely States – what Sir William Holdsworth described as the second of "two Indias".[3] The States made up about a quarter of India by population, and a third by territory. These were "not part, or governed by the law, of British India".[4]

It was a common joke that merchants would build their houses with the front door opening onto one jurisdiction, and the back door opening onto another.[5] As one "Law Member" (effectively cabinet minister for law reform) of the Viceroy's Council remarked: British and Princely India were so "intermixed and interlaced" that "absconding" was one of the "greatest disadvantages" for creditors.[6]

1 Throughout, historic terms and spellings are used.

2 H Roper to J P Willoughby (20.5.1836): IOR/P/206/84.

3 W S Holdsworth "Indian States" 1929 *NYU Law Quarterly Review* 1.

4 *Indian States Committee Report* Cmd 3302 (1929) 11.

5 B N Ramusack *The Indian Princes and their States* (2004) 3-4.

6 C Ilbert "Indian Bankruptcy Bill" (Legislative Council, 6.5.1886): *Times of India* (11.5.1886) 6.

3 The Problem of Foreign Judgments

India's merchants regularly litigated across these divisions, obtaining judgments needing to be enforced elsewhere. There were three "species" of judgments in circulation: those from British India, the Princely States, and other jurisdictions. Their treatment was both uneven and uncertain. More often than not, whether a judgment could be enforced – and the defences to enforcement – fell to the discretion of judges.

This uncertainty caused much consternation. A complaint made by Johuree Mull, and ten other cloth merchants from Allahabad, is illustrative: "great inconvenience is felt, and great loss and expenditure is suffered by decree holders, and sometimes the decrees become wastepaper after all".[7] This echoed an earlier petition by the Bombay Chamber of Commerce which adopted the views of a "native merchant", Sha Gordhundas Nurrotumdas (hastening to add that his views were shared by the "European portion of the mercantile community").[8] The uncertainty in enforcement caused "great hardship and injustice"; in some cases, a foreign judgment was simply "not worth the paper it is written on".[9]

By far the most pressing concern – and the most common stock-in-trade – were judgments from jurisdictions within British India. The need for a statutory response reflected more frequent and more valuable commercial flows,[10] resulting in more pressure on government. This led to the first statutory enforcement regime in the British Empire – although it applied to judgments from within British India, and not the Princely States. British Indian judgments were granted direct, statutory enforcement, through a simple registration process, from 1852 onwards.[11] These provisions were included, almost word-for-word, in British India's first "universal" Civil Procedure Code of 1859 – and have remained in subsequent versions of the Code.

By the 1870s, there was still no statutory regime for enforcing judgments from the Princely States or elsewhere, and no rules clarifying the defences to enforcement. Judgment creditors could seek indirect (common law) enforcement in British Indian courts, where the foreign judgment might found an action in debt, although some judges flatly refused enforcement.[12]

Eventually, the demands of businessmen became harder to ignore. The question of foreign judgments played a part in the lengthy debates on recasting

7 "Memorial of Certain Cloth Merchants of Allahabad" (14.12.1886): IOR/P/3260, App. A67.

8 Letter to Judicial Department, Bombay (9.12.1870): Bombay Chamber of Commerce, *Report for the Year 1870–71* (1872) 44.

9 Bombay Chamber of Commerce (1872) 38.

10 Ramusack (2004) 186–187.

11 Act 33 of 1852; amended by Act 34 of 1855.

12 See, for example, *Sama Rayar v Annamalai Chetti* (1883) ILR 7 Mad 164 and the cases cited there.

civil procedure. These debates culminated in the Civil Procedure Code 1908, which remains in force, the provisions on foreign judgments largely unaltered.

4 Codifying the Rules for Foreign Judgments

Outsiders who have occasion to look at the Indian enforcement rules will notice three unusual features. The first is the date of the Code: 1908. It is older than similar legislation in other common law jurisdictions – and its evolution began even earlier than that. The second is that the provisions are split into two groups: those relating to *res judicata*, the *negative* or defensive effect of a foreign judgment as a bar to suit; and those on its *positive* effect, where a decree from "listed" jurisdictions "may be executed in India as if it had been passed" in India.[13] The third is that the "defences" to execution are not explicit; they are incorporated by reference to *res judicata*. These rules originate in the Civil Procedure Code 1877, passed a good half-century before equivalent United Kingdom legislation.[14]

These "unusual features" are explained in light of India's other "unusual feature": the Princely States. The early development of these rules is linked to the commercial integration of British and Princely India. And the separation of the rules was shaped by how the problem was raised. The "defensive" provisions on *res judicata* were added first, applying to all "foreign" judgments, from the Princely States and further afield. These general provisions were included in one of the earlier draft codes – before the issue of Princely State judgments became apparent in the extensive (and unwieldy) consultations. These provisions outlined when a foreign judgment would not be conclusive for the purposes of *res judicata*. They covered much the same ground as the "defences" to enforcement developing in case law at the time. Thus, they were not repeated in the section on enforcing Princely State judgments, which were added later. Instead, they were incorporated by implication (as the courts would hold) for State judgments, although this was later made explicit for other judgments.[15] Accordingly, this chapter focuses on the development of the "negative" *res judicata* provisions, rather than the much shorter "positive" provisions for the enforcement of Princely State and other judgments.

5 *Res Judicata* and its Exceptions

The *res judicata* provisions are found in the 1877 Code's first chapter, on jurisdiction. Even though it was not a plea to jurisdiction but a plea in bar, the Select Committee responsible for the Code felt that "the convenience of having

13 Secs 44 and 44A of the Civil Procedure Code ("CPC") 1908.

14 Administration of Justice Act 1920; and Foreign Judgments (Reciprocal Enforcement) Act 1933.

15 Secs 44 and 44A of the CPC 1908.

so important a clause in a prominent position … outweigh considerations of logical arrangement".[16]

First, we have the general rule in section 13, that "[n]o Court shall try any suit or issue, in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit between the same parties" (now found in section 11 of the 1908 Code). This rule was elaborated upon in a series of "explanations". Explanation 6 (now section 14) addressed foreign judgments, defined earlier as those from courts "situate beyond the limits of British India":[17]

> Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction.[18]

Section 14 (now section 13) then identified the sorts of foreign judgments that would not bar proceedings under the general *res judicata* rule:

> No foreign judgment shall operate as a bar to a suit in British India –
> (a) if it has not been given on the merits of the case;
> (b) if it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India;
> (c) if it is in the opinion of the Court before which it is produced contrary to natural justice;
> (d) if it has been obtained by fraud;
> (e) if it sustains a claim founded on a breach of any law in force in British India.

Where did these provisions come from? Throughout the 1860s and 1870s, several cases considered foreign judgments – including those from the States. Drawing on English authorities, legal and academic, Indian judges began listing the "characteristics" that served to bar a suit, or to found a local debt action. The 1859 Code contained both "negative" and "positive" rules for judgments from elsewhere in British India – so a judgment in Bombay could stop another suit in Bengal; and the Bombay judgment could also be executed in Bengal. In the 1877 Code, why did the "negative" *res judicata* rules take precedence over the positive rules for enforcement?

The answer lies in Louisiana. The "lopsided" nature of these rules can be attributed to their origins. They were copied from a draft "System of Penal Law" for Louisiana. This System had a *res judicata* rule for foreign criminal judgments;

16 Select Committee Report ("SCR"), Bill No 3 (8.3.1875): IOR/P/1022, App.G2.

17 Sec 2 of the CPC 1877 (definitions: "foreign court", "foreign judgment").

18 Sec 13, ex 6 of the CPC 1877.

but, unsurprisingly, it had no rule for their execution.[19] It was well established then, as now, that one state will not enforce the criminal law of another. Thus, the rules carried with them the limitations of their original context. The link with Louisiana was not made in the Statement of Objects and Reasons that accompanied the 1877 Code, nor was it mentioned by the Law Member, Sir Arthur Hobhouse, in the Legislative Council.[20]

There are two references to their origins buried in the records: in a Select Committee Report, and in a marginal note in the third Bill, both in early 1875.[21] The Committee noted that the *res judicata* provisions were "to a large extent, founded on the definition in Livingston's Code" of 1833[22] – a reference to the proposed penal system for Louisiana drafted "almost unassisted" by American jurist and statesman Edward Livingston (Sir Henry Maine would describe him as "the first legal genius of modern times").[23] Foreign judgments first made an appearance in the third Bill, which included a marginal note referring to article 198 of Livingston's Code.[24] The matching words are italicised:

> The courts of this state will ex officio take notice of the jurisdiction given to the different tribunals within the same; but *where a judgment* given in another state, or in a *foreign* country, *is relied on, the production of the judgment, duly authenticated, is presumptive evidence that the court had a competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by* showing *the want of jurisdiction* by such evidence as is allowed by law.[25]

We see that Explanation 6 was lifted directly from Livingston's Code.

Determined, it seems, to cite English authorities, the marginal note also refers to *The Duchess of Kingston's Case* (1776) in *Smith's Leading Cases*,[26] as well as John Westlake's *Treatise on Private International Law* (1858).[27] (Although he later held the Whewell Chair at Cambridge, Westlake wrote his *Treatise* while still in his twenties.) Neither quite fit the bill. Indian authorities are noticeable by their

19 See n 25.

20 Legislative Council Proceedings (1876–1877): IOR/P/1022, Apps II, RRR, SSS.

21 W Stokes (ed) *The Anglo-Indian Codes* (1887–1888) 392–393.

22 SCR, Bill No 3 (n 16).

23 H J S Maine "Roman Law and Legal Education" in Cambridge Essays (1856) 17; see also J Hall "Edward Livingston and His Louisiana Penal Code" (1936) 22 *American Bar Association Journal* 191.

24 Bill No 3 (15.4.1875): IOR/P/1022.

25 Code of Evidence 1833; and E Livingston *A System of Penal Law for the State of Louisiana* (1833) 680.

26 *Duchess of Kingston's Case* (1776) 2 Sm LC (1867) 679.

27 J Westlake *A Treatise on Private International Law or the Conflict of Laws, with Principal Reference to its Practice in the English and Other Cognate Systems of Jurisprudence* (1858).

absence. There were many Indian cases on foreign judgments by this point, but the Government had no "machinery" for tracking them.[28]

Next to Explanation 6,[29] we are told, "[a]s to presumption of regularity of proceedings in foreign court" to refer to *Smith's*.[30] *The Duchess of Kingston's Case* was about a conflict between English spiritual (ecclesiastical) and temporal (criminal) courts – separate and "foreign" jurisdictions. It outlines the difficulties in treating a foreign judgment as "conclusive evidence … where an act of a foreign court shall at once … put an entire stop to the proceeding".[31] The case actually suggests that a "presumption" would be problematic: "the difficulty will not be removed by presuming that every Court determines rightly, because it must be presumed too, that the parties did right in bringing the … case before the Court".[32] Rather than an evidential presumption (as in Explanation 6), this may be seen as a justification for "receiving" the foreign judgment. If we receive the judgment because we "presume" the decision is right on the merits, we must also accept that the decision on jurisdiction was correct. The court suggested an alternative justification, leaving jurisdiction as a "gatekeeper": "the reason for receiving such sentence is, because it is the judgment of a Court competent to the inquiry" – a phrase familiar to modern conflicts scholars.[33] The case's conclusion says nothing about an evidential presumption of jurisdiction.[34] We can safely say that the evidential presumption in section 13 is more American than British.

The Duchess of Kingston's Case is a slightly better fit with section 14. Its conclusion does outline grounds for impeaching a foreign judgment: "admitting such sentence to be conclusive … counsel … may be admitted to avoid [it] … by proving the same to have been obtained by fraud or collusion".[35] The passage directly cited in the marginal note is on the status of a foreign judgment, as proof of a fact: "an authority accredited in a judicial proceeding by a court of competent jurisdiction … received … upon the same principles, and subject to the same rules, by which they admit the acts of other courts".[36] The note explains: "like all other acts of the highest judicial authority, it is impeachable from without: although it is not permitted to show that the Court was mistaken [as to the merits], it may be shown that they were misled".[37] In the 1877 Code, this is reduced to: "No foreign judgment shall operate as a bar … (d) if it has been obtained by fraud."[38]

28 M D Chalmers, Law Member, Viceroy's Council (1898): IOR/P/6636, No.2, 76.
29 Sec 13, ex 6 of CPC 1877.
30 Bill No 3 (15.4.1875): IOR/P/1022.
31 *Duchess of Kingston's Case* (n 26) 685.
32 *Duchess of Kingston's Case* (n 26) 686.
33 *Duchess of Kingston's Case* (n 26) 686; and Westlake (1858) 366.
34 *Duchess of Kingston's Case* (n 26) 688–689.
35 *Duchess of Kingston's Case* (n 26) 688–689.
36 *Duchess of Kingston's Case* (n 26) 682.
37 *Duchess of Kingston's Case* (n 26) 687.
38 Sec 14(d) of CPC 1877.

Where did the other exceptions come from? The cited section in *Westlake* reads:

> A foreign judgment for the defendant, in a court competent as to the matter, is a conclusive bar to any attempt by the plaintiff to reopen his claim here. But it must be a final judgment in its own country, it must have been given upon the merits, and it is besides liable to all the objections which may be urged against a foreign judgment sought to be enforced by the plaintiff.[39]

This gives us a source for exception (a) "on the merits". For the rest, the last sentence (though not the marginal note) directs us to another section in *Westlake*. There we find the equivalent of (c), on "natural justice": that a foreign judgment can be enforced at common law "unless we see in the clearest light that the foreign law, or at least some part of the proceedings of the foreign court, are repugnant to natural justice".[40] That was simplified to "if it is in the opinion of the Court before which it is produced contrary to natural justice".[41]

Exception (b), "if it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India", apparently stems from the following passage:

> For of its own code the foreign court will be allowed to be the best interpreter, but international maxims belong equally to all courts, and if they have not been followed, as understood by the tribunal where the judgment is to be enforced, the defendant will not be held to have been bound by a lawful authority acting lawfully (b)[42]. So too if the foreign judgment avowedly repose on the view taken by the foreign court of English law, whether as that considered applicable to the case, or as constituting a fact in the relation of the parties, it will not be enforced here, if the English law was erroneously interpreted in it (c)[43].[44]

The expansive phrase "incorrect view" – rather than "interpretation" – has persisted in India's Code.[45]

The last exception is (c): "if it sustains a claim founded on a breach of any law in force in British India". Westlake connected this with the "natural justice" rule:

> The citations made above … establish the principle that, whatever respect we should otherwise pay to a foreign judgment, we cannot enforce one

39 Westlake (1858) 376.
40 Westlake (1858) 373, citing *Henderson v Henderson* (1844) 6 QB 288 298.
41 Sec 14(c) of the CPC 1877.
42 Citing *Reimers v Druce* (1857) 23 Beav 145 156; and *Arnott v Redfern* (1825) 2 C & P 88.
43 Citing *Novelli v Rossi* (1831) 2 B & Ad 757.
44 Westlake (1858) 374.
45 Sec 13(c) of the CPC 1908.

> which we consider contrary to natural justice. Indeed the laws which, on the doctrine of Arts 196–198,[46] we could not directly apply ourselves, we can no more apply indirectly, by enforcing their results when embodied in a [foreign] judgment .... Also, it cannot be imagined that we should enforce here a foreign judgment sustaining a claim founded in a breach of the English revenue-laws.[47]

Westlake cited the dicta of Lord Wynford in *Forbes v Cochrane*, as it served to "furnish a real help towards setting the limits of comity": "It is a maxim ... that the *comitas inter communitates* cannot prevail in any case where it violates the law of our own country, the law of nature, or the law of God."[48]

These references go some way to explaining a few odd things about section 14. Why did it not use the catch-all term "public policy"? This is simply a reflection of the authorities as they stood in 1858 (the year *Westlake* was published). The conflict of laws was still "the Cinderella of the common law".[49] The cases on judgments which raised breaches of international norms, on natural justice, and on things repugnant to local law would later merge into the doctrine of "public policy".[50] We can see the last stages of evolution in the later British legislative regimes – both intended to reflect contemporary common law rules. The 1920 regime speaks of a judgment "which for reasons of public policy or for some other similar reason could not have been entertained by the registering court";[51] while the 1933 regime simply uses the shorthand "contrary to public policy".[52]

Why is an "incorrect view ... of any law in force in British India" paired with "international law" and not "breach of any law in force in British India"? Again, this may be attributed to the arrangement of information in *Westlake*. There, the comment on local law (belonging to the local court) is contrasted with international law (belonging "equally to all courts").[53] The "so too" connection is by way of illustration, not principle.[54] Westlake then refers to a separate section on the breach or misinterpretation of local law in its own right.[55] Even though he separates the "incorrect view" of local and international law, and keeps these in separate sections, because he discusses the two briefly in one paragraph, this connection was carried over – consciously or otherwise – into section 14.

46 Westlake (1858) 180–183.
47 Westlake (1858) 374.
48 Westlake (1858) 180, quoting *Forbes v Cochrane* (1824) 2 B & C 448 (as Best J).
49 C M Schmitthoff *The English Conflict of Laws* (1954) v.
50 Schmitthoff (1954) 55 and 65–68.
51 Sec 9(2)(f) of the Administration of Justice Act 1920.
52 Sec 4(1)(a)(v) of the Foreign Judgments (Reciprocal Enforcement) Act 1933.
53 Westlake (1858) 374.
54 Westlake (1858) 374.
55 Westlake (1858) 374.

The reason the rules on foreign judgments were so "lopsided" is rather prosaic. We are driven to the conclusion that it was determined by little more than what sources were consulted by Hobhouse's assistants, Whitley Stokes and F R Cockerell, and in what order (for example, that they looked to Livingston before Westlake). Westlake's chapter is fairly recognisable, with "*prima facie* enforceability at common law" followed by "defences".[56] The initial reference to Livingston's Code explains why, even today, we find "exceptions" to *res judicata*, rather than "defences" to enforcement.

6 Subsequent Developments

The fact that these sections were based on out-of-date foreign sources is, itself, unremarkable for the time. What is remarkable is that they have changed so little since.[57] As the Chief Justice of Bengal later argued: once they had become "familiar" to the untrained judges and advocates in the lower courts, changing them was like "depriving an artisan of his tools".[58]

With a few exceptions, they remained unaltered in the later consultation rounds – despite complaints that their "vague phrases" were anathema to "a truly scientific Civil Procedure Code".[59] An extra exception was added in 1908: "where it has not been pronounced by a court of competent jurisdiction"[60] – which simply made explicit the relationship between sections 13 and 14 of the 1877 Code. At the same time, it was decided that the phrase "incorrect view" could not be applied equally to international as to Indian law, perhaps because the latter would amount to a re-litigation of the merits. So, the second part was changed to "or a refusal to recognise the law of British India in cases where such law is applicable".[61] The Committee "hoped" that these minor changes within a "re-arranged" section left the law "stated more clearly".[62]

That last change is a tacit admission that the two issues should never have been paired in the first place, for the very reason Westlake was trying to illustrate.[63] International law is peculiarly the preserve of the international community, and so an Indian court could legitimately determine whether a foreign court had taken an "incorrect view".[64] There would, however, be instances where a foreign court would have jurisdiction over a suit, but make

56 Westlake (1858) 361–378.

57 Secs 11, 13, and 14 of the CPC 1908.

58 Sir Richard Garth to the Legislative Department (31.12.1875): IOR/P/1022, App.U, [10], [14].

59 Dayaram Gidumal, District Judge, Khandesh, to the Judicial Department, Bombay (18.4.1902) [5]: IOR/P/6636.

60 Sec 13(a) of the CPC 1908.

61 Sec 13(c) of CPC 1908 (formerly sec 14(b) of CPC 1877).

62 "Notes on Clauses" (31.8.1907) 10: IOR/L/PJ/5/79.

63 Westlake (1858) 374.

64 Westlake (1858) 374; cf S K Sarvaria and S Sarvaria *Mulla's Code of Civil Procedure* vol 1 (2007) 381.

a determination on Indian law as the applicable law. For an Indian court to question that decision's "correctness" would, effectively, amount to unpicking the merits. So, it makes sense that the provision was softened to a "refusal to recognise" Indian law where that was applicable. The unintended consequences of an "unthinking borrowing" had to be rectified.

The idiosyncratic collection of exceptions is still in force. The odd combination of factors in what is now section 13(c) (international and Indian law), and its overlap with section 13(f) (breach of Indian law), and section 13(a) (jurisdiction in the international sense),[65] has meant the exception has no "core" concept, and is dealt with in a cursory way in the leading commentary.[66] Another obvious overlap is between section 13(b) (adjudication on the merits) and section 13(d) (natural justice).[67] In 1937, Rangnekar J began his judgment by remarking that "[i]n matters of foreign judgments, it is clear the Courts in British India follow the rules laid down by English Courts".[68] But after analysing the statutory provisions (exceptions (b), (c), (e), and (f) were raised), he suggested that "the law on this subject … is more elastic and wider than that in England"[69] – a comment justified more by the vague, overlapping language of the Indian exceptions than by any definite policy on the part of Indian legislators.

7 Conclusion

The last words go to three leading Law Members. The complaint that Sir Henry Maine levelled at courts, pre-codification – that "the rules actually applied … are taken a good deal at haphazard, from popular text-books"[70] – could be levelled at the Code itself. And Sir Courtenay Ilbert's criticism of English legal education applies just as well to the Code's draftsmen: "the student is usually left to pick up odd fragments of knowledge … and is rarely compelled or urged to take any general or scientific view of the principles which he has to apply."[71] Sir James Fitzjames Stephen took a similar view of British Indian bureaucrats: "few had … any general knowledge of the law, or had given the subject any systematic study."[72] The process leading to the Code had the appearance of a "systematic study" – but, as the rules themselves show, it did not always produce systematic results.

65 See, for example, *Mallappa Yellappa Bennur v Raghavendra Shamrao* [1938] Bom 16 30.

66 Sarvaria and Sarvaria (2007) 398–399.

67 *Mallappa Yellappa Bennur v Raghavendra Shamrao* (n 65) 30.

68 *Mallappa Yellappa Bennur v Raghavendra Shamrao* (n 65) 22.

69 *Mallappa Yellappa Bennur v Raghavendra Shamrao* (n 65) 27.

70 H S Maine *Village-Communities in the East and West: Six Lectures Delivered at Oxford* (1872) 212.

71 C P Ilbert *Legislative Methods and Forms* (1901) 161.

72 J F Stephen "Legislation under Lord Mayo" in W W Hunter (ed) *A Life of The Earl of Mayo* Vol 11 (1876) 143 152.

Even if this process produced imperfect law, that did not stop it providing the template for Civil Procedure Codes elsewhere – bearing out Gabriel Tarde's prediction that "[a]ny important measure which has been enacted in one part of the Empire is pretty sure to be enacted sooner or later in another".[73] For better or worse, it formed the basis of civil procedure in what is now Kenya, Uganda, and Tanzania,[74] and North and South Sudan[75] (beyond the more "obvious" examples of Sri Lanka, Pakistan, Bangladesh,[76] Burma,[77] and some Malaysian States).[78] The fact that the Code took root in Anglophone Africa is "hardly surprising", given the "many direct points of contact" between India and Africa, both official and non-official.[79]

Why did it not go further? For one thing, the Indian codes and systems of administration were considered suitable models only for "dependent people"[80] – and not, for example, the settler colonies, or the United Kingdom itself. As for the rules themselves: India was not invited to the discussions that led to the 1920 and 1933 Empire enforcement regimes, because it was not a Dominion. In some ways, we might be grateful that India was not invited, for this prevented its imperfect model from spreading any further than it did. India's enforcement regime, with its vague, overlapping "defences", was, for some, an unhappy inheritance.[81] While British Indian lawmakers aspired to set up "a scientific body of law … framed in a rational manner",[82] they sometimes fell short – with far-flung law reports reminding us of "the complications which may arise over the years by the adoption of the legislation of another country".[83]

73 Quoted in C E A Bedwell (ed) *The Legislation of the Empire: Being a Survey of the Legislative Enactments of the British Dominions from 1898 to 1907* (1909) xxiv.

74 S Thanawalla "Foreign *inter partes* Judgments: Their Recognition and Enforcement in the Private International Law of East Africa" 1970 *International and Comparative Law Quarterly* 430–446; H F Morris "The Reception and Rejection of Indian Law" in H F Morris and J S Read (eds) *Indirect Rule and the Search for Justice: Essays in East African Legal History* (1972) 109–130; WF Menski *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2006) 462; and R F Oppong *Private International Law in Commonwealth Africa* (2013) 313–347.

75 M W Daly *Empire on the Nile: The Anglo-Egyptian Sudan, 1898–1934* (1986) 61.

76 *Report of the Law Commission on a Reference by the Government on Appeals and Revisions Against Orders* (Bangladesh, SL No 57, 23.2.2003) 4–5.

77 N Y Kham "An Introduction to the Law and Judicial System of Myanmar" (National University of Singapore, Centre for Asian Legal Studies, Myanmar Law Working Paper Series, No 1, March 2014) 4–5.

78 L A Sheridan *Malaya and Singapore, the Borneo Territories: The Development of their Laws and Constitutions* (1961) 175.

79 Morris (1972) 109.

80 Morris (1972) 109.

81 Thanawalla (1970) 430 and Oppong (2013) 338–340 and 344–347.

82 E Stokes *The English Utilitarians and India* (1959) 71.

83 *Mehta v Shah* [1965] EA 321 330.

Reforming Party Autonomy in African Private International Law

The Need for Clear and Effective Exceptions

*John Kiggundu**

1 Introduction[1]

Choice of law in contract is very much based on the concept of party autonomy. Under this concept, the parties are free to choose the law to govern their contract. This might even mean displacing the otherwise applicable law of the forum. The concept of party autonomy upholds the doctrine of freedom of choice, which is central in the law of contract. Upholding it, on the other hand, might offend the principle of sovereignty in public international law. This chapter examines the difficulty of reconciling the freedom of choice of the parties with the sovereignty of states. The chapter concludes that both principles are essential: the law must uphold the sovereignty of states on the one hand and freedom of choice on the other. The paper concludes that, as a solution, party autonomy must be upheld, but clear and effective exceptions to the doctrine must be crafted and applied so as to uphold the sovereignty of states on the other hand.

2 The Doctrine of the Proper Law

Ascertaining the applicable law is more difficult in the case of contracts than in other areas of the law. There are several reasons for this. Let us examine only three. First, there are many different types of contracts. A choice of law rule that is appropriate for a contract of hire-purchase will not necessarily be appropriate for a contract of insurance or employment or sale of goods. Second, there are so many different aspects of the law of contract: for instance, offer and acceptance; capacity; discharge; and performance. A choice of law rule applicable to offer and acceptance will not necessarily be appropriate to questions of capacity or

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1 This contribution is based on a paper presented at the conference on Party Autonomy in African Private International Law held at the University of Johannesburg, Republic of South Africa, on 4 October 2017.

discharge of contract. Third, there is always a multiplicity of connecting factors: the place of performance; the domicile, nationality or business centre of the parties; the situation of the subject matter; and the nationality of the ship in the case of a charter party. It therefore becomes very difficult to choose one determinant factor and to come up with one single rule.[2]

2.1 The Scenario

A contract is made between A from Zimbabwe and B from Botswana whereby A agrees to sell goods to B to be delivered and the price to be paid in Maputo, Mozambique. A fails to deliver. B sues for breach of contract. Which law applies?

2.2 The General Principle

The general principle is that every international contract has a governing law, called the proper law of the contract, by reference to which issues arising out of it are mainly, though not exclusively, decided. Subject to certain limitations, the parties have the power to choose this proper law for themselves. If they do not do so, then the proper law is the system of law with which the contract has its closest and most real connection.[3] This is the doctrine of the proper law of the contract. The doctrine is premised on freedom of contract. On the basis of this freedom of contract, the parties are free to choose the law to govern their contract by using the choice of law clause. This is the concept of party autonomy.

3 The Concept of Party Autonomy

Party autonomy operates in two ways:

3.1 Partial Party Autonomy

The parties may displace all or part of those rules of the governing legal system which parties are free to alter by agreement (the *ius dispositivum*) with the rules of some foreign system. For example, A and B enter into a contract in Gaborone, Botswana. This contract would be governed by the law of Botswana (Roman–Dutch law). But the parties may decide that English or French law will apply to matters relating to delivery and breach of contract.

3.2 Total Party Autonomy

Alternatively, A and B enter into a contract of sale in Botswana and by the choice of law clause they indicate that the entire contract is to be governed by English

2 See P M North and J J Fawcett *Cheshire and North's Private International Law* (1992) 457–458; J H C Morris *The Conflict of Laws* (1984) 265; and J H C Morris *The Conflict of Laws* (1980) 209.

3 See *Bonython v Commonwealth of Australia* [1951] AC 201; and *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277.

law. The law of Botswana is displaced in its entirety. This approach excludes even those rules of Botswana which are imperative and thus cannot be set aside by the parties' agreement (the *ius cogens).* Assuming that A and B's contract would be void in Botswana law (for example because it is oral, yet Botswana's law requires such contracts to be in writing) the contract would be upheld by Botswana courts if it were valid by the chosen law.

3.3 The Rationale of Party Autonomy

Contractual obligations are personal. It is therefore important to allow the parties freedom of choice. But does the concept of party autonomy go too far? Doesn't it make the law of the given country redundant – if it can be displaced so easily? Is it desirable, especially in as far as it undermines the territorial sovereignty of the country of the forum and whose law is the otherwise applicable law? This is the conundrum examined in this chapter. The author submits that there must be a compromise: party autonomy is indispensable and must be retained even in its total form, but clear and effective exceptions must be crafted and applied as to protect the territorial sovereignty of the country of the forum.

3.4 Study of Party Autonomy

Roman-Dutch common law recognises party autonomy. Botswana is a Roman-Dutch law country. In *Guggenheim v Rosenbaum (2)*,[4] Trollip J held that the doctrine of the proper law was part of Roman-Dutch law and that the proper law of the contract is the law of the country which the parties have agreed or intended shall govern it. The learned judge held that the proper law of the contract was South African law. The parties had chosen it by implication.

In *In re Ernestine*,[5] a German ship sailed from Hamburg to the Cape. She had been chartered to carry merchandise to the Cape, Port Elizabeth and East London. In the bill of lading, the shippers agreed that general average, if any, was to be regulated and paid according to the York-Antwerp Rules of 1890. The ship was damaged by the leakage of sulphuric acid from iron drums which had been stored beneath the deck. It became necessary to discharge the rest of the cargo in order to effect the required repairs. The captain tried to raise the money on bottomry of ship and cargo, but the applicants objected. He therefore applied to the German consul for permission to sell a portion of the applicant's cargo for the purpose of defraying such expenses as should remain unpaid after money had been raised on bottomry of ship and freight. The applicants objected. De Villiers CJ said that the ship was German, and that the parties to the bill of lading agreed to be bound by the York and Antwerp Rules of 1890. Therefore, the court had to proceed and consider whether under those rules general average was claimable. The judge considered the rules and found that they were not

4 1961 4 SA 21 (W).

5 (1895) 12 SC 27.

applicable. The damage here was caused by the negligence of the master, and the owners of the Port Elizabeth cargo (applicants) could not be called upon for contribution.

The case *Commissioner of Inland Revenue v Estate Greenacre*[6] involved the interpretation of the Death Duties Act 29 of 1922 as it applied to a marriage settlement in contemplation of the marriage of the deceased's son. The settlement was executed in South Africa but there was an express choice of English law to regulate the rights of all persons claiming under it. The case contains *dicta* which seem to endorse total party autonomy. South African law was the otherwise applicable law. But English law was the proper law of the contract. Both under South African and English law, it was not a *donatio inter vivos* taking effect within two years immediately prior to the decedent's death. It therefore did not attract death duty. The judge respected the parties' choice of English law. The choice of law could not displace South African statutory obligations – the *ius cogens*. Party autonomy did not extend to displace the *ius cogens*.

There are statements in *Guggenheim* which seem to support unlimited autonomy, but the judge did not expressly say that the parties could displace even the *ius cogens*. *Estate Greenacre* clearly indicates that the parties have no right to displace the *ius cogens*. Forsyth[7] submits that "it is not clear beyond doubt whether it is possible for the parties to avoid by their choice of law a *ius cogens* norm of an otherwise applicable legal system, but there are indications that this will be possible". The learned author submits that on the grounds of certainty and convenience, a relatively wide concept of party autonomy ought to be part of South African (Roman-Dutch) law. He moots the idea that party autonomy ought not to be absolute: that it should apply only to international contracts. But he concedes that this view is not supported by the authorities. The learned author supports the view that in international trade, party autonomy in its absolute form should be allowed.

4 Ascertainment of the Proper Law

4.1 Express Selection of the Proper Law

As a general rule, the court will uphold the parties' express choice of law, even where it excludes norms of the *ius cogens* of the otherwise applicable legal system.[8] The question, as raised above, is whether there should be exceptions here and what those exceptions should be.

6 1936 NPD 225.

7 C F Forsyth *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012) 323.

8 Revisit *Commissioner of Inland Revenue v Estate Greenacre* (n 6); and *In re Ernestine* (n 5).

4.2 Implied Choice of the Proper Law

Where the parties do not expressly state their choice of law, the choice could be inferred from the surrounding circumstances. In *Guggenheim v Rosenbaum*, the learned judge was of the view that the parties had by implication chosen South African law to govern their contract. The judge looked at all the surrounding circumstances and they pointed to South Africa. The most prominent ones were that the defendant was domiciled in South Africa and the parties had agreed that the plaintiff should follow the defendant to South Africa for the marriage.

In *Stretton v Union Steamship Company Ltd*,[9] there was reference to an English statute: this was taken as an inference that English law had been chosen to govern the contract. The use of technical terms of one legal system may be taken as a tacit choice of that system. The choice of an arbitrator in a particular country could be taken as a tacit choice of that country's law.[10]

But the arbitration clause is not conclusive. In *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA*,[11] the choice was between English law and French law. The contract had no connection with English law except for the arbitration clause. It was more connected with France. French law was held to be the proper law.

4.3 Assigned Proper Law: Where There is No Choice of Law and a Governing Law is Assigned

Where the intention of the parties to a contract with regard to the law governing it is not expressed and cannot be inferred from the circumstances, the contract is governed by the system of law with which the transaction has its closest and most real connection. The general rule in Roman–Dutch law is that the *lex loci contractus* governs unless the contract is to be performed elsewhere, in which case the *lex loci solutionis* applies. This rule is not rigid: the courts will assign to the contract a law other than the *lex loci contractus* or the *lex loci solutionis* in appropriate cases. The courts look for the presumed intention of the parties or the seat of the contract. The courts look at all the surrounding factors and then assign the proper law.

The problem with the *lex loci contractus* is that it may be entirely fortuitous. Sometimes it may not be easy to determine the *lex loci contractus*. The *locus solutionis* is easy to ascertain and is in most cases not fortuitous. The problem with the *lex loci solutionis* is that the parties may not agree on one or may state that it will be determined at some later date. Or the performance may take place in different places. Furthermore, the *lex loci solutionis* may be optional.

9 (1881) 1 EDC 315.

10 See *Suisse Atlantique Societe d'Armament SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361.

11 [1971] AC 572.

In *The Castle Mail Packets Co v Mitheram and Toteram*,[12] the plaintiffs were illiterate. They bought tickets from the defendant company to travel from Delagoa Bay to Durban. They could not read the conditions in the tickets. These conditions, *inter alia*, exempted the defendants from all liability for loss, damage or detention of luggage. The plaintiffs were compelled to leave the ship. They left their luggage behind. Articles were lost. The plaintiffs sued. The issues were whether there was a contract; which law governed it; and were the defendants liable? The parties had not considered the matter.

Gallewey CJ[13] laid down the general principle: "The general rule in these contracts is that the rights of the parties to the contract are to be judged by the law of that country by which they intend to bind themselves or rather by which they may jointly be presumed to have bound themselves."[14] The court held that the proper law of the contract was English law. Applying English law, the judge concluded that the ticket contained the contract. Under the contract, the defendants failed to take proper care of the box when they told the passengers to disembark. This loss occurred due to their negligence. They were accordingly liable for those items that were luggage.

It can be seen that selecting the system with which the contract has its closest and most real connection is not easy where the contract is evenly balanced or connected with two competing legal systems. In such cases there are factors pointing either way. The starting point in Roman–Dutch law is an examination of *Standard Bank of South Africa Ltd v Efroiken and Newman*,[15] where the basic rules and principles of the ascertainment of the proper law in Roman–Dutch law were laid down. The next important case is *Improvair (Cape) (Pty) Ltd* v *Establissements Neu*.[16] This case is important because, first, it reviews *Standard Bank* v *Efroiken* and other relevant cases and restates the modern position in Roman–Dutch law; and second, it is a very good illustration of what the court should do where the parties never chose the law expressly or impliedly and the factors are evenly balanced between two competing jurisdictions. In this particular case, the judge found that the factors were evenly balanced between South African law and French law. The judge leaned in favour of French law and held that French law had the closest and most real connection with the transaction between the parties and that they must be taken to have intended French law to apply.[17]

The English case of *The Assunzione*[18] is a very good example of the English approach. The issue was whether the transaction was governed by Italian or French law. The factors were evenly balanced. The charterers were French, a

12 (1892) 13 NLR 199.

13 *The Castle Mail Packets Co v Mitheram and Toteram* (n 12) 201.

14 *The Castle Mail Packets Co v Mitheram and Toteram* (n 12) 202.

15 1924 AD 171.

16 1983 2 SA 138 (C).

17 *Improvair (Cape) (Pty) Ltd v Establissements Neu* (n 16) 152.

18 [1954] 1 All ER 278.

factor that pointed to French law. Also, the charter party was made in France; and the bills of lading were issued in France. However, the goods were to be carried from Dunkirk (France) to Venice (Italy); the ship was Italian – Italian ship owners; and the freight and the demurrage were to be paid in Italy in Italian currency. Thus the country of performance (*locus solutionis*) was Italy. The English judges faced with such a problem are guided by the following principle: the court looks at all the circumstances and seek what just and reasonable persons ought to have intended if they thought about the matter. Applying this principle, the scales came down in favour of Italian law.

Another interesting illustration of the English approach is *Whitworth Street Estates Ltd v James Miller and Partners*,[19] where the factors were evenly balanced between England and Scotland. The majority of the House of Lords held that English law was the proper law.

5 Scope of the Proper Law

Not all aspects of the contract are governed by the proper law. Ideally, it should govern as many aspects as possible. Commercial convenience, principle or logic dictate that some aspects of the contract should be governed by a law other than the proper law.

5.1 Capacity to Contract

There must first be a contract before the law to govern it can be chosen. If one of the parties lacks capacity to contract, then there can be no contract and thus no proper law. Accordingly, capacity to contract is governed by some other law. Issue: what law – *lex domicilii*? *Lex loci contractus*? How about in the case of a contract involving immovables? Is it the *lex rei sitae*?

In *Hulscher v Voorschotkas voor Zuid Africa*,[20] it was held that the *lex domicilii* should determine capacity. It was further held that the proper law does not determine capacity. The case is not very useful because the *lex domicilii* and the *lex loci contractus* coincided.

In *Kent v Salmon*,[21] it was held that in contracts of a commercial nature, capacity is determined by the *lex loci contractus* other than the *lex loci domicilii*: commercial convenience and the protection of third parties, especially the interest of local traders, dictate that capacity should be governed by the *lex loci contractus*. In *Powell v Powell*,[22] the husband made a gift of a car to his wife. He wished to revoke it. The parties were domiciled in England at the time of the marriage. They were now domiciled in South Africa. Which law applied? If English law applied, the gift was irrevocable. If South African law applied, the gift was revocable. It was held that the *lex domicilii* applied. The gift was

19 [1970] AC 583.
20 1908 TS 542.
21 1910 TPD 637.
22 1953 4 SA 380 (W).

therefore revocable. Once again, the *lex domicilii* coincided with the *lex loci contractus*. How can these cases be reconciled? The best view seems to be that in commercial contracts, the *lex loci contractus* should govern the question of capacity and that in all other contracts the *lex domicilii* should govern.

In the case of immovables, the law is clear. The *lex rei sitae* will govern capacity.[23]

5.2 Formalities of the Contract

These must be undertaken before a valid contract can exist. They are therefore not governed by the proper law of the contract. They are generally governed by the *lex loci contractus*. This rule is fully justified: parties entering into a contract in a foreign country would require local legal advice and would have to comply with local procedures. In the case of a contract for the sale of immovable property, the *lex rei sitae* governs. In *Roux v Kuils River Land Syndicate*,[24] Transvaal was the forum. The contract involved the sale of land in the Cape Province. The contract was entered into in the Transvaal, but it did not comply with the law of the Transvaal, which required that all such contracts had to be in writing and signed by the parties or their authorised agents. The law of the Cape Province did not require that a contract for the sale of land should be in writing. It was held that the law of Transvaal was meant to govern formalities for the sale of land in the Transvaal. It was never intended that contracts for the sale of land in other parts of the world should be in writing. Applying the doctrine of *locus regit actum*, a contract in regard to land situated elsewhere than in the Transvaal was valid and could be sued upon in the Transvaal provided it was valid according to the *locus rei sitae*.

5.3 The Problem of Consensus

This is an issue of offer and acceptance. For a valid contract, there must be consensus *ad idem* by the parties. If one of the parties thinks they have agreed and the other thinks they are still negotiating, there is no contract. If there is no contract, there is no proper law. Thus, there must be a law to determine whether the parties have reached an agreement – a contract.

In English law, the problem has been resolved by the use of the putative proper law – the law which would have been the proper law had a contract been concluded. In *Albeko Schuhmaschinen AG v The Kamborian Shoe Machine Co Ltd*,[25] A in England wrote a letter to B in Switzerland in which A offered to appoint B as his agent in Switzerland. B alleged that he posted a letter of acceptance in Switzerland, but that it was lost in the post. By English law, a contract is concluded when the letter of acceptance is posted, even if it is not received. However, according to Swiss law, a contract is concluded when the letter of

23 See *Ferraz v d'Inhaca* 1904 TH 137.

24 1912 TPD 547.

25 (1961) 111 LJ 519.

acceptance is received by the offeror. The English court held that there was no contract because it had not been proved that the letter of acceptance had in fact been posted. The court expressed the view that if it could be proven that the letter had been posted, Swiss law would govern (because that is where the letter of acceptance was allegedly posted), but there would still be no contract because if a contract had been concluded, Swiss law would have been its proper law. Since the letter of acceptance was never received by the offeror, Swiss law would hold that there was no contract.

6 International Efforts and Instruments

In recent years, there have been efforts at the supranational or international level to regulate party autonomy. The most prominent efforts are the Rome I Regulation on the Law Applicable to Contractual Obligations (2008), and, most recently, the Hague Principles on Choice of Law in International Commercial Contracts (2015). It is to these instruments that we now turn.

6.1 The Rome I Regulation on the Law Applicable to Contractual Obligations

With the exception of Denmark,[26] the Regulation is applicable in the European Union Member States.[27] The Regulation contains several fundamental provisions. Article 3 restates the concept of party autonomy. It provides that the parties are free to choose the law to govern their contract. The choice need not be express but it must be demonstrated with reasonable certainty. Where the parties have not chosen the law to govern their contract, the Regulation provides a list of fixed rules that deals with most of the contracts entered into by parties.[28] However, "where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated" by the fixed rules, "the law of that other country shall apply".[29] Further, where the applicable law cannot be determined pursuant to the fixed rules, the contract is governed by the law of the country with which it is most closely connected.[30] The court will look at several factors to determine the law with which the contract is most connected. These include the habitual residence of the parties and the place where the characteristic performance has to be effected. The Regulation provides that those rules of the *lex fori* which cannot be derogated from (mandatory rules) apply notwithstanding the parties' choice of a different law. This provision is a rejection of total party autonomy.[31]

26 See Recital 46 of the Rome I Regulation.
27 Art 24 of the Rome I Regulation.
28 Art 4 of the Rome I Regulation.
29 Art 4(3) of the Rome I Regulation.
30 Art 4(4) of the Rome I Regulation.
31 See also Art 9(1)–(2) of the Rome I Regulation.

A contract can be split between different legal systems. This is known as *dépeçage*. It can be done by reference to different duties of performance, or, presumably, different numbered clauses.

As pointed out earlier, the Regulation is applicable in most European Union Member States. In the United Kingdom, despite Brexit, the Regulation is still applicable.[32]

6.2 The Hague Principles on Choice of Law in International Commercial Contracts[33]

6.2.1 *Party autonomy*

Party autonomy, which, as we have seen above, refers to the power of the parties to a contract to choose the law that governs that contract, enhances certainty and predictability within the parties' contractual arrangement and recognises that parties to a contract may be in the best position to determine which set of legal principles is most suitable for their transaction.[34]

The Hague Conference on Private International ("the Hague Conference") believes that the advantages of party autonomy are significant and encourages the spread of this concept to states that have not yet adopted it, or have done so with significant restrictions, as well as the continued development and refinement of the concept where it is already accepted.[35]

The instrument sets out general principles (the Principles) concerning choice of law in international commercial contracts. They affirm the concept of party autonomy with limited exceptions.[36] They may be used as a model for national, regional, supranational or international instruments. They may be used to interpret, supplement and develop rules of private international and they may be applied by courts and by arbitral tribunals.[37]

The Principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession.[38] They do not

32 See The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019 (UK). See also P Beaumont "Some reflections on the way ahead for UK private international law after Brexit" 2021 *Journal of Private International Law* 1; and R Mortensen "Brexit and private international law in the Commonwealth" 2021 *Journal of Private International Law* 18.

33 For a more detailed analysis, see J L Neels "The nature, objective and purposes of the Hague Principles on Choice of Law in International Contracts" 2013/2014 *Yearbook of Private International Law* 45. See also the Hague Conference on Private International Law *Commentary on the Principles of Choice of Law in International Commercial Contracts* (2015).

34 par 1.3 of the Commentary on the Hague Principles.

35 pars 14 and 15 of the Commentary on The Hague Principles.

36 preamble to the Hague Principles.

37 preamble to the Hague Principles.

38 Art 1 of the Hague Principles.

apply to consumer or employment contracts. The Principles do not address the law governing: the capacity of natural persons; arbitration agreements and agreements on choice of court; companies or other collective bodies and trusts; insolvency; the proprietary effects of contracts; and the issue whether an agent is able to bind a principal to a third party.[39]

Party autonomy is addressed in Article 2. The article provides very clearly that a contract is governed by the law chosen by the parties.[40] The parties may choose the law applicable to the whole contract or to only part of it, and different laws for different parts of the contract.[41] In other words, there is a splitting of the choice of law. As has been stated above, this is known as *dépeçage*. The choice may be made or modified at any time. A choice or modification made after the contract has been concluded does not prejudice its formal validity or the rights of third parties, and no connection is required between the law chosen and the parties or their transaction.[42]

6.2.2 *Rules of Law*

The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.[43]

6.2.3 *Express and Tacit Choice*

A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not a choice of law *per se*.[44]

6.2.4 *Formal Validity of the Choice of Law*

A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.[45]

6.2.5 *Agreement on the Choice of Law and the Battle of Forms*

Subject to Article 6 paragraph 2, whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to.[46] And if the parties have used standard terms designating two different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies; if under these laws different standard terms prevail, or if under one or both of these laws no standard terms prevail, then there is no choice of

39 Art 1 of the Hague Principles.
40 Art 2 of the Hague Principles.
41 Art 2(2) of the Hague Principles.
42 Art 2(3)-(4) of the Hague Principles.
43 Art 3 of the Hague Principles.
44 Art 4 of the Hague Principles.
45 Art 5 of the Hague Principles.
46 Art 6(1)(a) of the Hague Principles.

law.[47] Furthermore, the law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in Article 6 paragraph 1.[48]

6.2.6 *Severability (Separation)*

A choice of law cannot be contested merely on the ground that the contract to which it applies is not valid (severability).[49]

6.2.7 *Exclusion of* Renvoi

A choice of law does not refer to the rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise.[50]

6.2.8 *Scope of the Chosen Law*

The law chosen by the parties governs all aspects of the contract between the parties, including but not limited to: (i) interpretation; (ii) the rights and obligations arising from the contract; (iii) performance and the consequences of non-performance, including the assessment of damages; (iv) the various ways of extinguishing obligations, and prescription and limitation periods; (v) validity and the consequences of invalidity of the contract; (vi) burden of proof and legal presumption; and (vii) pre-contractual obligations.[51] The provision on validity and the consequences of invalidity of the contract, does not preclude the application of any other governing law supporting the formal validity of the contract.[52]

6.2.9 *Assignment*

In the case of contractual assignment of a creditor's rights against a debtor arising from a contract between the debtor and creditor: (a) if the parties to the contract of assignment have chosen the law governing that contract, the law chosen governs the mutual rights and obligations of the creditor and the assignee arising from their contract; and (b) if the parties to the contract between the debtor and creditor have chosen the law governing that contract, the law chosen also governs: (i) whether the assignment can be invoked against the debtor; (ii) the rights of the assignee against the debtor; and (iii) whether the obligations of the debtor have been discharged.[53]

47 Art 6(1)(b) of the Hague Principles.
48 Art 6(2) of the Hague Principles.
49 Art 7 of the Hague Principles.
50 Art 8 of the Hague Principles.
51 Art 9(1) of the Hague Principles.
52 Art 9(2) of the Hague Principles.
53 Art 10 of the Hague Principles.

6.2.10 *The Limitations/Exceptions*

As already indicated, the thesis of this chapter is that party autonomy should be retained but several exceptions/limitations should be crafted and applied so as to mitigate possible undesirable effects of party autonomy.

The limitations or exceptions in the Hague Principles are not very different from those in Roman–Dutch common law, English common law, English statutory law and the Rome I Regulation. It is to these limitations/exceptions that we now turn.

(a) *Mandatory Rules (*Ius Cogens*)*

The Principles do not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.[54] The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.[55]

(b) *Public Policy*

A court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.[56] The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State the law of which would be applicable in the absence of a choice of law.[57] The Principles do not prevent an arbitral tribunal from applying or taking into account public policy (*ordre public*) or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.[58]

6.2.11 *Establishment*

Where a party has more than one establishment, the relevant establishment for the purpose of the Principles is that which has the closest relationship to the contract at the time of its conclusion.[59]

7 Conclusion

So what is the way forward? As submitted earlier, a compromise is required here: party autonomy (even in its total or absolute form) should be allowed but should be controlled through clear and effective exceptions. It is to these exceptions that we now turn.

54 Art 11(1) of the Hague Principles.
55 Art 11(2) of the Hague Principles.
56 Art 11(3) of the Hague Principles.
57 Art 11(4) of the Hague Principles.
58 Art 11(5) of the Hague Principles.
59 Art 12 of the Hague Principles.

7.1 Public Policy

This exception was clearly recognised in the famous case of *Vita Food Products Inc v Unus Shipping Co Ltd*.[60] A cargo of herrings was to be carried in a Nova Scotia ship from Newfoundland to New York. The parties were companies incorporated respectively in New York and Nova Scotia. After the ship ran aground, the herrings were to be "reconditioned" before they could be sold. The bill of lading declared that English law was the proper law. Lord Wright stated:[61]

> [W]here the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy.

It is submitted that the public policy exception be clearly incorporated into Roman-Dutch law as an exception to, or limitation of, total or partial party autonomy. It is also submitted that the public policy exception above is too wide and too vague and should be clarified and streamlined.

7.2 *Fraus Legis*

This is a purely Roman-Dutch law concept; it provides that where persons, in order to avoid the provisions of the normally applicable legal system, so act as to create connecting factors which attract to them or their transaction some other legal system as governing law, then the choice of law rules will not operate and the normally applicable legal system will apply – their creation of the connecting factors has been *in fraudem legis*.[62] While it is generally agreed that the *fraus legis* principle is part of Roman-Dutch law, its scope and extent are far from clear.[63] The principle has been rejected by the English courts. It is submitted, however, that the principle of *fraus legis* could be crafted into an exception to party autonomy which would be acceptable universally. Forsyth is of the view that Roman-Dutch law could adopt a similar principle provided this does not lead to the application of a law which is neither chosen nor the *lex fori*.[64]

7.3 *Mala Fides*

Where the parties act *mala fide* in selecting the law to govern their contract, that law will not be applied and the court will apply the otherwise applicable law.

60 [1939] AC 277.
61 Par 290.
62 Forsyth (2012) 126.
63 Forsyth (2012) 126.
64 Forsyth (2012) 324.

7.4 Illegality

Where the parties choose a law to govern their contract which is illegal by the law of the forum, that law will not be applied, and the court will apply the otherwise applicable law.

7.5 Mandatory Rules of the *Lex Fori* (the *Ius Cogens*)

Where the law chosen by the parties to govern their contract offends the *lex fori* or the otherwise applicable law, then that choice will not be applied and the court will apply the *lex fori* or the otherwise applicable law.

Jurisdiction in International Civil Cases

How Many Links are Enough?

*Thalia Kruger**

1 Introduction

In the preface to the second edition of Christopher Forsyth's *Private International Law*, he stated that as a student he never understood jurisdiction. He added that this confession should be a motivation for students: if you do not understand something, maybe one day you will write a book about it. These words have stuck with me throughout my PhD research and after. If we read and research hard enough, we can get our heads around the difficulties of the law.

Writing about jurisdiction seemed appropriate not only because of this statement of Christopher's, but also because this is an area of private international law that is in development. Only, the more I read, the murkier jurisdiction, at least in current-day South African law, became in my mind. I was disheartened even further when I read that Professor Ellison Kahn complained as far back as 1987 that the law on jurisdiction was murky.[1]

In the end I was wondering whether Christopher Forsyth's statement is true: can we always understand the law by hard work? But I ventured on, attempting to get it right and to make proposals where I don't agree with what I understand the current state of the law to be.

The purpose of this contribution is to examine how many links, or which links, are required to make the exercising of civil jurisdiction fair. In South Africa, the Superior Courts Act of 2013[2] changed matters, but so did the case law. In particular, the *Multi-Links* case[3] started off on a course to change the approach to jurisdiction in our Constitutional legal system. This piece is certainly not comprehensive: Forsyth's seminal *Private International Law* discusses it in a lot more detail than I can here. So my objective is more modest: to contribute a few thoughts in the debate about what is a sufficient amount or intensity of links for jurisdiction. The contribution will first look at links that are sufficient

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1 E Kahn "Conflict of Laws" 1987 *Annual Survey of South African Law* 472 474.

2 Act 10 of 2013.

3 *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 3 SA 265 (GP).

for civil jurisdiction (section 2) and links that are insufficient (section 3). Next the ideas of confirming jurisdiction (section 4) and of effectiveness (section 5) deserve some attention. By way of conclusion, I make some suggestions for amendments to the South African statutory and case law.

2 Bases of Civil Jurisdiction: It's All About Links

2.1 General Approach to Links

For a court to exercise jurisdiction over a defendant, there must be some links to the court. In general, that broad statement is true of course, not only in South Africa. There has been much debate internationally about the relevant links for this purpose: between the defendant and the forum or between the case and the forum.[4] This matter was on the table at the Hague Conference on Private International Law (Hague Conference) for many years when the Member States attempted to conclude a world-wide convention on jurisdiction and the recognition and enforcement of foreign judgments.[5]

Their attempts failed, however, because there was too much disagreement between the negotiating delegations about the appropriate links for jurisdiction. The Hague Conference subsequently proceeded with two other Conventions, more limited in scope. The first is the Choice of Court Convention of 2005.[6] This Convention is based on the first of the accepted links, discussed below. The second Convention is the 2019 Convention on Recognition and Enforcement of Foreign Judgments.[7] For this latter Convention, negotiators were less ambitious and parted with the idea of world-wide agreement about appropriate rules for jurisdiction. The Convention contains only so-called *indirect* bases

4 See *inter alia* P J Borchers "A Few Little Issues for the Hague Judgments Negotiations" 1998 *Brooklyn Journal of International Law* 157 160-162; R A Brand "Access-to-Justice Analysis on a Due Process Platform" 2011 *University of Pittsburgh Legal Studies Research Paper* no 2012-01; H van Lith *International Jurisdiction and Commercial Litigation: Uniform Rules for Contract Disputes* (2009).

5 See "Interim Text – Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference (6-22 June 2001)" prepared by the Permanent Bureau and the Co-reporters, as well as various preparatory documents, available at https://www.hcch.net/en/instruments/conventions/publications1/?dtid=35&cid=98. See also A T von Mehren "Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?" 1994 *Law and Contemporary Problems* 271-287 and the discussion pointing out the difficulties by A F Lowenfeld "Thoughts about a Multinational Judgments Convention: A Reaction to the von Mehren Report" 1994 *Law and Contemporary Problems* 289-303.

6 Hague Convention of 30 June 2005 on Choice of Court Agreements, full text available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=98.

7 Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Hague Judgments Convention), full text available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=137.

of jurisdiction: those bases that a recognising court (or other authority) should consider internationally acceptable to have based the decision upon.[8] Recognition or enforcement would be guaranteed only where the original court used one of these acceptable bases of jurisdiction. If the court had used another basis of jurisdiction, the judgment is not "eligible for recognition and enforcement" under the Convention,[9] although it may of course be recognisable under another Convention or treaty or national law.[10] For the purposes of this contribution, the Convention is relevant only as an expression of international agreement of acceptable bases of jurisdiction.

The next sections will discuss such internationally acceptable bases of jurisdiction and the current position of South African law in relation to them.

2.2 Choice of Court as a Link

When parties choose a specific court to decide their disputes, that court's assumption of jurisdiction should be considered fair.[11] Such agreement can be made before the dispute arises, by way of a clause in their contract, or after the dispute arose. It may be subjected to certain requirements relating to form, for instance that it must be in writing.[12]

A variation of such explicit choice of court agreement is a defendant submitting to the court chosen by the plaintiff.[13] This form of granting jurisdiction to a court is referred to in various ways, such as voluntary appearance, tacit consent or submission to jurisdiction. It is, just like the jurisdictional basis of explicit choice, based on party autonomy in civil and commercial disputes.

Jurisdiction based on choice of court or submission, although widely accepted globally, does not appear in the South African Superior Courts Act. The case law has acknowledged submission as an alternative to attachment of property to found or confirm jurisdiction.

In *Veneta Mineraria*,[14] the Court of Appeal found that submission could not establish jurisdiction if both parties are *peregrini* of the court's area and

8 Art 5 of the Hague Recognition and Enforcement Convention.

9 Art 5 of the Hague Recognition and Enforcement Convention.

10 Art 15 and 23 of the Hague Recognition and Enforcement Convention.

11 See for instance Art 5 of the Hague Choice of Court Convention; and Art 5(1)(m) of the Hague Recognition and Enforcement Convention. For the EU: Art 25 of Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L* 351, 20 December 2012 (Brussels I Recast). For the US: *M/S Bremen v Zapata Off-Shore Co* 92 SCt 272 (1971).

12 See for instance Art 3(c) of the Hague Choice of Court Convention; and Art 25(1)(a) of Brussels I Recast.

13 Art 5(1)(f) of the Hague Recognition and Enforcement Convention; and Art 26(1) of Brussels I Recast.

14 *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (In Liquidation)* 1987 4 SA 883 (A).

if there is no local cause of action. The Witwatersrand High Court clarified in the *American Flag* case[15] that if the plaintiff was an *incola* of the court's area, submission is sufficient to establish jurisdiction even in the absence of a local cause of action. This finding, the Court said, is not a diversion from *Veneta Mineraria*, but a reconfirmation of a long-standing rule in South African common law that was not affected by *Veneta Mineraria*. The Supreme Court of Appeal confirmed this finding in *Hay Management Consultants*.[16]

The Supreme Court of Appeal in *Jamieson v Sabingo*[17] found that if there is a local cause of action, submission is sufficient to confirm jurisdiction. In this case the defendant was a foreign *peregrinus* while the plaintiff was an *incola* of the court *a quo*'s area. The Supreme Court of Appeal therefore found it unnecessary to decide whether submission in the absence of a cause of action would be sufficient for jurisdiction. Similarly, the Supreme Court found in *Ingosstrakh v Global Aviation Investments*[18] that submission by a foreign *peregrinus* defendant in a case brought by a foreign *peregrinus* plaintiff provides for jurisdiction in a case where the insurance policy in question was concluded in the court's area.[19] Again, the Supreme Court of Appeal did not find it necessary to decide whether submission in itself would be a sufficient basis of jurisdiction.[20]

Thus, in current South African law, submission is not a self-standing basis for jurisdiction, but it serves to confirm jurisdiction when the plaintiff is an *incola* and there is a local cause of action or to found jurisdiction if the plaintiff is an *incola* and there is no local cause of action. When both parties are *peregrini* and the cause of action did not arise in the court's area, submission will not grant jurisdiction. This is out of sync with international standards.[21]

As far back as 1992 Professor Kahn wrote: "One can only say that this restrictive attitude to jurisdiction by consent is not one taken generally in the West today."[22] Since then, the High Court of Botswana also expressed its disagreement with the *Veneta Mineraria* finding. In a well-reasoned judgment

15 *American Flag plc v Great African T-Shirt Corporation CC: In re Ex parte Great African T-Shirt Corporation CC* 2000 1 SA 356 (W).

16 *Hay Management Consultants Ltd v P3 Management Consultants (Pty) Ltd* 2005 2 SA 522 (SCA).

17 *Jamieson v Sabingo* 2002 4 SA 49 (SCA).

18 *Ingosstrakh v Global Aviation Investments (Pty) Ltd* 2021 6 SA 352 (SCA).

19 *Ingosstrakh v Global Aviation Investments (Pty) Ltd* (n 18) par 29-31.

20 *Ingosstrakh v Global Aviation Investments (Pty) Ltd* (n 18) par 31.

21 As acknowledged by Wunsch J in *American Flag plc v Great African T-Shirt Corporation CC: In re Ex parte Great African T-Shirt Corporation CC 2000* (n 15); Christopher F Forsyth *Private International Law* (2012) 231-232. Makgoba J also admitted in *Ingosstrakh v Global Aviation Investments (Pty) Ltd* (n 18) par 31 that there are "forceful arguments reflected in academic literature that would recognise submission alone by the defendant in a suit between a foreign *peregrinus* plaintiff and a foreign *peregrinus* defendant as sufficient for the court to assume jurisdiction".

22 E Kahn "Conflict of Laws" 1992 *Annual Survey of South African Law* 673 690.

of 2006, the High Court discussed *Veneta Mineraria* as comparative law, and explained that it was not bound by it and took a different direction.[23] In the case before it, one of the applicants was an *incola*, but both respondents were foreign *peregrini*. The contract contained a choice-of-court agreement for the Court of Botswana. In the absence of this submission, the Botswana court would not have had jurisdiction (which is thus different from the *Jamieson* case). The court ruled that the submission did confer jurisdiction on it, finding that parties must be held to their contracts and that effectiveness could be achieved through international enforcement.[24]

2.3 Residence of the Defendant as a Link

The second basis of jurisdiction is that a defendant can be sued in their home forum. This *actor sequitur forum rei* principle is globally accepted.[25] This has a statutory basis in South Africa.[26] The wording of the Act is broad, as was the previous Act.[27] Both provisions refer to "persons residing or being in", but the courts have explained it clearly. Under the common law, the place of registration as well as the principal place of business of a company can be considered as "residence" for purposes of jurisdiction.[28] However, the Companies Act[29] restricted this broad concept, so that companies have only one residence, being the place of their registration or, if they are registered in various places in South Africa, their principal office. The Western Cape High Court confirmed this state of the law in *Mfwethu Investments CC v Citiq Meter Solutions*.[30] In this case, the defendant's principal office was in South Africa, but not in the court's area, so that it found that it lacked jurisdiction, despite the fact that the defendant had activities in its area.

As this link is not controversial, this contribution will not discuss it further.[31]

2.4 Cause of Action as a Link

Courts can take jurisdiction over defendants outside their area when the dispute has a sufficient link with the court's area. But at this point the agreement about

23 *MAK (Pty) Ltd v St Paul Insurance Co SA Ltd* 2007 1 BLR 210 (HC).

24 *MAK (Pty) Ltd v St Paul Insurance Co SA Ltd* (n 23) at 218 B and D, referring to *Jamieson v Sabingo* (n 17 above).

25 Art 5(1)(a) and (b) of the Hague Recognition and Enforcement Convention; and Art 4 of Brussels I Recast. See also A T von Mehren and D T Trautman "Jurisdiction to Adjudicate: A Suggested Analysis" 1966 *Harvard Law Review* 1121 1127.

26 Art 21(1) of the Superior Courts Act 10 of 2013.

27 Sec 19(1)(a) of the Supreme Court Act 59 of 1959.

28 *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 1 SA 482 (A).

29 See sec 23(3)(b) of the Companies Act 71 of 2008.

30 *Mfwethu Investments CC v Citiq Meter Solutions (Pty) Ltd* 2020 6 SA 578 (WCC).

31 The law on residence and domicile has been more than clearly set out by Forsyth (2012) 205-212.

what is a sufficient link stops. Legal systems are in disagreement about when it is appropriate to take jurisdiction over a foreign defendant who has contracted with local traders or been doing business locally. The tensions on this point have led to the failure of a world-wide dual convention (*ie* a convention including not only recognition and enforcement of foreign judgments but also unified jurisdiction rules).[32] In the end, agreement was possible only almost twenty years later, and only on a single convention, *ie* addressing cross-border recognition and enforcement, containing only indirect jurisdiction rules.[33] The bases of jurisdiction relying on contract or tort are narrowly and precisely circumscribed.[34]

In short, according to EU law, a cause of action is a sufficient link for jurisdiction: if a contract were to be performed in a court's area or a harmful event (tort or delict) occurred there, the court can take jurisdiction over the dispute.[35] The type of cause of action that is sufficient for jurisdiction is clearly defined, *eg* the place of delivery for sales contracts.[36] Where there is uncertainty about the exact ambit, the Court of Justice of the EU brings clarity.[37]

Crossing the Atlantic, briefly again, the Americans have a very restricted view of cause of action as a basis of jurisdiction in civil matters. Every exercising of jurisdiction has to be in line with the Fourteenth Amendment of the US Constitution.[38] After several Supreme Court judgments[39] and academic analysis,[40]

32 See above and n 5.

33 Hague Judgments Convention (n 7 above).

34 Art 5(g)-(j) of the Hague Judgments Convention.

35 Art 7(1) and 7(2) Brussels I Recast.

36 Art 7(1)(b) Brussels I Recast.

37 This was done for tort or delict in a long line of cases starting with CJEU C-21/76 *Handelskwekerij Bier v Mines de Potasse d'Alsace* ECLI:EU:C:1976:166 and including CJEU C-68/93 *Shevill and Others v Presse Alliance* ECLI:EU:C:1995:61; joined cases CJEU C-509/09 and 161/10 *eDate Advertising GmbH and Others v X and Martinez v Société MGN LIMITED* ECLI:EU:C:2011:685; CJEU C-45/13 *Kainz v Pantherwerke AG* ECLI:EU:C:2014:7; CJEU C-189/08 *Zuid-Chemie BV v Philippo's Mineralenfabriek NV/SA* ECLI:EU:C:2009:475.

38 Sec 1 provides for a fair trial: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

39 Starting with *International Shoe Co v State of Washington* 326 US 310 (1945) and including *World-Wide Volkswagen Corporation v Woodson* 444 US 286 (1980); *Burger King Corporation v Rudzewicz* 471 US 462 (1985); *Asahi Metal Industry Co Ltd v Superior Court of California, Solano County* 480 US 102 (1987); *Goodyear Dunlop Tires Operations SA v Brown* 564 US 915 (2011); *J McIntyre Machinery Ltd v Nicastro* 564 US 873 (2011); *Bristol-Myers Squibb Co v Superior Court of California, San Francisco County* 582 US (2017).

40 For instance A von Mehren and D T Trautman "Jurisdiction to Adjudicate: A Suggested Analysis" 1966 *Harvard Law Review* 1121-1179; A von Mehren "Adjudicatory Jurisdiction: General Theories Compared and Evaluated" 1983 *Boston University Law*

cause of action jurisdiction came to be called *specific* jurisdiction, referring to the fact that the defendant had contacts (links) with the court's area and the dispute resulted from these contacts. Specific jurisdiction is accepted only if the strict requirements of the Fourteenth Amendment are met: it has to be in accordance with fair play and substantial justice to exercise jurisdiction over the defendant. For this purpose, the court considers the defendant's activities and expectations.[41] In recent cases, the US Supreme Court has been strict. In *McIntyre*,[42] for instance, the Court found that the court of the place where an imported machine caused an accident did not have jurisdiction over the British manufacturer of the machine because the manufacturer did not have sufficient contacts with the State where the accident took place. In an interesting dissenting opinion Justice Ginsburg compares the court's finding with EU law, stating that an EU court would have taken jurisdiction over a similar dispute.[43]

Crossing the Atlantic once more and arriving at South Africa, cause of action as a basis of jurisdiction is, like unfortunately so many aspects of South African private international law, unnecessarily complicated. When the defendant is a *peregrinus*, a cause of action in South Africa can be the start of a jurisdictional basis. However, there are two complicating elements. First, cause of action is not narrowly defined as it is in EU law: our courts have explained that "causes arising"[44] refers to proceedings arising.[45] Second, it is not in itself sufficient: something is needed to *confirm* that jurisdiction.

Needing something to confirm jurisdiction has been explained with reference to the principle of effectiveness (further discussed below).

3 Insufficient Links: Exorbitant Bases of Jurisdiction

3.1 Exorbitant Bases of Jurisdiction in General

Within the context of the European Union, Brussels I Recast outlaws the use of certain bases of jurisdiction against defendants domiciled in the EU.[46] These bases of jurisdiction are considered exorbitant. Member States had

Review 279–340; F K Juenger "Judicial Jurisdiction in the United States and in the European Communities: A Comparison" 1984 *Michigan Law Review* 1195–1212; L Brilmayer "A General Look at General Jurisdiction" 1988 *Texas Law Review* 721–783; F K Juenger "A Shoe Unfit for Globetrotting" 1995 *UC Davis Law Review* 1027–1045.

41 See for instance *McIntyre* and *Bristol Myers* (n 39). For a recent analysis, see P S Goldberg, C E Appel and V E Schwart "The US Supreme Court's Paradigm Shift to End Litigation Tourism" 2018–2019 *Duke Journal of Constitutional Law & Public Policy* 51–89.

42 See *J McIntyre Machinery Ltd v Nicastro* (n 39).

43 *J McIntyre Machinery Ltd v Nicastro* (n 39) par IV.B of the dissenting opinion.

44 Sec 21(1) of Act 10 of 2013, using the same wording as Sec 19(1)(a) of Act 59 of 1959.

45 *Ewing McDonald & Co Ltd v M&M Products Co* 1991 1 SA 252 (A); *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* (n 28).

46 Art 5(2) of Brussels I Recast.

to communicate these bases of jurisdiction to the European Commission.[47] Examples of such exorbitant bases of jurisdiction include jurisdiction grounded purely on the nationality of either the plaintiff[48] or the defendant,[49] the presence of property in the court's area,[50] the seizing of property in the court's area,[51] and serving of proceedings on the defendant during a temporary presence in the country.[52]

3.2 Attachment of Property

Whether attachment of the defendant's property in the court's area is sufficient to found jurisdiction under South African law is somewhat unclear. What is certain is that attachment of property will not suffice if there is no other link to the court's area: when both parties are *peregrini* of the court (local or foreign) and the cause of action did not arise locally, attaching property cannot establish jurisdiction to the court.[53] However, the Superior Courts Act 10 of 2013 created uncertainty for the situation when the plaintiff is an *incola* while the defendant is a foreign *peregrinus* and the cause of action did not arise locally. In this case, there is no basis of jurisdiction that could be confirmed by attachment. So the question is whether the plaintiff can attach property belonging to the defendant to found jurisdiction.

The uncertainty stems from the fact that the 2013 Act deleted the word "found" entirely from section 21. On a literal interpretation that seems to mean that attachment can no longer found jurisdiction. If there is nothing (such as a cause of action) to be confirmed, there simply is no jurisdiction. However, there are arguments to be made that this was not the intention of the Act. First, the Admiralty Jurisdiction Act still allows attachment of property to found jurisdiction, also for *in personam* actions.[54] Why would the legislator have introduced a different standard in the more general Act? Its reasons are unclear. Second, the Superior Courts Act does still refer to founding jurisdiction,

47 The Commission makes the information available on their e-Justice website: https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do?clang=en (see the country flags on the right).

48 Art 14 of the French Civil Code (*Code Civil*); and Art 4(1)(2) of the Bulgarian Code of International Private Law.

49 Art 15 of the French Civil Code (*Code Civil*).

50 Art 23 of the German Code of Civil Procedure (*Zivilprozessordnung*); and Art 86 of the Estonian Code of Civil Procedure.

51 This basis of jurisdiction exists in England and Wales, see https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-ew-en.do?member=1#a_7; and in Ireland, see https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-ie-en.do?member=1#a_7.

52 This basis of jurisdiction exists in England and Wales, see https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-ew-en.do?member=1#a_7.

53 See the helpful table in Forsyth (2012) 221.

54 Sec 3(2)(b) of the Admiralty Jurisdiction Regulation Act 105 of 1983.

where it provides that arrest to found jurisdiction over a defendant resident in South Africa is not permitted.[55] This could be an argument that attachment to found jurisdiction still exists. However, I do not agree with this argument: prohibiting attachment to found jurisdiction against South African defendants while explicitly allowing attachment to confirm jurisdiction against non-South African defendants does not seem to add up to allowing attachment to found jurisdiction against non-South African defendants. Third, authors write that attaching property to found jurisdiction is still possible.[56] Van Loggerenberg explains this view by stating that the provisions of the Act must be read together with the common law and that the common law prevails.[57] I hesitate to contradict such an authority, but the Act's omission of the word "found" without explanation keeps bothering me.

Maybe this is because attachment as a basis of jurisdiction is considered exorbitant in other legal systems despite its sustained importance in South Africa. It seems to me that South Africa should replace it with something more broadly accepted.

3.3 Arrest

Arrest for purposes of establishing civil jurisdiction was previously accepted in South Africa.[58] The Supreme Court of Appeal found in *Bid Industrial Holdings v Strang* that this is unconstitutional.[59] Since the judgment of 2008, arrest was no longer allowed and thus could not form a basis of jurisdiction in civil cases.[60] The Supreme Court of Appeal stated that the common law could be developed and that a replacement could be found for arrest. The court considered (*obiter* in my view) which links could replace arrest as the basis of jurisdiction. The court referred to serving proceedings within the court's jurisdiction.[61] This was seen as something similar to arrest, in the sense that it proved the court's power over the defendant.[62]

3.4 Service of Proceedings

In its *Multi-Links* judgment,[63] the High Court in Northern Gauteng took the Supreme Court of Appeal's lead. This case concerned a local plaintiff and a

55 Sec 28 of Act 10 of 2013. This provision is not new: Sec 28(1) of Act 59 of 1959 contained the same prohibition.

56 D E van Loggerenberg *Pollak: The South African Law of Jurisdiction* (2019) 29-37; J P van Niekerk and W G Shulze *The South African Law on International Trade: Selected Topics* (2016) 318.

57 Van Loggerenberg (2019) 37.

58 This had a statutory basis in sec 21 of the Supreme Courts Act 59 of 1959.

59 *Bid Industrial Holdings v Strang* 2008 3 SA 355 (SCA).

60 This state of the law is now reflected in sec 19 of the Superior Courts Act 10 of 2013.

61 *Bid Industrial Holdings v Strang* (n 59) 370B-C.

62 *Bid Industrial Holdings v Strang* (n 59) 369D-F.

63 *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* (n 3).

foreign plaintiff on the one hand and various local defendants and one foreign (Nigerian) defendant. The application for an order that the court did not have jurisdiction was dismissed. The court further left the assessment of jurisdiction to the trial court. The case is therefore not very strong authority. (There was no subsequent judgment, as the case was settled.)[64]

In this case the cause of action arose in the court's area. The agreement that led to the dispute contained a clause for arbitration in South Africa and a choice for South African law. The foreign defendant's attorneys agreed to accept service of all proceedings on behalf of this defendant. These could possibly amount to sufficient links for the court to consider it the most appropriate forum (the forum of convenience, in the court's words)[65] to hear the case.

However, according to the South African jurisdiction rules, attachment would be necessary to confirm the court's jurisdiction. The defendant had no property in South Africa that could be attached, and it did not submit to the court's jurisdiction. The court found that in such a situation the common law has been developed and that where attachment was not possible, arrest was replaced by the serving of summons on the defendant while in South Africa plus a sufficient connection between the suit and the court's area so that disposing of the case would be appropriate and convenient.[66]

The North Gauteng court thus considered service of proceedings in itself insufficient, but it would be necessary for another link to exist. However, the court did not explicitly say that the cause of action would have had to arise in the court's area (although this was the case in *Multi-Links*, which made the discussion unnecessary). The general wording of the court seems quite fluid: appropriateness and convenience. This resembles the flexible bases of jurisdiction in the US, using terms such as "doing business" and "purposeful availment". However, as indicated above, the US Supreme Court has in recent years severely reined in the flexibility.

4 Confirming Jurisdiction: When the Links are not Sufficient

Interestingly, the South African cases do not always distinguish clearly between attachment to confirm and attachment to found jurisdiction. Van Niekerk states that founding jurisdiction is the basis of jurisdiction, rather than the fact that the cause of action arose within the court's jurisdiction.[67]

This lack of distinction further complicates the ambit of the *Multi-Links* judgment. If the court considers service of proceedings to be an adequate replacement for arrest or attachment, can service in itself establish jurisdiction in the absence of a cause of action in the court's area? If attachment to found

64 According to a report by Fin24 on 10 December 2014, https://www.news24.com/fin24/tech/ companies/dispute-settled-between-telkom-and-blue-label-20141210.

65 *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* (n 3) par 2.10.

66 *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* (n 3) par 11.

67 Van Niekerk and Schulze (2016) 318.

jurisdiction is still possible, which I doubt but which others think is the case, then the logical next step is that service in itself can also found jurisdiction. Surely this goes too far, especially in light of the fact that other legal systems consider the mere service of proceedings as an exorbitant basis of jurisdiction, as indicated above.

So the question is: how many links do our courts need to establish jurisdiction? The Competition Appeal Court had the opportunity to develop the common law further. In *Competition Commission v Bank of America Merrill Lynch*,[68] it held that what was required for purposes of jurisdiction is a real and substantive connection between the forum and the action.[69] It added that in this case subject-matter jurisdiction was determined by the Competition Act,[70] because this Act covered all economic activity that was located outside South Africa but that had direct and foreseeable substantial consequences in South Africa.[71] The Competition Tribunal applied this finding to the facts: it considered the influence of the alleged behaviour by the respondents on the exchange rate and on the South African economy as relevant elements for the establishment of personal jurisdiction.[72] Moreover, this impact in South Africa was foreseeable to the respondents.[73]

Besides the specific context of competition law (where the affected market plays an important role), the idea of an adequate connection was also taken up by the Gauteng Local Division (Johannesburg) in *Holloway v Padi Emea*.[74] In this case, which had its basis in contract, the court found that whether there is an adequate connection between the suit and the court's area of jurisdiction is measured by suitability and convenience.[75] The court considered as relevant factors: the respondent's considerable business and substantial turnover in South Africa, its bank account in the country, and an address at which it conducted business (through an employee of a foreign legal entity). The respondent was summoned in South Africa, which seems to remain an important factor to establish jurisdiction.

This recent line of cases seems to indicate that attachment is no longer required.

68 *Competition Commission v Bank of America Merrill Lynch International Ltd* 2020 4 SA 105 (CAC).

69 *Competition Commission v Bank of America Merrill Lynch International Ltd* (n 68) par 51.

70 Act 89 of 1998.

71 *Competition Commission v Bank of America Merrill Lynch International Ltd* (n 68) par 54, referring to sec 3 of the Competition Act.

72 *Competition Commission of South Africa v Bank of America Merrill Lynch International Designated Activity Company* (CR212Feb17) [2023] ZACT 26 (30 March 2023), par 150–151.

73 *Competition Commission of South Africa v Bank of America Merrill Lynch International* (n 72) par 155.

74 *Holloway v Padi Emea Ltd* 2020 5 SA 172 (GJ).

75 *Holloway v Padi Emea Ltd* (n 74) par 12.

5 The Link to Effectiveness

South African courts have repeatedly explained the rationale of attachment by referring to effectiveness: the court must be able to issue an effective judgment. In old terms, this meant that the court had to be able to exercise its power over the defendant. This a court can do when it has attached property or arrested the person of the defendant.

Effectiveness here refers to the ability of the court to see to the enforcement of the judgment on the territory of South Africa. In line with this logic, attachment of property is allowed only against foreign defendants, that is, foreign *peregrini*, not local *peregrini*.[76] If the defendant is to be found somewhere in South Africa, the judgment will obviously be effective, irrespective of whether property has been attached.

The idea of effectiveness as a form of power over the defendant is rather outdated. Already in the 2003 edition of his book, Christopher Forsyth stated that "today the doctrine of effectiveness is artificial and conceptual rather than realistic".[77] The Supreme Court of Appeal quoted this statement with approval in *Hay Management Consultants*.[78] In *Utah International Inc v Honeth*, Van Schalkwyk AJ explained that effectiveness is merely something that is tested at the moment of securing jurisdiction and has little to do with actual effectiveness after the judgment.[79]

In the same vein, Van Loggerenberg states:

> Both historically and logically the procedure of attachment to found or confirm jurisdiction is closely correlated with the principle of effectiveness, though the principle has been considerably eroded by the long-established practice of our courts to permit the attachment of property whose value bears no realistic relationship to the amount of the claim advanced in the proposed litigation.[80]

If effectiveness is merely a test at the time of establishing jurisdiction and this test is moreover quite watered down (consent for instance does not give any guarantee of effectiveness),[81] should South African law still link it so heavily with attachment? Judgments can also be effective if there is some guarantee that they can be recognised and enforced abroad.[82] Ironically, this will often not

76 According to sec 28 of Act 10 of 2013.

77 Christopher F Forsyth *Private International Law* (2003) 215.

78 *Hay Management Consultants Ltd v P3 Management Consultants (Pty) Ltd* (n 16) par 17.

79 *Utah International Inc v Honeth and Others* 1987 4 SA 145 (W) 147B–C.

80 Van Loggerenberg (2019) 28.

81 *Utah International Inc v Honeth* (n 79) 147D–E.

82 As acknowledged in *Jamieson v Sabingo* (n 17) par 24–25; referred to with agreement by the Botswana High Court in *MAK v St Paul Insurance Co SA Ltd* (n 23) 218D; *Competition Commission v Bank of America Merrill Lynch International Ltd* (n 68) par 51.

be the case if the South African court's jurisdiction was based on the attachment of property, as many foreign courts will consider that basis of jurisdiction as exorbitant.

It seems to me that a more up-to-date way of thinking of effectiveness is through the possibility for our courts to render a judgment that will be capable of recognition and enforcement in other countries. There are two ways to secure this goal. The first is by aligning South Africa's jurisdiction rules with those that are internationally acceptable, such as consent or submission. The second way is to sign and ratify international conventions on the recognition and enforcement of foreign judgments. Two such conventions have been mentioned in this contribution, namely the 2005 Hague Choice-of-Court Convention and the 2019 Hague Recognition and Enforcement Convention. Moreover, South Africa could conclude bilateral treaties with its trading partners.

6 Conclusion and Way Forward

The South African law of jurisdiction is complicated and confusing. This confusion is old but has been deepened over the past years by the lack of clarity of the 2013 Act and by the *Multi-Links* judgment and subsequent cases.

Some links are internationally considered sufficient for purposes of civil jurisdiction, others are broadly considered exorbitant and yet others fall into an in-between category. It is submitted that the South African law should be amended in order to bring it more in line with international standards. First, our courts should accept consent or submission as a sufficient basis for jurisdiction, irrespective of any other links to the court's area. Second, attachment should no longer be considered a basis of jurisdiction in civil matters (I make no comment here about admiralty jurisdiction): it should simply not be available, irrespective of whether there is a local cause of action (attachment to confirm) or not (attachment to found). This leads directly to the third necessary amendment: true links should be sought, such as the cause of action (*eg* performance of the contract) which is not tenuous or incidental. Fourth, service in itself should not be considered sufficient for purposes of establishing jurisdiction, but the courts should seek other elements that show a real connection between the suit and the forum, as recent judgments have shown. Jurisdiction can be based on the cause of action plus the sufficient links that the case showed with the court's area. Fifth, South Africa should make an effort to conclude international (or even bilateral) conventions on the recognition and enforcement of foreign judgments.

Such a clear system, in line with international standards, would to my mind benefit not only students attempting to understand private international law, but also litigating parties and their lawyers.

The Incoterms® 2020 by the International Chamber of Commerce (ICC)

Evolution and Practical Application with Specific Reference to Containerisation

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1 Introduction

The International Commercial Terms (Incoterms®) constitute a regulatory system of rules commonly used by the parties of cross-border sales transactions to denote and define particular issues of their international trade relationship, such as passing of risk and bearing of transport or insurance costs concerning the goods sold.[1] In the absence of detailed contractual provisions, the parties may refer to one of the standardised Incoterms® to establish specific conditions for their sales agreement. The allocation of risk and costs is the main task of these rules, consisting of abbreviations such as "FOB" for "Free on Board" or "CIF" for "Cost Insurance and Freight" (to mention two of the oldest).[2] The introduction to the Incoterms® puts it thus: "The Incoterms® rules explain a

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1 Eiselen "Adopting the Vienna Sales Convention: reflections eight years down the line" 2007 *SA Merc LJ* 14 16. Also see Coetzee "The interplay between Incoterms and the CISG" 2013 *Journal of Law and Commerce* 1 4; Graffi "Remarks on trade usages and business practices in international sales law" 2011 *Journal of Law and Commerce* 273 283; Kadłubska "The significance of the Incoterms rules in the freight forwarding services market" 2016 *WSN* 97 97; Murray, Holloway and Timson-Hunt *Schmitthoff: The Law and Practice of International Trade* (2012) 8; Ramberg *ICC Guide to Incoterms 2000 – Understanding and Practical Use* (1999) 10.

2 Herre and Tiberg *ICC Guide to Incoterms 2020 – Understanding and Practical Use* (2022) 18; Ramberg *ICC Guide to Incoterms 2010 – Understanding and Practical Use* (2011) 16.

set of eleven of the most commonly used three-letter trade terms, … reflecting business-to-business practice in contracts for the sale and purchase of goods."[3]

These rules do not belong to any state's national commercial law, nor have they ever been a concern of international conventions.[4] They do not appear in the codifications of commercial law in the civil-law jurisdictions, nor have they gained the quality of state law in any common-law jurisdictions, either as part of judge-made case law or statutory law. However, they are considered a prominent body of transnational soft law and are widely acknowledged through commercial usage in international trade law,[5] forming, as such, an essential part of the *lex mercatoria*.[6]

The Incoterms® enjoy a worldwide common interpretation[7] and allow all involved parties to work in the same language, thus minimising the potential for future disputes.[8] It is not uncommon that the parties share obligations concerning carriage and transport to the final destination. Therefore, the Incoterms® are a welcome instrument, allowing the parties to avoid grappling with foreign law. It is not only the trading parties who benefit from these terms, but also the carriers and banks. They enable specific mechanisms in practice, which make it easier for the carrier to acquire important information. The bill of lading (B/L) specifies the carrier's responsibilities for the goods, including the delivery location and timing. Banks also benefit from using Incoterms®. In most international commercial contracts, the seller receives payment only upon

3 International Chamber of Commerce (ICC) *Incoterms® 2020: ICC Rules for the Use of Domestic and International Trade Terms* (2020) 2.

4 Moens and Gillies *International Trade and Business: Law, Policy and Ethics* (1998) 123; Spanogle "Incoterms and UCC Article 2 – conflicts and confusion" 1997 *The International Lawyer* 111 113; Wolff *The Law of Cross-Border Business Transactions: Principles, Concepts, Skills* (2013) 118.

5 Coetzee *INCOTERMS as a Form of Standardisation in International Sales Law: An Analysis of the Interplay between Mercantile Custom and Substantive Sales Law with Specific Reference to the Passing of Risk* (LLD thesis Stellenbosch 2010) 184; Coetzee "A pluralist approach to the law of international sales" 2017 *PER/PELJ* 1 16; Eiselen (n 1) 16; Hugo "Non-Governmental initiatives towards the harmonization of international trade law" 2003 *JJS* 142 150; and Zeller "Regional harmonization of contract law – is it feasible?" 2016 *Journal of Law, Society and Development* 85 90, 94. Also see, in general, Schiller "Legal pluralism – the investor's view" 2011 *Acta Juridica* 272 282.

6 Hugo (n 5) 150-151; Ndlovu "Incoterms 2010: a consideration of certain implications of the amendments to the traditional Incoterms 2000" 2011 *CILSA* 204 210; Schiller (n 5) 283; Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2016) 72; and Wandrag "Unification of South African contract law" 2011 *European Journal of Law Reform* 451 457 and 460.

7 Chung and Leeb "A genealogical approach to the Incoterms rules and revised Incoterms 2010" 2013 *Journal of Korea Trade* 1-19; Schmidt in Schmidt V *Münchener Kommentar zum Handelsgesetzbuch* §§ 343-406 (2018) § 346 par 114; Van Niekerk and Schulze (n 6) 72.

8 Ndlovu (n 6) 205.

transmitting the B/L to the buyer's bank, which has issued a letter of credit (L/C) on the buyer's behalf.[9] Upon delivery, the buyer will present the B/L to the carrier, demonstrating that they are the rightful purchaser.[10] These mechanisms can be considered a fall-back system for the parties to the contract of sale.

Sea freight is governed worldwide by the Incoterms®, which is essential for South Africa due to its geographic location. South Africa has a total of eight commercial ports: Richards Bay and Durban (KwaZulu-Natal), East London, Gqeberha and the Port of Ngqura (Eastern Cape), and Mossel Bay, Cape Town and Saldanha Bay (Western Cape).[11] These ports are significant places of transhipment both to and from Europe, Asia, America, Australia and, of course, along the coast of South Africa itself. Some 96% of South African commodity exports proceed by sea.[12] Unsurprisingly, South African exporters and importers are constantly dealing with Incoterms.[13] Globally, 90% of general cargo is containerised,[14] with thousands of containers being shipped daily.

2 Genesis and Evolution of the Incoterms®

The historical developments of the Incoterms® have been reflected upon comprehensively elsewhere; therefore, a detailed discussion is not required.[15] These rules[16] originate from customary usage of national trade terms in countries such as France, Germany, the United Kingdom and the USA.[17] These domestic trade terms took shape as trade usages at the end of the 19th century

9 Booysen *International Transactions and the International Law Merchant* (1995) 242; Murray, Holloway and Timson-Hunt (n 1) 189-194; Van Niekerk and Schulze (n 6) 242-299.

10 Herre and Tiberg (n 2) 27-28; Ramberg (n 2) 30; Van Niekerk and Schulze (n 6) 140-152 and 157-158. *Cf* Bridge *The International Sale of Goods* (2013) 83 and 157-179.

11 See Port & Corridor Cooperation "Ports & Shipping" at http://portandcorridor.org/sector-information/sector-information-2/ports-shipping; and Van der Molen and Moes "General characteristics of South African Ports and the safe mooring of ships" July 2009 *Proceedings of the 28th Southern African Transport Conference (SATC 2009)* 308.

12 See Port & Corridor Cooperation (n 11).

13 See Ndlovu (n 6) 207.

14 Naidoo "How SA is responding to the global containerisation surge" available at https://www.engineeringnews.co.za/article/how-sa-is-responding-to-the-global-containerisation-surge-2007-09-28; Commentary/recommendation to the ICC Drafting Committee by Mr Patrick Corbin, President of the International Chamber of Commerce South Africa, Johannesburg, "Incoterms 2020: Free Carrier (FCA) – Ocean Shipping – Containers South and Eastern Africa perspective" March 2018 (referred to with permission of the author; on file).

15 See Coetzee (n 5, 2010) 179-183 for a thorough discussion of the historical developments. Also see Ramberg "Incoterms 2010" in Schwenzer, Atamer and Butler (eds) *Current Issues in the CISG and Arbitration* (2014) 225 225-230.

16 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3).

17 Coetzee "Incoterms: development and legal nature – a brief overview" 2002 *Stellenbosch L Rev* 115-134.

and were increasingly incorporated by trade partners, particularly in their cross-border contracts.[18] The problem arose that the different terms and abbreviations used in the contractual documents were not precisely defined and were open to various interpretations depending on the countries involved.[19] Consequently, the International Chamber of Commerce (ICC), founded in Paris in 1919,[20] decided to collect, define and systematise the existing national (and increasingly international) trade terms to develop a coherent framework of "universal" trade terms with a reliable, unequivocal meaning for each particular term.[21] The initial introduction and publication of the ICC's Incoterms® occurred in 1936. They were revised several times in the following decades, namely in 1953 and 1967, 1976, 1980, 1990, 2000, 2010 and 2020.[22]

The first Incoterms® of 1936[23] focused mainly on the trade of commodities shipped overseas.[24] They defined and explained many terms which are familiar today, like the aforementioned FOB and CIF terms, as well as other terms like FAS (Free Alongside Ship), CFR (Cost and Freight), or EXW (Ex Works).[25] After

18 See Coetzee (n 17) 115–134.

19 For example, in South Africa, confusion emerged from using C&R (not a recognised Incoterm), as reflected in *Ex Parte Sapan Trading (Pty) Ltd* 1995 1 SA 218 (W). See Carr *International Trade Law* (2014) 6; Herre and Tiberg (n 2) 18–19; Ramberg (n 2) 16; Reynolds *Incoterms for Americans (Completely Rewritten for Incoterms 2010)* (2010) 11. Also see Coetzee (n 17) 116; Coetzee "Incoterms 2010: codified mercantile custom or standard contract terms?" 2012 *Stellenbosch L Rev* 564; Klotz and Barrett *International Sales Agreements: An Annotated Drafting and Negotiating Guide* (1998) 72–73; and Roth and Roth "Incoterms: facilitating trade in the Asian Pacific" 1997 *U Pa J Int'l Econ L* 731 732–733.

20 Coetzee (n 5, 2010) 179; Hugo "Letters of credit and demand guarantees: a tale of two sets of rules of the International Chamber of Commerce" 2017 *TSAR* 1 3 *et seq*; Schwenzer, Hachem and Kee *Global Sales and Contract Law* (2012) 35.

21 Basedow "The state's private law and the economy – commercial law as an amalgam of public and private rule-making" 2008 *The American Journal of Comparative Law* 703 709–710; Coetzee (n 19) 564; Herre and Tiberg (n 2) 10–11 and 18; Ramberg (n 2) 16; Wolff (n 4) 118.

22 See ICC "Incoterms rules history" at https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-history/. The rationale behind the revision is for the Incoterms® to reflect current international commercial practice. See Ramberg "Incoterms 2010" 2011 *Penn State International Law Review* 415. Also see Bergami "Managing Incoterms 2010 risks: tension with trade and banking practices" 2013 *International Journal of Economics and Business Research* 324 326; and Glitz "Incoterms and Brazilian legislation on contracts" 2011 *Education and Science without Borders Journal* 40–44.

23 thirty years before the dawn of the age of containerisation.

24 Casuccio "A modernization of the Incoterms" 2012 *Global Trade and Customs Journal* 70–73; Ramberg (n 2) 8; Ramberg (n 22) 416. See Sassoon *CIF and FOB Contracts*, Volume 5 of *British Shipping Laws* (1975) for a historical account.

25 Ndlovu (n 6) 208.

1945, the focus shifted from vessel transport to railway and road.[26] Thus, new rules were established in 1953: FOR (Free on Rail) and FOT (Free on Truck). In the 1960s, adding terms whereby the seller assumed more obligations, especially concerning transportation and insurance costs, became necessary.[27] The point at which the passing of risk for loss and damage of goods took place and where the burden of freight costs and/or insurance costs shifted from the vendor to the vendee could no longer automatically coincide and had to be differentiated. Moreover, in the 1970s, air transport became more popular due to its reduced cost and greater speed. Hence, the term "FOB Airport" was added in 1976.[28] In the revision of 1980, two new terms were introduced: CPT (Carriage Paid to Destination) and CIP (Carriage and Insurance Paid to Destination) for non-maritime transportation. The rules also cover questions of transport documents, notably of the B/L customarily used in maritime transport,[29] since the cargo *in transitu* can be sold without surrendering the goods by transferring this instrument.

The Incoterms® revision 1990 embraced only thirteen instead of the former fourteen clauses and considered modern transport technologies such as containerised freight, multimodal transport and electronic data exchange.[30] Possibly the most crucial change was the replacement of FOR (Free on Rail/Road on Destination), FOT and FOB Airport with FCA (Free Carrier). The second-to-last revision occurred in 2000, resulting in only minor changes. For instance, under FAS, the seller had to clear the goods for export.[31] However, the revision of 2010 yielded several crucial innovations, notably a system of different meanings of the same abbreviations according to other types of transportation. Only eleven officially acknowledged ICC Incoterms® can be found on the list today.[32] Two categories have been developed: one "for sea and inland waterway transport", such as FAS, FOB, CFR, CIF and the other "for any mode or modes of transport" like EXW, FCA, CPT, CIP, DAT (Delivered at Terminal), DAP (Delivered at Place), and DDP (Delivered Duty Paid).[33] Some former terms have been abolished so that the new system of E-, F-, C- and D-clauses would be more easily comprehensible and operational.[34] Furthermore, the terms can be

26 Herre and Tiberg (n 2) 10; Ramberg (n 2) 8. After the Second World War, there was an increase in the carriage of goods by rail, and thus, there was a need to introduce appropriate terms for transactions in this regard.

27 Herre and Tiberg (n 2) 10; Ramberg (n 2) 9.

28 Herre and Tiberg (n 2) 10; Ramberg (n 2) 8.

29 Coetzee (n 5, 2010) 181–182; Herre and Tiberg (n 2) 11; Ramberg (n 2) 8.

30 Coetzee (n 5, 2010) 183; Herre and Tiberg (n 2) 11; Moens and Gillies (n 4) 126–154; Ramberg (n 2) 9.

31 Coetzee (n 5, 2010) 184; Ndlovu (n 6) 204–222.

32 Schiller (n 5) 283.

33 Kadłubska (n 1) 99; Schwenzer, Hachem and Kee (n 20) 483.

34 Ndlovu (n 6) 219; Ostendorf *International Sales Terms* (2014) 68; Schwenzer, Hachem and Kee (n 20) 484.

used domestically.[35] The Incoterms® 2020, on the other hand, do not contain any structural innovation. They pursue the basic concept of the Incoterms® 2010. The system of rules is still divided into two categories: on the one hand, the rules "for sea and inland waterway transport" and, on the other, the rules "for any mode or modes of transport". Even the various clauses were predominantly retained. Just one modification was made with DAT. The current version renamed this Incoterm to DPU (Delivered at Place Unloaded). The reasons for the renaming are discussed below.[36] In other aspects, the Incoterms® 2020 contain only precise modifications compared to the previous version. The most significant focus was directed at the layout of the system of rules. They tried to make the rules more understandable and user-friendly. In this context, it should be mentioned that the introduction of Incoterms® 2020 now deals with different topics, such as the rules' scope and the relation between the sales agreement and other types of contracts. In addition, they also changed the internal order in which the ten articles within each Incoterm rule have been organised.[37] Finally, they have adopted a "horizontal" layout, organising the ten articles of each Incoterm rule under distinct headings to facilitate a clearer comparison between the rules for the parties involved.[38] Changes in the content will be displayed at the relevant Incoterm.

3 The Incoterms® 2020 Rules

One of the most challenging questions in trading practice is how the parties are to settle on the appropriate Incoterm or how they can modify one for their specific requirements. Often, the trading parties do not select the most appropriate Incoterm. In the foreground, business strategies frequently focus on minimising the costs of procuring goods. The decision for a particular Incoterm often depends on the type of goods that are transported.[39] As evident below, the "waterway" Incoterms® are unsuitable for containerised sea freight. It is not only the type of goods that can lead the parties to a specific Incoterm, but also their ability to assume specific obligations. If the seller has well-established business relationships with foreign carriers, they will likely choose CFR or CIF. Similarly, if the buyer is in a comparable position, they may prefer FAS or FOB.[40] These are not the only circumstances that can influence the choice of the correct term – the buyer can specify a particular insurance or type of route to be covered, which can also be important when considering which term to use.

35 International Chamber of Commerce (ICC) *Incoterms® 2010: ICC Rules for the Use of Domestic and International Trade Terms* (2010) 8; Coetzee (n 19) 567 and 568; Murray, Holloway and Timson-Hunt (n 1) 9; Van Niekerk and Schulze (n 6) 72.

36 par 3.1(e).

37 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) 11.

38 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) 12.

39 Herre and Tiberg (n 2) 25; Ramberg (n 2) 27. Also see iContainers Guide *How to Choose the Best Incoterm: A Guide for Exporters and Importers* (2018) 2.

40 Herre and Tiberg (n 2) 25; Ramberg (n 2) 27

The E, C, F and D clauses have the same structure but different contents. The first distinction must be made between arrival and shipment contracts. This is important for the performance of the seller's obligations.[41] All D terms are arrival clauses,[42] meaning the exporter must deliver the goods to the destination country.[43] All other terms are called shipping clauses. This means that the seller's obligation is typically discharged in the country of dispatch once the goods have been placed on the premises of a shipyard and handed over to a carrier for loading onto the vessel.[44] Secondly, the Incoterms® must be distinguished based on the point at which risk transfers and where the buyer assumes the costs. E, F and D clauses are known as "one-point clauses", meaning that the passing of risk and the responsibility for costs co-occur.[45] In contrast, the C clauses are "two-point clauses".[46] Under the C clauses, the seller not only has to deliver the goods as under FAS, FCA, and FOB but also assumes responsibility for carriage costs until the goods arrive at the final destination.[47] In the end, under the C-terms, the passing of risk takes place when the seller delivers the goods to the place which the particular rule states (in the case of CIF, it would be at the deck of a ship in the port of shipment) and the buyer assumes responsibility only for the costs of carriage from the final destination.[48] A third basis for categorising these rules relates to who is responsible for the conclusion of the contract of carriage. There are two groups. The first is where the buyer must conclude the contract of carriage, namely FCA, FAS and FOB.[49] This obligation is not inalienable because it is also possible that the seller may conclude the contract of carriage under FCA, FAS and FOB, but at the buyer's risk and expense. The second includes CFR, CIF, CPT, CIP, DAP, DDP[50] and DPU, for which the seller is responsible for concluding the contract of carriage.

3.1 Rules for Any Mode or Modes of Transport[51]

(a) EXW[52]

The EXW clause is one of the oldest Incoterms® and a component of the first edition from 1936.[53] It can be used irrespective of the selected mode of carriage

41 Herre and Tiberg (n 2) 40; Ramberg (n 2) 48; Van Niekerk and Schulze (n 6) 78.
42 Hopt in Baumbach and Hopt IX *Handelsgesetzbuch* (2018) Einl. Incoterms par 24.
43 Ostendorf (n 34) 69.
44 Herre and Tiberg (n 2) 40; Ramberg (n 2) 48.
45 Schwenzer, Hachem and Kee (n 20) 483.
46 Hopt (n 42) Einl. Incoterms par 23; Van Niekerk and Schulze (n 6) 72-74.
47 Schwenzer, Hachem and Kee (n 20) 483; Van Niekerk and Schulze (n 6) 82-86.
48 Herre and Tiberg (n 2) 40; Ramberg (n 2) 48.
49 Herre and Tiberg (n 2) 42; Ramberg (n 2) 50.
50 Herre and Tiberg (n 2) 43 and 46; Ramberg (n 2) 53 and 58.
51 Murray, Holloway and Timson-Hunt (n 1); Schmidt (n 7) § 346 par 111.
52 Von Bernstorff *Incoterms 2010 der Internationalen Handelskammer (ICC): Kommentierung für die Praxis inklusive offiziellem Regelwerk* (2010) par 1.1 *et seq.*
53 Also see Ndlovu (n 6) 212-214.

and it may also be used for multimodal transport.[54] If EXW is agreed upon, the seller's obligation of delivery is discharged once the goods are placed at the buyer's disposal, for example, at the seller's factory, warehouse, or with a nominated carrier.[55] The seller is not obliged to load the goods onto the vehicle provided by the buyer. The seller often does the loading in practice but then at the risk and expense of the buyer.[56] This generally enables a smoother and faster execution process. Under EXW, the seller's obligations are rudimentary, although the seller has special additional commitments such as giving notices to the buyer[57] and suitable packaging of the goods.[58] In addition to the seller's duties, the parties are advised to stipulate precisely where the goods should be delivered to determine where the responsibility for the costs and the risk for loss or damage passes from the seller to the buyer.[59] The consequence of the seller's limited obligations is that the EXW clause is most suitable where the buyer is willing to arrange the whole transport and to export the goods at its own expense. Although, as pointed out, the seller often loads the goods onto the means of transportation, this is done at the risk and cost of the buyer. This is because the buyer bears all negative consequences from the named place of dispatch.[60]

Furthermore, problems can arise with the export formalities. The seller is obliged to support the buyer with the export of the goods.[61] This does not mean that the seller purchases the export licence, however.[62] EXW is not suitable if the seller must obtain an export licence; this would lead to both practical and procedural problems. Furthermore, the buyer cannot expect further assistance from the seller concerning the export clearance.[63] This assistance only includes providing the buyer with information about the goods and the export

54 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) 21; Herber *Seehandelsrecht – Systematische Darstellung* (2016) 341; Herre and Tiberg (n 2) 72; Ramberg (n 2) 87. Also see Schwenzer, Hachem and Kee (n 20) 358.

55 See Coetzee (n 17) 120; Murray, Holloway and Timson-Hunt (n 1) 11; Ostendorf (n 34) 69; Schwenzer, Hachem and Kee (n 20) 340; Van Nierkerk and Schulze (n 6) 74.

56 Carr (n 19) 7; Herre and Tiberg (n 2) 72-73; Ostendorf (n 34) 69; Ramberg (n 2) 87. Also see iContainers (n 39) 20-21.

57 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par A10 (EXW).

58 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par A8 (EXW). Also see Carr (n 19) 7.

59 Herre and Tiberg (n 2) 72; Ramberg (n 2) 87; Schwenzer, Hachem and Kee (n 20) 483.

60 Herre and Tiberg (n 2) 72-73; Ramberg (n 2) 87.

61 See Carr (n 19) 7.

62 See Ostendorf (n 34) 117; Schwenzer, Hachem and Kee (n 20) 356; Schwenzer *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (2010) par 85. *Cf* Bridge (n 10) 210.

63 Herre and Tiberg (n 2) 78; Ramberg (n 2) 88.

transaction.[64] If the buyer needs special information or data, the parties are advised to consider that during contract formation.

(b) FCA[65]

FCA is another Incoterm that can be used for any "mode or modes of transport". FCA means that the seller delivers the goods to the carrier or another person nominated by the buyer.[66] As with EXW, the parties are advised to specify a named place of delivery expressly.[67] This is important for the seller's obligation to load or unload the goods and for the passing of risk.[68] If the buyer names a special carrier to receive the goods, the seller must deliver them to that person. The carrier is a person who concludes a transport agreement, which includes carriage by rail, road, air or sea. The carrier can also perform multimodal transport, which combines different modes of transport. Finally, the seller must prepare the goods for export as far as possible, but there are no further obligations to clear the goods for import. FCA is similar to FOB, but the latter term should only be used for waterway transport, not multimodal or containerised sea transport.[69] Under FCA, the buyer assumes responsibility for the carriage of goods.[70] The buyer must organise the transportation, including issuing instructions to the carrier. Furthermore, the buyer bears the costs and risks for loss or damage from when the seller hands the goods to the carrier.[71] To prevent misunderstandings, the parties are also advised to specify the mode or modes of transport and the place of delivery. One possibility is to add a precise location from which a particular mode of transport operates, for example, "FCA Airport" (indicating transport by aircraft) or "FCA Harbour" (indicating transport by ship).

Another possibility is to name the mode of transportation expressly, for example, "FCA Truck Warehouse". In such a case, the seller hands the goods to the warehouse's truck driver (carrier). If the parties set a special mode of transport, they automatically specify further obligations, namely "checking, packaging, marking"[72] and, of course, "delivery".[73] It is also possible that the parties may not have stipulated any mode of transport. In such a case, the buyer may specify the mode of transport afterwards.[74] Under the Incoterms® 2010,

64 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par A4/A7 (EXW).
65 Von Bernstorff (n 52) par 1.2 *et seq.*
66 Herre and Tiberg (n 2) 84; Ramberg (n 2) 97. Also see Coetzee (n 17) 120; and Schwenzer, Hachem and Kee (n 20) 340.
67 Ostendorf (n 34) 70; Schwenzer, Hachem and Kee (n 20) 340.
68 Herre and Tiberg (n 2) 85; Murray, Holloway and Timson-Hunt (n 1) 12; Ramberg (n 2) 97.
69 Herre and Tiberg (n 2) 86; Ramberg (n 2) 100. Also see the discussion in par 9.
70 Herre and Tiberg (n 2) 91; Ramberg (n 2) 105. Also see iContainers (n 39) 14 and 18.
71 Herre and Tiberg (n 2) 88–89; Ramberg (n 2) 101 and 106.
72 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par A8 (FCA).
73 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par A2 (FCA).
74 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par B10 (c) (FCA).

the seller frequently faced the issue of not receiving the necessary documents when goods were sold for carriage by sea. In that case, sellers might require a B/L with on-board notation. However, delivery under FCA is completed before loading the goods onboard the vessel. It is by no means certain that the seller can obtain an on-board B/L from the carrier.[75] Indeed, the seller can obtain only a received B/L. However, this document typically does not allow the seller to demand payment, as L/C requirements usually stipulate a shipped B/L. FCA A6/B6 provides an additional option to cater to this situation. The parties can agree that the buyer will instruct its carrier to issue an on-board B/L to the seller after loading the goods, and the seller is then obliged to tender that B/L to the buyer, typically through the banks.[76] In that context, the ICC emphasise that despite that option, the parties should use FCA instead of FOB for containerised goods.[77]

(c) CPT[78]

This Incoterm has a wide use. CPT is independent of the mode of transport, so it can be used for any carriage mode, even for container and multimodal transportation. It should be used for all dealings in which the buyer assumes the risk for losses or damages from the place of delivery. At the same time, the seller bears all carriage-related costs until the goods arrive at the final destination.[79] In contrast to FCA, the place of delivery is not stipulated, meaning that delivery occurs when the goods are handed over to the carrier.[80] If more than one carrier is responsible for the delivery to the final destination, the passing of risk occurs when the goods are handed over to the first carrier.[81] Significantly, the seller concludes the contract of carriage with the first carrier for the whole transportation and hands over the consignment note, which is valid for the complete freight route.[82] The first carrier hauls the goods for only one part of the transport route. Afterwards, the first carrier contracts with the second carrier on their account for the second part of the voyage. Upon receiving the consignment note and goods, the second carrier becomes the contracting party with the consignor.

The CPT term contains two critical points: passing risk and allocating costs. Hence, the contracting parties are advised to specify the precise place

75 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) 16.
76 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) 16.
77 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) 16.
78 Von Bernstorff (n 52) par 1.3 *et seq.*
79 Herre and Tiberg (n 2) 104; Ostendorf (n 34) 72; Ramberg (n 2) 111.
80 Herre and Tiberg (n 2) 102; Ramberg (n 2) 113; Schwenzer, Hachem and Kee (n 20) 340-341.
81 Herre and Tiberg (n 2) 100; Ramberg (n 2) 111. The "first carrier", according to O'Conner (ed) *INCOTERMS 2010 Q&A: Questions and Expert ICC Guidance on the Incoterms 2010 Rules* (2013) 78, "is the very first carrier independent of the seller (i.e. not the seller's own vehicle/vessel) with whom the seller has contracted for carriage".
82 Schwenzer, Hachem and Kee (n 20) 340.

of delivery and the final destination.[83] The named place of delivery is essential for the passing of risk and the transfer of the goods to the carrier. The final destination matters for the contract of carriage and the responsibility for the costs.[84] As mentioned above,[85] the passing of risk takes place when the goods are handed over to the first carrier (for multimodal transport). The term does not require a stipulated place of delivery.[86] If the parties do not stipulate a place of delivery, there is a high risk of abuse, because the seller can determine when the carrier takes the goods and consequently the passing of risk.

The place of delivery and the final destination must be stipulated precisely in the contract. This is because additional handling charges can accrue during the transport.[87] The handling firm may impose these charges on the buyer. In such a case, the buyer may incur double payment: on the one hand, paying the transport costs included by the seller in the purchase price, and on the other, paying the handling charges separately. If the parties set a precise destination, it is clear that the seller assumes all costs that arise until the goods arrive at that place, thus avoiding double payment on the buyer's part.[88] Should transport insurance be arranged, the buyer should do this exclusively.[89] It may be advisable to do so because the buyer bears all risks for loss or damage from the seller's place of delivery, that is, the point at which the passing of risk takes place.[90] For practical reasons, it is advisable to use one insurance policy to cover all legs of the journey from the seller's point of delivery to the final destination. This avoids uncertainties regarding which insurance policy applies and when. This means that the buyer bears the risk and insures the goods during the entire delivery process up to the final destination, whilst the seller bears the costs, which is the most practical solution.

(d) CIP[91]

This Incoterm should be chosen where the parties are keen on an arrangement similar to CPT but with an additional insurance policy.[92] In this case, the seller is responsible for the transport insurance, while the buyer bears the risk of losses or damages during transportation.[93] In contrast to the Incoterms® 2010, the seller must conclude transport insurance which complies with Institute Cargo Clauses (A) (LMA/IUA – London Market Association/International Underwriting

83 Herre and Tiberg (n 2) 100; Ramberg (n 2) 111. Also see iContainers (n 39) 7.
84 Herre and Tiberg (n 2) 100; Ramberg (n 2) 111.
85 See the text at notes 80 and 82.
86 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par A4 (CPT).
87 Herre and Tiberg (n 2) 100–101; Ramberg (n 2) 111.
88 Herre and Tiberg (n 2) 113; Ramberg (n 2) 120.
89 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par A5 and B5 (CPT).
90 Herre and Tiberg (n 2) 105; Ramberg (n 2) 119.
91 Von Bernstorff (n 52) par 1.4 *et seq.*
92 Ndlovu (n 6) 214–215. Also see the discussion by Ndlovu (n 6) 216–218.
93 Herre and Tiberg (n 2) 116–117; Ostendorf (n 34) 72; Ramberg (n 2) 123.

Association) or any similar clauses as appropriate to the means of transport used.[94] Nevertheless, the parties can also agree to transport insurance with a lower insurance coverage.

(e) DPU

With DPU, Incoterms® 2020 established a new Incoterm in the system of rules. Initially, DPU appears to be a completely new clause; however, upon closer inspection, it is evident that DPU shares the same content as DAT. The latter was introduced in the 2010 revision. Together with DAP,[95] it replaced the old DAF (Delivered at Frontier), DES (Delivered Ex Ship), DEQ (Delivered Ex Quay) and DDU (Delivered Duty Unpaid) of the Incoterms® 2000.[96] The omission of some of these Incoterms was discussed vigorously before the 2010 revision was published. Among other things, whether the DEQ clause should be abolished was discussed because this Incoterm was especially appropriate for large cargo and heavy lifts. In contrast to DES and DEQ, DAT could be used for any mode of transport, including multimodal transport.[97] In the Incoterms® 2010, the only difference between DAT and DAP was the varying content of the obligation to supply. Under DAT, the seller delivered the goods once unloaded from the arriving means of transport into a "terminal", whereas, in DAP, the seller delivered the goods when the goods were placed at the buyer's disposal on the arriving means of transport for unloading. The renaming of DAT to DPU clarifies that the destination may be any location, not just a "terminal".[98] Because DPU is coextensive with DAT, the seller has to deliver the goods unloaded from the arriving means of transport at the place of destination. Contrary to DAP, the buyer is responsible for unloading the goods. Until the point of delivery, the seller assumes the costs and the risk of loss and damage.[99] DPU should be used when FCA or CPT are applicable, but the buyer is unwilling to accept any costs or risks until the goods arrive at the destination. The transfer of risk and costs occurs at the destination, making DPU highly attractive to buyers.

(f) DAP[100]

DAP was a completely new term that was established in the Incoterms® 2010. It is an "arrival clause", implying that the seller delivers the goods to the final destination and bears all costs and risks up to that point.[101] In introducing the DAP term, the drafters state that it can be used for all transportation, including

94 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par A5 (CIP).
95 discussed immediately below.
96 Kadłubska (n 1) 100; Ramberg (n 2) 9.
97 Ramberg (n 2) 127.
98 Herre and Tiberg (n 2) 148; International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) 19.
99 Herre and Tiberg (n 2) 156; Ostendorf (n 34) 72; Schwenzer, Hachem and Kee (n 20) 341.
100 Von Bernstorff (n 52) par 1.6 *et seq.*
101 Herre and Tiberg (n 2) 132–133; Ostendorf (n 34) 72; Ramberg (n 2) 137.

multimodal transport.[102] DAP is appropriate for all dealings in which the seller has to deliver the goods to the named destination and have them ready for unloading.[103] The parties should stipulate the destination precisely in both the sales and carriage contracts.[104] By so doing, they may avoid future problems arising from the passing of risk and costs. Essentially, the seller must deliver the goods to the destination, but is not responsible for unloading.[105] The parties to the contract of carriage (seller and carrier) often agree that the carrier has to unload the goods at the final destination. Therefore, the seller has to pay the carrier. The seller can demand those costs from the buyer only if this has been agreed upon in the contract of sale. DAP can always be used if FCA or CPT are applicable, but the buyer is neither willing to bear the costs and risks of the transport (in the case of FCA) nor to bear the risk alone (in the case of CPT). If the parties are keen on the seller bearing the risk until the goods arrive at the place of destination, they should use DAP or DPU. The term obliges the seller to clear the goods for export, but the seller is not responsible for import clearance, payment of import duties, or compliance with import customs formalities.[106]

(g) DDP[107]

DDP is the Incoterm that assigns the most obligations and responsibilities to the seller, allowing the buyer to enjoy the maximum advantages. This implies that the seller bears the maximum risk and costs. Like DAP, it is an arrival clause, and the seller is not obliged to unload the goods at the point of delivery. If the carrier is responsible for offloading, the seller bears the carrier's costs.[108] In trading practice, problems can arise with the import licence and associated costs. Although the DDP term transfers almost all the responsibilities to the seller, the parties are well advised to set out their respective obligations and formalities relating to the import charges in the contract of sale. If it is more practical for the buyer to deal with the import costs and formalities, the parties should consider using the DAP term instead.

102 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) Explanatory Notes for Users (DAP). Also see Coetzee (n 19) 570; iContainers (n 39) 11.

103 Herre and Tiberg (n 2) 132; Ramberg (n 2) 137.

104 Herre and Tiberg (n 2) 132; Ramberg (n 2) 137.

105 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par A2 (DAP).

106 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) Explanatory Notes for Users (DAP); Herre and Tiburg (n 2) 140 and 142; Ramberg (n 2) 137.

107 Von Bernstorff (n 52) par 1.7 *et seq.*

108 Herre and Tiberg (n 2) 164 and 166; Ostendorf (n 34) 72; Ramberg (n 2) 151.

3.2 Rules for Sea and Inland Waterway Transport[109]

(a) FAS[110]

FAS is one of the oldest Incoterms® in maritime transport, but, as pointed out below,[111] it should not be used for containerised sea freight.[112] Handling the goods in container terminals makes it impossible for the seller to deliver the container to the vessel or quay as stipulated under FAS.[113] Before shipping, the goods must be handed over to a third party for packing and stowage. Consequently, the scope of FAS is limited to waterway transportation without containers, whereby the goods can be delivered alongside the ship or to a feeder ship to pass risk and costs. As is the case under FCA and FOB, the seller is responsible for export clearance. Under FAS, the parties must name the place of delivery in the port as precisely as possible;[114] a declaration such as "FAS Durban" is insufficient. If the parties do not set a precise place, the buyer might be obliged to assume any costs arising from moving the goods to the correct location.[115] Conversely, the buyer is responsible for the contract of carriage and all customs formalities in the country of destination.[116] If the buyer requires insurance coverage for the transport, they are responsible for the insurance policy.

(b) FOB[117]

FOB remains one of the original Incoterms® preserved across all revisions.[118] FOB is comparable to FCA, the only difference being the modes of transport for which they are designed. Like FAS, as pointed out below,[119] it is not recommended for use with containerised freight.[120] Its scope is limited to non-containerised sea freight, such as general cargo and bulk goods.[121] FOB is appropriate if the seller

109 Chow and Schoenbaum *International Business Transactions: Problems, Cases and Materials* (2015) 69; Ostendorf (n 34) 69; Murray, Holloway and Timson-Hunt (n 1) 9; Schmidt (n 7) § 346 par 111.

110 Von Bernstorff (n 52) par 2.1 *et seq.*

111 See the discussion in par 9.

112 See Herre and Tiberg (n 2) 175; and Ramberg (n 2) 161.

113 Herre and Tiberg (n 2) 175; Murray, Holloway and Timson-Hunt (n 1) 13; Ostendorf (n 34) 70; Ramberg (n 2) 161. Also see Bergami "The ship's rail is dead: Incoterms 2010" at https://www.shippingsolutions.com/blog/the-ships-rail-is-dead-incoterms-2010.

114 Herre and Tiberg (n 2) 175; Ramberg (n 2) 161; Schwenzer, Hachem and Kee (n 20) 340.

115 Herre and Tiberg (n 2) 185; Ramberg (n 2) 168.

116 Herre and Tiberg (n 2) 181; Ramberg (n 2) 166.

117 Von Bernstorff (n 52) par 2.2 *et seq.*

118 Coetzee (n 5, 2010) 188-189, 192-197; Ndlovu (n 6) 214; Van Niekerk and Schulze (n 6) 83-84.

119 See the discussion in par 9.

120 Herre and Tiberg (n 2) 187; Ramberg (n 2) 171.

121 See Coetzee (n 19) 569.

is obliged to deliver the cleared goods onto the vessel.[122] How the seller is to deliver the goods depends on the trading practice at the port of shipment. In the ICC's opinion, the goods are delivered "on board" when put on deck if there is no special relevant commercial custom.[123] Subsequent handling operations, like stowage or security, are charged to the buyer.[124] The buyer not only assumes the risk when the goods are put on deck but is also required to fulfil other obligations, such as promptly informing the seller of the vessel's name, loading time, and designated quay.[125] Failure to meet these obligations may render the buyer liable for any resulting damages.[126] It is possible to use this term for goods transported by container, but this will often be inappropriate since the passing of risk takes place only when the containerised goods are placed on the vessel.[127] The seller is responsible for clearing the goods for export, not import.[128]

(c) CFR[129]

CFR can only be used for waterway transport.[130] CFR means that the seller delivers the goods on the vessel or must prepare the goods for shipping. In this context, all C-terms share a common feature: the seller fulfils their obligations upon handing the goods over to the carrier (subject to the specific term), rather than arrival at the final destination.[131] The passing of risk for losses or damages takes place when the goods are placed on the vessel.[132] As pointed out above,[133] this means, in fact, that the goods have to be put on deck. In addition, the seller is also responsible for the carriage contract, which includes the costs and freight.[134] As with FOB and FAS, the CFR clause can be inappropriate if the goods are handed over to the carrier before they are placed on the vessel (for example, containerised sea freight). In this case, it could be advisable to use the CPT term instead. Against the background of the passing of risk and costs, the parties should name the place of destination precisely.[135]

122 Coetzee (n 19) 569; Herre and Tiberg (n 2) 187; Murray, Holloway and Timson-Hunt (n 1) 16; Ramberg (n 2) 171. Also see Ostendorf (n 34) 12. *Cf* Bridge (n 10) 71

123 Herre and Tiberg (n 2) 188; Ramberg (n 2) 173.

124 Herre and Tiberg (n 2) 181; Ramberg (n 2) 177. *Cf* Bridge (n 10) 76.

125 Ostendorf (n 34) 71; Van Niekerk and Schulze (n 6) 83-85.

126 Herre and Tiberg (n 2) 179; Ramberg (n 2) 178.

127 Herre and Tiberg (n 2) 187; Ramberg (n 2) 171.

128 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) Explanatory Notes for Users (FOB); Herre and Tiberg (n 2) 181; Ramberg (n 2) 171.

129 Von Bernstorff (n 52) par 2.3 *et seq.*

130 Herre and Tiberg (n 2) 200 and 204; Ramberg (n 2) 183 and 185.

131 Herre and Tiberg (n 2) 200; Ostendorf (n 34) 72; Ramberg (n 2) 183.

132 Herre and Tiberg (n 2) 200, 202 and 204; Ramberg (n 2) 184 and 187.

133 See the text at note 130 and 132.

134 Herre and Tiberg (n 2) 204 and 206; Ramberg (n 2) 183-185. Also see Carr (n 19) 34.

135 Herre and Tiberg (n 2) 200; Ramberg (n 2) 183.

(d) CIF[136]

CIF is the appropriate option when the parties wish to adopt the FOB principle, with the addition of the seller assuming responsibility for freight and insurance costs.[137] In detail, this means that the seller has to deliver the goods on board the vessel, which is also the point at which the passing of risk takes place.[138] The seller is also responsible for the carriage contract and all carriage-related costs incurred until the goods arrive at the final destination.[139] In addition, the seller is responsible for arranging and bearing transport insurance costs.[140] The scope of CIF is similar to CFR, with the main difference being the additional obligation of the seller to insure.[141] CIF can always be used if the seller has to deliver the goods on the vessel.[142] If the seller has secured a global insurance policy, there is a possibility that it may not meet the specific requirements of a CIF agreement.

The problem is that the buyer cannot automatically claim against the insurer, as the buyer is not party to the contract. Therefore, it is recommended that the parties to the insurance contract ensure the buyer has the same claim rights as the seller. Moreover, the parties should ensure that CIF's minimum cover requirements are fulfilled.[143] The seller's obligations are so confined unless the parties have stipulated something different in the contract of sale. If the buyer requires a higher degree of cover, this should be agreed upon in the contract of sale.[144] Otherwise, the buyer has to conclude an insurance policy himself.[145]

4 Incoterms® 2020 and Private International Law

It is a common misunderstanding in the international trade community that the Incoterms® govern all obligations and duties arising from the sales contract between the parties. They determine only key obligations of sellers and buyers,

136 Von Bernstorff (n 52) par 2.4 *et seq.*

137 Coetzee (n 5, 2010) 190, 198–201; Ndlovu (n 6) 215; Van Niekerk and Schulze (n 6) 85–86.

138 Herre and Tiberg (n 2) 216; Ramberg (n 2) 199; Van Niekerk and Schulze (n 6) 85–86. See the discussion by Lord Atkinson in *Johnson v Taylor Bros & Co Ltd* (1920) 122 LT 130. Also see Ostendorf (n 34) 12.

139 See Carr (n 19) 31; and Ostendorf (n 34) 71. *Cf* Bridge (n 10) 123–124.

140 Herre and Tiberg (n 2) 217; Ramberg (n 2) 199.

141 Herre and Tiberg (n 2) 222; Ramberg (n 2) 200.

142 See Ostendorf (n 34) 71, who asserts that the use of the CIF clause (through an older Austrian Supreme Court case *OGH* (6 Jun 1986) File no 8Ob510/86) often causes major misunderstandings concerning the meaning of delivery dates and the seller's liability in this regard.

143 Herre and Tiberg (n 2) 224; Ramberg (n 2) 200. Also see Ostendorf (n 34) 71.

144 Herre and Tiberg (n 2) 224; Ramberg (n 2) 200–201.

145 For further detail, refer to the discussion of CPT immediately above. Also see iContainers (n 39) 8.

particularly regarding delivery and transfer of risk and costs.[146] They do not regulate the conclusion of the contract of sale or closer details about the delivery time and the payment obligation. The execution of international commercial sales should be simplified using these rules. Therefore, the Incoterms® deal only with different aspects occurring consistently in international trade. There is a need to clarify which party assumes the carriage and who clears the goods for export. Moreover, the parties still have to determine the contractual provisions and/or the applicable law in the event that the contract is not performed as expected. A common notion is that these rules set out what the parties have to do, but they do not explain what will happen should they (the parties) fail to do so. For this reason, the parties should design an international sales contract stipulating their respective rights and duties, or they have to use a standard form contract; in any event, the applicable law should be determined.[147] The ICC assists by offering its *Model International Sale Contract*.[148] If the parties fail to determine the applicable law, the principles of conflict of laws, private international law will determine the law to be applied.[149] The Convention on the International Sale of Goods (CISG) or Vienna Sales Convention will often constitute the applicable law.[150] This can also be the case when South African exporters are involved, although South Africa has not yet ratified the convention.[151] The foreign importers often insist on the CISG. In these cases, the chosen Incoterm modifies the CISG provisions.[152] Using a particular Incoterm does not mean a waiver of the CISG as such; in fact, the terminology and the content of the CISG and the Incoterms® are coordinated and adjusted to each other. An Incoterm only supplements the rights and obligations of the parties under the CISG.[153]

A compelling argument is that, irrespective of the fact that South Africa is not a Contracting State to the CISG, a South African court should apply the

146 Eiselen (n 1) 16. Also see Ostendorf (n 34) 14.

147 Von Bernstorff (n 52) par 3.1.1.

148 ICC Model International Sale Contract: ICC Publication 738E (2013).

149 Schwenzer, Hachem and Kee (n 20) 58.

150 United Nations Convention on Contracts for the International Sale of Goods (Vienna) (1980); Ramberg (n 22) 419. *Cf* Bridge (n 10) 527; Chow and Schoenbaum (n 109) 67; DiMatteo, Janssen, Magnus and Schulze *International Sales Law: Contract, Principles & Practice* (2016) 280–281.

151 Coetzee (n 5, 2017) 20; Eiselen "Teaching transnational commercial law in the African context" 2016 *University of Western Australia Law Review* 3 19; Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (CISG) in South Africa" 1999 *SALJ* 329; Eiselen (n 1) 14; Hugo "The United Nations Convention on the International Sale of Goods: its scope of application from a South African perspective" 1999 *SA Merc LJ* 1; Wethmar-Lemmer "Harmonising or unifying the law applicable to international sales contracts between the BRICS states" 2017 *CILSA* 372 381.

152 as provided for in Art 6 of the CISG (n 150).

153 Coetzee (n 1) 4–5.

CISG as part of the proper law of the contract when the country involved is indeed a contracting state.[154] The argument continues that the parties should be able to choose the CISG to govern their contract in cases where the CISG is not automatically applicable.[155] In general, South African private international law recognises party autonomy.[156] In the absence of the parties' express or tacit choice, the law of the closest connection must be applied.[157] In this regard, the place of performance[158] and the chosen place for dispute resolution[159] will play essential roles as connecting factors. An Incoterm may actually indicate the place of performance. However, many other connecting factors may also feature in determining the law of the most significant connection.[160]

154 Wethmar-Lemmer "When could a South African court be expected to apply the United Nations Convention on Contracts for the International Sale of Goods (CISG)?" 2008 *De Jure* 419; Wethmar-Lemmer "Applying the CISG via the rules of private international law: Articles 1(1)(b) and 95 of the CISG – analysing CISG Advisory Council Opinion 15" 2016 *De Jure* 58 71–72; Wethmar-Lemmer and Schoeman "The International Arbitration Act 15 of 2017: impetus for developments on the cross-border commercial front" 2019 *TSAR* 127 135–136; *cf* Wethmar-Lemmer "Party autonomy and international sales contracts" 2011 *TSAR* 431 440–444.

155 Wethmar-Lemmer (n 154) 424; Wethmar-Lemmer "The Vienna Sale Convention and party autonomy – Article 6 revisited" 2016 *TSAR* 255 256; and Wethmar-Lemmer and Schoeman (n 154, 2019) 133. *Cf* Wethmar-Lemmer (n 154, 2011) 446–450.

156 *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171 185–186; *Guggenheim v Rosenbaum (2)* 1961 4 SA 21 (W) 31; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 3 SA 509 (D) 525; *Representative of Lloyd's v Classic Sailing* 2010 5 SA 90 (SCA) par 21.

157 *Ex Parte Spinazze* 1985 3 SA 650 (A) 665; *Kleinhans v Parmalat SA (Pty) Ltd* (P 151/01) [2002] ZALC 57 (27 June 2002) pars 19 and 29; *Parry v Astral Operations Ltd* (LC 190/04, C190/04) [2005] ZALC 15 (21 June 2005) par 40; *Society of Lloyd's v Romahn* 2006 4 SA 23 (C) par 82; *Society of Lloyd's v Price ; Society of Lloyd's v Lee* 2006 5 SA 393 (SCA) par 28.

158 See, for example, *Standard Bank of South Africa Ltd v Efroiken and Newman* (n 156) 185–188; *Guggenheim v Rosenbaum (2)* (n 156) 31; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 156) 528.

159 *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 156) 529.

160 For a list of connecting factors, see Fredericks and Neels "The proper law of a documentary letter of credit" (part 1) 2003 *SA Merc LJ* 63 67–68 and Neels and Fredericks "The music performance contract in European and South African private international law" (part 2) 2008 *THRHR* 529 534–535. The importance given to the connecting factors differs widely. For instance, in *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (n 156), the places of performance and agreed localised arbitration were emphasised (528–529), while the incorporation of legislation and the currency (namely USD) of the payment obligation were not deemed to be very important (529–530).

5 Incoterms® and Dispute Resolution

The problem in international trade is that the parties do not often foresee that complications may arise with their contract in the future. During contract formation, the parties are enthusiastic due to their fresh new deal, and they often neglect to consider the circumstances in which problems may arise. International contracts of sale regularly contain terms dealing with the resolution of disputes.[161] These clauses determine where disputes should be litigated, or choice-of-court clauses. There are two possibilities: on the one hand, they can choose state courts[162] and on the other, arbitration tribunals.[163] Modern international commercial contracts also often stipulate the applicable law in a choice-of-law clause.[164] It is not uncommon that international contracts of sale contain clauses that oblige the parties to settle their disputes amicably, avoiding costly litigation that could taint the parties' reputations and result in future economic loss. In these cases, the parties can settle their disputes themselves or with a lawyer's assistance (mediation).[165]

However, the parties often still protect their interests, meaning they may not always be ready to compromise. In these situations, they might require the assistance of an objective third party, in which case the dispute is resolved in an arbitration or state court.[166] In this context, a problem can arise concerning the choice of law; during contract negotiation, one party may carefully choose a particular jurisdiction due to its preferable treatment of specific cases. Each party will be wary of giving the other party an advantage, and attempts may be made to breach the agreement by starting proceedings elsewhere to avoid unfavourable consequences. It could also be that the parties do not choose a law to govern their contract or fail to fulfil the requirements of a choice-of-law agreement. In this context, the ICC provides the Rules of Arbitration dated 1 January 2021.[167] These rules provide some solutions; for example, if the parties do not stipulate the place of arbitration, it will be set by the arbitration tribunal,[168] or if the parties do not set the applicable law, it will determine

161 Herre and Tiberg (n 2) 37–38; Ramberg (n 2) 45.

162 Ries *Der Schadensersatzanspruch wegen der Missachtung einer internationalen Gerichtsstandsvereinbarung* (2018) 22 *et seq*.

163 Girsberger and Voser *International Arbitration – Comparative and Swiss Perspectives* (2016) 266 *et seq*.

164 Schärtl "Introduction to international civil law – Principles of private international law and International Contract Law Convention on Contracts for the International Sale of Goods (CISG)" in Arnold, Feldbaum, Kisgen and Faix (eds) *International Business Law* (2015) 11 38 *et seq*.

165 Herre and Tiberg (n 2) 37; Ramberg (n 2) 45–46.

166 Herre and Tiberg (n 2) 37–38; Ramberg (n 2) 46.

167 International Chamber of Commerce (ICC) "Arbitration Rules" at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/.

168 Art 18 of the Rules of Arbitration.

the appropriate law.[169] For this reason, arbitration tribunals are often more popular among commercial parties than state courts – there are ICC arbitration guidelines, the process is more efficient and specialists can be called in to assess the situation, resulting in a more informed decision by the arbitrator. To ensure disputes are settled by arbitration, the parties are advised to conclude a written agreement stating this and specifying the arbitration rules concerned.[170]

6 Legal Nature of the Incoterms®

The Incoterms® dealing with issues such as carriage of goods from the seller to the buyer,[171] export, import and security-related clearance, generally become part of a contract of sale by express reference,[172] at least to one of the terms of a particular Incoterms® version.[173] Frequently, the parties include a specified trade term like FOB in their contract and refer to "the Incoterms® 2020 rules". This is because the ICC has no legislative powers, meaning it cannot impose the use of these rules on the contract.[174] Nonetheless, the codes of some states (for example, Qatar and Costa Rica) use trade terms consisting of three letters, but they do not have the same regulatory content. In such cases, the parties must stipulate the express use of the Incoterms® to avoid misinterpretation. There is no standard international opinion as to the legal nature of the rules. Different views regarding their legal nature range from common law, objective construction, general business terms, and soft law to *lex mercatoria*.[175] Usually, the parties to the sales contract stipulate a specific Incoterm in their contract so that their declaration of intention is included.[176] More than one Incoterm can become part of the contract through express declaration or trade customs. This is usually the exception since, with the express inclusion of one Incoterm, the parties are subjected to special obligations from which economic consequences can arise.

7 Interpretation of the Incoterms® 2020

The short abbreviations, such as FCA or FOB, can be referred to as "keywords", which unlock several rights and obligations.[177] Since the Incoterms® are used

169 Art 21 of the Rules of Arbitration.

170 Herre and Tiberg (n 2) 38; Ramberg (n 2) 46.

171 Lehmann-Richter in Häublein and Hoffmann-Theinert *HGB* (2017) § 346 par 44.

172 DiMatteo, Janssen, Magnus and Schulze (n 150) 277-278; Koller, Kindler, Roth and Morck *Handelsgesetzbuch* (2015) § 346 par 20; Moens and Gillies (n 4) 123; and Schmidt (n 7) § 346 par 113.

173 Booysen (n 9) 53; Dasser *Incoterms and Lex Mercatoria: Applicability of Incoterms in the Absence of Express Party Consent* (1990) 70-72; Joost in Ebenroth, Boujong, Joost and Strohn *Handelsgesetzbuch* (2015) § 346 par 129.

174 Piltz and Bredow *Incoterms* (2016) par A-300. Also see the discussion in par 1.

175 Piltz and Bredow (n 174) par A-301.

176 Sharrock *Business Transactions Law* (2017) 310; Van Niekerk and Schulze (n 6) 72.

177 Herre and Tiberg (n 2) 21; Ramberg (n 2) 20-21.

worldwide, a common interpretation is an inexorable demand.[178] The rules cannot be interpreted like a private declaration of will; one must analyse them objectively,[179] similar to a legal provision of a general and abstract nature.[180] The ICC provides an introduction explaining the purpose and extent of the Incoterms® and offers definitions and interpretations of the different terms.[181] The aim of the Incoterms® 2020 is to prevent uncertainties and ambiguities concerning various kinds of interpretation. Nevertheless, some obscurities and doubts may remain even if the 2020 version is applicable and relevant for interpretation. For instance, this version often employs terms like "port of shipment" or "port of destination" but also sometimes uses just the word "place". Therefore, the parties are always well advised to state and fix precise locations concerning a particular Incoterm. Moreover, specific habits, customs and practices at the named port or place can often influence the legal situation.[182] Uncertainties and doubts aggravating the interpretation problem can also arise when the parties use their freedom to modify the Incoterms®.[183] They then depart from an approved and generally acknowledged interpretation, creating the additional risk of diverging interpretations.

8 The Concomitant Contracts of Carriage and Insurance[184]

The legal basis for an international contract of carriage depends on the transport mode and is not the same in every country. Internationally, they are governed by different conventions.[185] These conventions govern the duties and liabilities of the carrier.[186] To name but a few, there are the Hague-Visby Rules, Hamburg Rules and Rotterdam Rules.[187] Sometimes, the carriers fail to perform their carriage obligations up to the final destination, or do so only partially. In trading practice, it is not unusual for the carriage to be executed by different carriers (multimodal) or even to be outsourced by the "main" carrier to a subcontractor.

178 Pamp in Oetker *Handelsgesetzbuch* (2017) § 346 par 72.

179 Hopt (n 42) Einl. Incoterms par 18.

180 DiMatteo, Janssen, Magnus and Schulze (n 150) 280; von Bernstorff (n 52) par 3.2.2.

181 Hopt (n 42) Einl. Incoterms par 18.

182 Von Bernstorff (n 52) par 3.2.2.2.

183 Herre and Tiberg (n 2) 34-36; Ramberg (n 2) 41-43.

184 See, in general, Ademuni-Odeke "Insurance of CIF and related contracts under Incoterms, Anglo-American and other common law jurisdictions" (part 1) 2016 *European Insurance Law Review* 20-31.

185 Booysen (n 9) 247.

186 Carr (n 19) 217.

187 The Hague Rules as Amended by the Brussels Protocol, 1968 (The Hague-Visby Rules); United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules); United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (the Rotterdam Rules). See, in general, Carr (n 19); Van Niekerk and Schulze (n 6) 128-130; Veenstra "International trade, global supply chain and compliance" in Zijm, Klumpp, Regattieri and Heragu (eds) *Operations, Logistics and Supply Chain Management* (2019) 136; Wolff (n 4) 133-135.

The contract of carriage is the basis for the transport of goods, which obliges the carrier to deliver the goods to the named place of destination.[188] Otherwise, the consignor is obliged to pay the cost of delivery. The recipient is not a contracting party but a "third person" who benefits from the delivery contract.[189] Beyond that, the virtue of the contract does not depend on any formal requirements. The carrier can demand a consignment note summarising its integral parts as proof of the contract. The Incoterms® aim to precisely and succinctly delineate the respective roles of the parties involved in the contract or contracts of carriage. Generally, the seller must secure the initial contract with the carrier to the specified destination under C terms or D terms.[190] In contrast, the buyer must do so under the terms starting with the initial letters E or F (so-called E terms and F terms).[191] Issues often arise regarding terms such as FAS, FOB, CFR and CIF, which are intended explicitly for sea transport. This can create ambiguity about whether the seller or the buyer is responsible for arranging and finalising contracts for carriage in addition to sea transport. Furthermore, commercial practice under contracts of carriage changes occasionally and varies in different places or regions. The Incoterms® are used in sales and carriage contracts; ensuring the terms correspond is essential. Non-uniformity can cause legal disputes concerning claims by or against a charterer. For example, if the delivery time has been exceeded, the charterer may have to compensate the skipper (demurrage)[192] in the case of a FOB or FAS contract. Conversely, if the charterer delivers too early, the skipper saves money (earns dispatch money), potentially allowing the charterer to claim charges against the skipper. The terms of the charter party might not match the contract of sale terms, and consequently, problems can occur at the destination. Under the CIF and CFR terms, the buyer must receive the goods from the carrier at the named place of destination. The problem is that the carrier is not responsible for the discharge operation.[193] This does not mean that the seller is not obligated to induce the discharge of the goods. Furthermore, the parties to the contract of sale are advised to clarify to what extent the costs of discharging operations are included. In the final analysis, it is suggested that synchronising the terms of the charter party or other contract of carriage with those of the contract of sale is important because the commercial practice differs in different ports and

188 Van Niekerk and Schulze (n 6) 119-120.

189 Van Niekerk and Schulze (n 6) 182.

190 Coetzee (n 19) 571; Van Niekerk and Schulze (n 6) 180.

191 Murray, Holloway and Timson-Hunt (n 1) 402; Van Niekerk and Schulze (n 6) 180. *Cf* Bridge (n 10) 73-74.

192 Herre and Tiberg (n 2) 26; Murray, Holloway and Timson-Hunt (n 1) 363; Ramberg (n 2) 28. *Cf* Bridge (n 10) 101.

193 Unless a "free out" (FO) contractual arrangement is expressly stipulated. FO is described as a shipping term in ocean freight which specifies that the consignee (recipient) is responsible for the costs related to unloading the goods from the vessel at the destination port. See Herre and Tiberg (n 2) 57; Ramberg (n 2) 71; and http://www.kkfreight.com/free-in-free-out.html in this regard.

occasionally changes. A failure to match the contracts may have devastating effects on the contracting parties.

Especially under "C" terms, the seller must conclude a contract of carriage for the buyer's benefit.[194] As aforementioned, the buyer is not the carrier's contracting party. But what happens if the buyer wishes to take delivery of the goods from the carrier at the destination port or intends to sell the goods in transit to a subsequent buyer? In such situations, the B/L becomes essential. Possession of the B/L not only empowers the buyer to receive the goods at the destination port but also facilitates the sale of goods in transit through negotiating the bill.[195]

As mentioned above,[196] different international conventions regulate the applicable law for the contract of carriage.[197] These conventions often stipulate that the liability of the carrier is limited.[198] Therefore, it can be useful to conclude an insurance contract. Another advantage of insurance cover is that the person who caused the damage often cannot be identified in multimodal transportation. For instance, if the parties to the contract of sale stipulate FCA and the seller hands over the goods to the truck driver (first carrier), who delivers the goods to the next station (second carrier) from where they are carried to the port of shipment (third carrier) and finally to the buyer, it may be challenging to determine where the damage occurred. The Institute Cargo Clauses and the Protection and Indemnity Insurance (P&I) are the most crucial transport insurances.[199]

The Institute Cargo Clauses[200] are released by the International Underwriting Association of London (IUA) and are regularly used to cover the cargo in transit.[201] They specify the items which are covered by the policy when they are damaged or lost in shipment.[202] These clauses protect the cargo, the

194 Van Niekerk and Schulze (n 6) 180. See, in general, Kuusamo *Optimizing the Usage of Incoterms 2010. The Case of Topcon Europe Medical BV* (Bachelor's thesis, Tampere University of Applied Science, 2017).

195 Becker *Die Beweiskraft des Konnossements* (1991) S10; Sharrock (n 176) 312; Van Niekerk and Schulze (n 6) 154–150. *Cf* Bridge (n 10) 83.

196 See the text at notes 186 and 188.

197 *Cf* Van Niekerk and Schulze (n 6) 186–187.

198 See Carr (n 19) 217.

199 Rabe and Bahnsen in Rabe and Bahnsen IX b *Seehandelsrecht* (2018) Vor § 481 par 75 and 77.

200 The current clauses came into effect on 1 January 2009.

201 Institute of London Underwriters *Institute Cargo Clauses (A), (B), and (C) 2009* (2009). See Carr (n 19) 231; Murray, Holloway and Timson-Hunt (n 1) 424; Wolff (n 4) 197. For information on the range of marine insurance clauses available, see http://www.iua.co.uk/, http://lmalloyds.com/ and http://iuaclauses.com/.

202 Carr (n 19) 419; Wolff (n 4) 196.

container where the goods are stored, or the vessel itself.[203] Generally, there are three basic types of clauses: A, B and C.[204] Type A is the most expensive (has the highest premium). In return, the policyholder gets the highest marine insurance cover.[205] In this case, the insurer usually covers all damages to the goods.[206] Type B is more restrictive, with a moderate premium; the policy does not cover all goods but rather valuable items.[207] Type C is the most restrictive and has the lowest premium.[208] Hence, the policyholder receives the least protection.[209] It is important to note that all Institute Cargo Clauses provide cover that fulfils CIF's minimum requirements.

Another method of protecting the cargo or vessel is to acquire P&I cover.[210] The distinction between conventional marine insurance and P&I cover lies in the fact that the latter is a specialised form of collective insurance. Unlike standard insurance, which operates on a premium-based model, P&I clubs are composed of members who contribute through "call", rather than through premiums. These "calls" are pooled and used to cover claims.[211] A key advantage of this system is that members may receive partial refunds if the pool contains surplus funds after the billing period.[212] The rationale behind forming such P&I clubs is that traditional insurers typically provide limited coverage for specific risks, while P&I clubs offer comprehensive, often unlimited coverage, including damages arising from war or actions by third parties.[213]

203 Van Niekerk and Schulze (n 6) 189. Also see Ordoro Blog "The three different levels of Institute Cargo Clauses" at https://blog.ordoro.com/2012/12/30/institute-cargo-clauses.

204 See Carr (n 19) and Van Niekerk and Schulze (n 6) 189 for a detailed discussion of the three types of clauses.

205 Murray, Holloway and Timson-Hunt (n 1) 425; Wolff (n 4) 197.

206 Institute of London Underwriters (n 201) clause 1 of clause A.

207 Carr (n 19) 419 and 424; Murray, Holloway and Timson-Hunt (n 1) 425-426; Wolff (n 4) 197. Institute of London Underwriters (n 201) Clause 1 of Clause B.

208 Carr (n 19) 429; Murray, Holloway and Timson-Hunt (n 1) 426; Wolff (n 4).

209 See Van Niekerk and Schulze (n 6) 189. Also see Gesamtverband der Deutschen Versicherungswirtschaft "Institute Cargo Clauses (ICC)" at http://www.tis-gdv.de/tis/taz/i/ institute_cc.htm.

210 Van Niekerk and Schulze (n 6) 182. The necessity of P&I cover (or P&I clubs) can be traced back to the case of *De Vaux v Salvador* (1836) 111 ER 845.

211 Herber (n 54) 436; Van Niekerk and Schulze (n 6) 182.

212 Hare *Shipping Law and Admiralty Jurisdiction in South Africa* (2009) §21-2 *et seq*.

213 Herber (n 54) 436. Also see *London Steamship Owners Mutual Insurance Association Ltd v Westdeutche Landesbank Girozentrale & Others* 1996 1 SA 1 (SCA).

9 Incoterms® and Containerisation

9.1 Introduction

Containerisation gained prominence in the second half of the twentieth century.[214] Containers are standardised metal units designed to efficiently transport goods by road, rail, sea, inland waterway, and air in international shipping.[215] They may be loaded and unloaded rather quickly and are readily transferred from one mode of transport to another with relative ease and carried on the decks of ships.[216] As a result, cargo handling is less labour-intensive and faster. Containers generally do not require warehouse facilities – they may be stored outdoors, stacked in layers and inherently offer protection from the elements.[217]

For the sale of goods transported by sea, the ICC typically recommends traditional "waterway" Incoterms®, such as FOB, FAS, CIF, and CFR.[218] Except for FAS, the passing of risk occurs when the goods are placed on the vessel – FAS merely requires the placement of the cargo alongside the quay. However, the ICC does *not* recommend the "waterway" Incoterms® for *containerised* sea freight. In these cases, the ICC advises the parties instead to choose from the terms FCA, CIP or CPT, that is, from the rules "for any mode of transport".[219]

214 Heins *The Shipping Container and the Globalization of American Infrastructure* (LLD thesis, University of Michigan, 2013) 2–3; Miler, Gostomski and Nowosielski *Containerisation in Maritime Transport: Contemporary Trends and Challenges* (2023) 9–11. South Africa has already implemented containerisation in its ports since 1977: Beytell *Sustainable Transport and Intermodal Solutions for Urban Growth and Development: A Case Study of the Integrated Gauteng Transport Master Plan 2025* (LLD thesis, NWU, 2012) 138; Govender and Mbhele "Dynamics of intermodal logistical systems on containerisation and road transportation in Durban, South Africa" 2014 *Journal of Transport and Supply Chain Management* 1 2. Also see Dempsey "The law of intermodal transportation: what it was, what it is, what it should be" 2000 *Transportation Law Journal* 367 368–369; Zhang *The Liability of the Multimodal Transport Operator* (LLD thesis, New South Wales, 1993) 1.

215 Corbin (n 14); Naidoo (n 14).

216 DiMatteo *The Law of International Contracting* (2000) 93; DiMatteo *International Contracting: Law and Practice* (2016) 134.

217 Murray, Holloway and Timson-Hunt (n 1); Sharrock (n 176) 313. Also see Baughen *Shipping Law* (2023) 14; Bridge *Benjamin's Sales of Goods* (2017) 21-073; Dempsey (n 214) 369; Hare (n 212) §13-2; Moens and Gillies (n 4) 124.

218 Herre and Tiberg (n 2) 25; International Chamber of Commerce (ICC) *Incoterms 2020* (n 3) 10; Ramberg (n 2) 27; Stapleton "Optimizing shipper contracting: the correct usage of Incoterms for containerized/intermodal freight" *University of Wisconsin La Crosse* available at https://www.pomsmeetings.org/confpapers/051/051-0153.pdf.

219 Malfliet "Incoterms 2010 and the mode of transport: how to choose the right term" in *Management Challenges in the 21st Century: Transport and Logistics – Opportunity for Slovakia in the Era of Knowledge Economy – Proceedings* (2011) 163 173; Murray,

In maritime traffic, many containers are transported. Hence, there may be an assumption that the "waterway" clauses can be used for containerised freight. However, this is far removed from reality. In trading practice, the FCA term replaced FOB and FAS.[220] In the ICC's opinion, the reason is that the seller's duty to deliver the goods on the vessel is impossible. The seller cannot deliver the goods to the vessel, but to the port of shipment (container terminal). The seller can deliver the goods only to the cargo terminal.[221] The subsequent delivery of the goods depends not on the seller but on the ocean carriers.[222] They are employed by quay operators who manage the terminal. They can be regarded as the link between the seller (exporter) and the buyer (importer); they undertake the duty to deliver the goods onto the vessel.[223] The extent of their role depends on the container used. In this regard, there is a difference between two types of containers: a full container load (FCL) means that the ocean carrier takes the ready-loaded container and places it on the vessel, whereas a less-than-container load (LCL) means that the containers are not completely loaded. The quay operator fills the container with general cargo before placing it on the vessel.[224]

The ICC's official position can be summarised as follows: the "waterway" Incoterms®, particularly the FOB clause, should be avoided for container shipments.[225] The position of most South African exporters differs: they emphasise that most of their buyers are keen to buy on the FOB term, and the fact that the goods are shipped in containers does not seem to bother them at all. The term FOB dates back long before maritime container transport was

Holloway and Timson-Hunt (n 1) 361 and 364; O'Connor (n 81) 99; UNCTAD/ICC Rules for Multimodal Transport Documents: ICC Publication no 481 (1992).

220 Ostendorf (n 34) 70; Veenstra (n 187) 136. Also see Bridge (n 217) 21-075.

221 Coetzee (n 19) 569; von Bernstorff (n 52) 582. See Bergami (n 113). Also see Ramberg "CISG and INCOTERMS 2000 in connection with international commercial transactions" in Andersen and Schroeter (eds) *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday* (2008) 394 395*ff*.

222 Ostendorf (n 34) 70.

223 Al-Deb'i *Überseekauf und Abladegeschäft* (2008) s 173 *et seq*; Sorgenfrei *Port Business* (2018) par 11.2.

224 Baughen (n 217) 14; Murray, Holloway and Timson-Hunt (n 1) 362; Sharrock (n 176) 314; von Bernstorff (n 52) 584. Also see *Ace Imports Pty Ltd v Companhia de Navegacao Lloyd Brasileiro (The "Esmeralda 1")* [1988] 1 Lloyd's Rep 206.

225 Bergami "Incoterms 2010: comments on the new revision of delivery terms" 2011 *Vindobona Journal of International Commercial Law & Arbitration* 157 167 states: "FOB is a term with a rather interesting history. It was coined before maritime container usage was known, incorrectly used for moving goods by containers over the seas, recommended not to be used for container traffic in the Incoterms 1990, Incoterms 2000 and Incoterms 2010, yet it is still being used today."

invented.[226] The term FOB has been questioned for almost 50 years, the main issue being the risk transfer point between the seller and the buyer under this term. In a rather prominent English case of 1954, the court expressed its concerns in this regard as follows: "Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail."[227]

Prudent risk-management practices would prefer the risk transfer to be when the journey commences or when the seller loses control of the goods by handing them over to a third party. Indeed, this is the case in FCA, CPT, and CIP, which are the multimodal answers to FOB, CFR, and CIF.[228] The Incoterms® have exhibited some ambiguity in this regard over the years. The terms FOB, CFR and CIF all retain the traditional practice of delivering the goods on board the vessel, while, traditionally, the point of delivery according to the contract of sale coincided with the point of handover of the goods for carriage. Contemporary transportation techniques create a considerable problem of "synchronisation" between the contract of carriage and the contract of sale. Nowadays, goods are usually delivered by the seller to the carrier before the goods are taken on board or sometimes even before the ship has arrived at the seaport. In such cases, merchants are advised to use the "multimodal" F and C terms instead of FOB, CFR and CIF because the "multimodal" F and C terms do not attach the passing of risk to loading on board the ship.[229] In that case, the buyer must bear all risks of loss or damage to the goods from when they are handed over to the terminal at the named port of shipment. The "waterway" Incoterms® can be used only for *transport by non-containerised sea or inland waterways*. If the parties do not intend to deliver the goods on board the ship, as is the case for containerised traffic, the FCA term should be used instead of the FOB clause. Thus, the Incoterms® 2020 clearly state that FOB is not the preferred choice for container traffic because, in practice, the container is invariably part of a multimodal movement.[230] A recent study on container movements reveals that 57% of export containers are staged.[231] This means these containers are not delivered directly from the exporter's premises to the wharf; they go through third parties such as container packing warehouses, freight forwarders, container parks, etc.

226 Petrova, Krugerova and Koziel "New challenges in Incoterms in the background of their historical development" 2021 *ACC Journal* 90 93-94; Ronai "Free on Board FOB – Incoterm® 2020 rules" (21 August 2024) https://www.tradefinanceglobal.com/incoterms/fob-price-free-on-board-meaning/.

227 *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402 419 (per Devlin J).

228 Bergami (n 225) 168.

229 See Bergami (n 225) 168.

230 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) 103. See Bergami (n 225) 157; Murray, Holloway and Timson-Hunt (n 1) 361 and 364; O'Connor (n 81) 99.

231 Department of Transport Port of Melbourne *2020 Container Logistics Chain Study* (2021) 70.

Both parties seek to minimise their respective risks, and the allocation of risk is typically a matter of negotiation. Generally, the seller is best positioned to transfer the risk to the buyer at the point where physical control of the goods is relinquished. This is because the seller cannot manage the risk effectively without possessing the goods. In FOB transactions, the seller would be responsible for a multitude of loadings and offloads from the time the goods leave the export premises until they are loaded onto the vessel, that is, export warehouse to container packing station (CPS), CPS to forwarder, forwarder to container park, container park to wharf, and wharf to ship.

9.2 The Influence of Containerised Sea Freight on the Incoterms®

The advantages and disadvantages of the specific terms concerning container sea shipping are considered below. The main terms involved are FAS, FOB, CFR, CIF, FCA, CPT and CIP. The "waterway" Incoterms® are dealt with first, followed by the "multimodal" terms.

(a) FAS

If the parties stipulate FAS, the seller is responsible for delivering the container alongside the vessel. In this context, the seller must place the container on the quay, at which point risk and costs are transferred.[232] The advantage for the seller lies in the obligation to deliver the container to the named place only. The seller is not responsible for preparing the container for unloading from their vehicle or loading it onto the mode of transport arranged by the buyer. This arrangement also enables the exporter to deliver the goods earlier than stipulated in the contract of sale, as they are not dependent on the immediate availability of the shipper or freight forwarder. Ultimately, this grants the seller greater flexibility in managing their delivery schedule. However, as mentioned above,[233] the seller can generally not deliver the container directly to the quay "alongside ship," as container handling procedures typically require the container to be handed over to container terminal personnel.[234] Furthermore, the buyer cannot name a place at the container yard (CY) where delivery will be effected.[235] If general cargo is the object of the delivery, the seller benefits because the buyer is liable for dangerous loading on the vessel. But if LCL or FCL containers are being transported, and FAS were to be used, the seller would be liable for damages until the terminal staff placed the goods on the quay (which makes it inappropriate). It may even be argued that the buyer cannot insist on FAS for containerised transport, as the seller would be unable to perform under such terms. The operational procedures of container terminals force the seller to deliver the container into the custody of the port operator, thereby precluding

232 See par 3.2 (a) above. Murray, Holloway and Timson-Hunt (n 1) 13.

233 par 3.2 (a)

234 Murray, Holloway and Timson-Hunt (n 1) 13.

235 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par B10 (FAS).

direct delivery to the quay.[236] Therefore, in these circumstances, the ICC directs the buyer to choose FCA.[237]

(b) FOB

Under the FOB term, the seller's obligation is somewhat broader than under FAS. The seller must deliver the container to the quay and ensure it is loaded onto the vessel.[238] The buyer's advantage is avoiding the risk of loading the container onto the vessel. The buyer's responsibility commences only once the container has been placed on board the vessel arranged by the buyer.[239] In this scenario, the buyer typically contracts directly with the carrier, enabling the buyer to claim damages from the carrier, if necessary. Another advantage for the buyer is that international transportation costs are more reasonable. Since the terminal handling and loading charges differ from port to port, the buyer can compare different shipping proposals and is not bound by the exporter's choice. Furthermore, the buyer benefits from being relieved of responsibility for export customs formalities. The seller likewise benefits in fulfilling their duties once the goods have been loaded onto the vessel. At that point, the seller is no longer exposed to the risk of damage to the goods during the voyage, nor are they responsible for arranging carriage to the destination.[240] However, if the seller is unable to deliver a containerised shipment directly onto the vessel, the same challenges that arise under FAS terms emerge, rendering FOB unsuitable, as the seller retains the risk until the container has been successfully loaded on board.[241] Conversely, the importer must ensure that a suitable vessel is available to receive the goods as stipulated in the contract (in terms of time and location); failure to do so makes the buyer liable for damages.[242]

(c) CFR

Under CFR, the seller also has the advantage of not being responsible for losses or damages during the shipment. As mentioned above, all C Incoterms® are "two-point clauses".[243] As in the case of FOB, the exporter is also responsible

236 Malfliet (n 219) 163.

237 Ostendorf (34) 70. See Bergami (n 113); and Ramberg (n 221).

238 Bergami (n 225) 169; Bergami "Variations in using Incoterms" (8 June 2015) https://www.shippingsolutions.com/variations-in-using-incoterms-2010.

239 Murray, Holloway and Timson-Hunt (n 1) par 2-013.

240 See par 3.2 (b) above. Van Niekerk and Schulze (n 6) 83-85.

241 Bergami (n 238); Deloitte *Incoterms® (2020) – The Hidden Champions of Efficiency. Your Guide to Improving Business Performance across the Entire Value and Supply Chain* (2020) 33; Stapleton (n 218).

242 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par A2 read with B3 (FOB).

243 Hajdukiewicz and Pera "Factors affecting the choice of incoterms: the case of companies operating in Poland" 2021 *International Entrepreneurship Review* 35 38; Piltz "Incoterms® 2020" 2020 *Revija Kopaoničke Škole Prirodnog Prava* 9 12; Van Niekerk and Schulze (n 6) 72-74.

for loading the goods onto the vessel, at which stage the risk passes.[244] If the containerised goods cannot be delivered directly to the ship by the seller, the same issues as with the previously discussed terms occur, making the CFR term unsuitable, as the seller retains risk until the container is aboard the ship.[245] Unlike in the case of FOB, however, the seller's duties do not end with the passing of risk.[246] Under CFR, the exporter also assumes all carriage-related costs and is responsible for complying with all formalities that accrue until the goods reach the final destination port.[247] This includes the contract with the carrier.[248] In a sense, CFR can be regarded as a hybrid between FOB and the D Incoterms®. The seller benefits from not bearing the risk of losses or damages after the goods have been loaded and from the chance to make an attractive offer to the importer by assuming the costs and the transport arrangements to the final destination. Conversely, the importer has fewer duties because the exporter organises the transport of the goods. This means that the importer is responsible for domestic activities in their country only, namely the carriage to the premises and clearing the goods for import. On the other hand, the buyer bears the risk of losses or damages from the port of shipment.[249] If the importer is interested in insurance for the transport from the port of shipment to the port of destination or even to their premises, they are responsible for acquiring such cover. Seen broadly, CFR tries to balance the obligations and risks the parties face. After the goods have been loaded onto the ship, the risk of damage passes to the buyer, but the seller is responsible for clearing the goods for export and for the costs of the carriage to the destination.[250]

(d) CIF

If necessary, the parties can go one step further and stipulate CIF. The advantages and disadvantages of the CIF term are the same as those under CFR, except concerning transport insurance.[251] Only two Incoterms® oblige the seller

244 Herre and Tiberg (n 2) 202 and 204; Ramberg (n 2) 187. See par 3.2(c) above.

245 Bergami "Incoterms 2010: the newest revision of delivery terms" 2012 *Acta Universitatis Bohemiae Meridionales* 33 36; Deloitte (n 241) 36; Piltz (n 243) 24; Stapleton (n 218).

246 See Davies and Snyder *International Transactions in Goods: Global Sales in Comparative Context* (2014) 249; O'Connor (n 81) 54–55.

247 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) Explanatory Notes for Users (CFR); UNDP *Shipping and Incoterms: Practice Guide* (2008) 14; Bergami (n 238).

248 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par A4 (CFR).

249 Davies and Snyder (n 246) 254.

250 Jimenez *ICC Guide to Export/Import: Global Standards for International Trade* (2012) 56; Malfliet (n 219) 166.

251 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) Explanatory Notes for Users (CIF); Malfliet (n 219) 166. See Hoffman "Shipping terms explained: CFR, CIF, and FOB" (22 August 2024) https://www.tradefinanceglobal.com/posts/shipping-terms-matter-difference-cfr-cif-fob.

to acquire the transport insurance (CIF and CIP).[252] D terms do not oblige the seller to insure. If the importer requires insurance coverage under these terms, it is borne by the importer. The reason is simple: under DAP and DDP, the passing of risk occurs at the premises of the named destination.[253] The importer is not interested in transport insurance because the exporter bears all risks during the transportation.[254] If the goods are damaged during transport, the buyer can claim from the seller accordingly. The fact that only C terms provide for the conclusion of an insurance contract accordingly arises from the two-point nature of these clauses.[255] The importer may be interested in acquiring insurance coverage from the point at which the risk of loss or damage passes to them. As with CFR, the seller is responsible for paying for the transport to the final destination port.[256] As with the other "waterway" Incoterms® discussed above, the CIF term is unsuitable for containerised sea freight where the container is not delivered directly by the seller to the ship.[257] If the parties wish to approximate their positions to those under a CIF term in the case of containerised sea freight, they will be best advised to choose CIP.[258]

252 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par A5 (CIP) and par A5 (CIF); Herre and Tiberg (n 2) 32; Lee and Seung-Lin "Study of marine cargo insurance under the Incoterms 2020 CIP Term" 2024 *Global Trade and Customs Journal* 260 262; Ramberg (n 2) 35; Thompson "Incoterms® 2020 explained – the complete guide" (8 January 2025) https://incodocs.com/blog/incoterms-2020-explained-the-complete-guide/. However, an innovation under the 2020 Incoterms is that they have different levels of insurance coverage. See International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) 21.

253 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par A3 read with par A2 (DAP) and par A3 read with par A2 (DDP); Ndlovu (n 6) 220.

254 See par 3.2 (d) above. Carr (n 19) 31; Ostendorf (n 34) 71.

255 Lazăr "The INCOTERMS rules and their importance" 2011 *Juridical Tribune* 143 148.

256 Bergami (n 238); Klotz *International Sales Agreements: An Annotated Drafting and Negotiating Guide* (2008) 61; Piltz (n 243) 12.

257 Bergami (n 245) 36; Ndlovu (n 6) 210; Ramberg "Incoterms 1980" in Horn and Schmitthoff (eds), *The Transnational Law of International Commercial Transactions* (1982) 137 147; Stapleton (n 218) 2; von Bernstorff *Incoterms® 2020* (2020) par 172 *ff* and 851 *ff*.

258 HDI Global "Incoterms® 2020" https://www.hdi.global/globalassets/_local/international/downloads/ group_incoterms2020/20191025_404-trp114_incoterms2020_engl.pdf; Munich Reinsurance "Incoterms® rules 2020: controlling costs and cover" https://www.munichre.com/content/ dam/munichre/mram/content-pieces/pdfs/specialty-insurance/Incoterms-Rules-FS-WEB-FINAL.pdf/_jcr_content/renditions/original./Incoterms-Rules-FS-WEB-FINAL.pdf; UNDP (n 246) 37; Stapleton (n 218) 2.

(e) FCA

Under FCA, the seller's obligations extend further than those of EXW.[259] The multimodal Incoterms® are less closely tied to maritime regulations than the "waterway" counterparts. FCA actually holds more advantages for the exporter than the importer due to the seller's limited obligations.[260] As explained above,[261] the seller fulfils their obligations upon handing the container to the first carrier.[262] Since this point can be far inland, there can be a long distance to cover. Once the seller has handed over the goods, they are no longer responsible for loss or damage that may occur during the long transport. Consequently, FCA is suitable for a seller who is not entirely intent on limiting their obligations (as under the EXW term) but is prepared to accommodate the buyer to an extent. The importer's only advantages lie in not having to collect the container from the seller's premises and in the exporter's obligation to arrange export clearance.[263] This latter obligation is particularly beneficial to the buyer, who may not speak the language of the exporting country and might be unfamiliar with the relevant export formalities. The buyer is responsible for organising the whole transport process from where the seller hands the goods to the first carrier.[264] The delivery is not to the quay or ship.[265] Hence, the seller is not exposed to the problems arising from the "waterway" Incoterms®. The risk passes when the container is handed over to the first carrier (which, at the latest, will be the container terminal staff). The buyer carries the risk of whatever may happen to the containerised goods from that moment onwards. Contrary to FOB, the parties can use the optional practice in B6 under FCA. The rule enables the buyer and seller to agree that the seller can obtain a shipped B/L early.[266] If the parties do so, the seller doesn't have to wait until the container is on board the vessel. The ICC recognises that, despite this somewhat unhappy union between an on-board B/L and FCA delivery, this caters for a demonstrated need in the marketplace.[267]

259 Chevalier "Incoterms – bien les connaître pour mieux les utiliser" 2003 *Le MOCI* 84 88; Trade Forward Southern Africa "Better understanding the INCOTERMS 2020: FCA" https://www.tfsouthernafrica.org/wp-content/uploads/2022/03/TFSA-Individual-Incoterms-FCA.pdf; International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) 29.

260 See Kuusamo (n 194).

261 See the discussion at par 3.1 (b).

262 Herre and Tiberg (n 2) 86; Ramberg (n 2) 97. Also see Coetzee (n 17) 120; and Schwenzer, Hachem and Kee (n 20) 340.

263 Bergami (n 238); Hajdukiewicz and Pera (n 243) 37; Magnus and Piltz "Trade terms and Incoterms" in DiMatteo, Janssen, Magnus and Schulze (eds) *International Sales Law: A Handbook* (2021) 322 326; UNDP (n 247) 39.

264 Piltz (n 243) 11–12.

265 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) (FCA); Bergami (n 238) (FCA).

266 See the discussion at par 3.1 (b). Piltz (n 243) 21.

267 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) 14.

(f) CPT

The second multimodal Incoterm that should be considered is CPT. As in the case of FCA, the exporter benefits from domestic risk passing. Risk passes when the goods are delivered to the first carrier.[268] In contrast to FCA, however, the exporter must also arrange and pay for the carriage until the goods reach their final destination.[269] This, to a degree, counterbalances the early passing of risk to the buyer, who does not have to shoulder the burden of organising additional carriage from the domestic named place of delivery to the port of shipment. On the other hand, the parties must remember that the seller will typically add transportation costs to the purchase price[270] and that the delivery to the first carrier (the passing of risk) may take place far inland.[271] So viewed, the counterbalance argument could also be regarded as artificial.

(g) CIP

Recently, CIP has come to the forefront. CIP actually follows the same structure as CPT,[272] with the difference that the exporter is also obliged to acquire transport insurance,[273] complying with Institute Cargo Clauses (A) (LMA/IUA) (the parties can also agree to transport insurance with lower insurance coverage).[274] As with CIF, it is in the importer's interest to secure coverage for the period between the seller's transfer of the goods to the first carrier[275] and the moment of their arrival at the destination port.[276] An advantage for the importer is that they are required to handle only domestic customs formalities, with which they are typically familiar. But here, we find the same problem experienced under CPT, namely that the costs for an additional contract of carriage and the insurance

268 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par A3 read with A2; Davis and Vogt "Incoterms® 2020 and the missed opportunities for the next version" 2022 *International Journal of Logistics Research and Applications* 1263 1271; Magnus and Piltz (n 263) 326; UNDP (n 247) 41.

269 See par 3.1 (c) above. Herre and Tiberg (n 2) 104 and 106; Jeon "An analysis of delivery/transport documents content in relation to the contract of carriage under Incoterms 2020 rules" 2021 *Journal of Korea Trade* 203 213–214; Ostendorf (n 34) 72; Ramberg (n 2) 111; Ronai *A Commentary on the Incoterms® 2020 Rules* (2020) 32.

270 Malfliet (n 219) 166.

271 Bergami (n 245) 37; Coetzee (n 19) 571; Hajdukiewicz and Pera (n 243) 37–38.

272 Ronai "Carriage Paid To – Incoterms® 2020 rules" (21 August 2024) https://www.tradefinanceglobal.com/incoterms/cpt-carriage-paid-to/.

273 Lee and Seung-Lin (n 252) 262; *Geofizika DD v MMB International Ltd & Anor* [2010] EWCA Civ 459 par 16; *Impala Platinum Ltd v Koninklijke Luchtvaart Maatschappij NV* [2007] 1 All SA 545 (SCA).

274 See par 3.1 (d) above. International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) Explanatory Notes for Users (CIP); Jeon (n 269) 206.

275 Malfliet (n 219) 177.

276 Davis and Vogt (n 268) 1281; Magnus and Piltz (n 263) 326.

are components of the purchase price. Also, as in the case of FCA and CPT, the passing of risk takes place when the goods are delivered to the first carrier.[277]

In summary, FOB, CFR and CIF are unsuitable for container traffic. For container traffic, the Incoterms® 2020 rules recommend using FCA in place of FOB, CPT in place of CFR, and CIP in place of CIF. It is important to note that the time of risk passing regarding FCA, CPT, and CIP is essentially the same, namely when the goods are handed over to a third party (the first carrier).

10 Complaints from South African Exporters

Although the position of the ICC reduces the risks South African exporters face, they see good reason to complain. Their dissatisfaction arises from the fact that FCA, CIP and CPT clauses are regarded as inappropriate since an informed foreign buyer will not usually be prepared to assume any risk or foreign obligations and expenses before the goods have passed all the hurdles that can impede on-board shipment.[278] Buyers sourcing goods internationally can compare offers effectively only when they receive clear-cut "on board" quotes.[279] The buyer can compare different offers and prices only when the passing of risk is internationally comparable. With FCA, buyers must appoint an overseas agent to accept local delivery and arrange shipment. In such a case, the buyer assumes a dual role: acting both as the exporter and importer. Additionally, complications may arise with export clearance, as the carrier is not the final exporter and therefore cannot issue an international sales invoice. Indeed, it remains unclear how suppliers/exporters using FCA terms can clear goods for export when a FOB value must be declared.[280] For these reasons, the South African trade practice tends to use, against the recommendation of the ICC, the "waterway" Incoterms® for containerised freight, first and foremost, the traditional old FOB term.[281]

277 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par A3 read with A2 and A4; Davies and Snyder (n 246) 254; Hajdukiewicz and Pera (n 243) 37–38; Magnus and Piltz (n 263) 336.

278 Commentary/recommendation to the ICC Drafting Committee by Patrick Corbin "Contract of sale: FOB (CFR and CIF) v FCA (CPT and CIP)"; Patrick Corbin "International trade … Risk transfer" undated (referred to with permission of the author in both cases; on file). See O'Conner (n 81) 82.

279 Corbin (n 14). Emmert *International Business Transactions: Text, Cases and Materials* (2021) 77.

280 Corbin (n 14).

281 See Corbin (n 278) "International trade … Risk transfer"; Southern African Development Community (SADC) Secretariat *SADC Merchandise Trade Statistics Bulletin* (2021); Wines of South Africa *Export: A Step-by-step Guide to Exporting Wine* (2021) 22; Import Export License "Your questions answered" https://importexportlicense.co.za/blog/your-questions-answered-13/.

11 Incoterms® and Containerisation: A South Korean Perspective

South African exporters, as do their South Korean counterparts, experience some problems with certain Incoterms® and containerisation. However, their point of departure is different. Korean merchants are unfamiliar with all Incoterms®, and the trend is to use the "old" established terms.[282] They are eager to increase transaction stability and avoid adopting unfamiliar trade terms. Therefore, South Korean parties mostly use FOB for export and CIF for import transactions.[283] The consequence is that the merchants do not know precisely when the passing of risk or costs takes place. Korean merchants use FOB, CFR and CIF for containerised sea freight.[284] This does not apply to Korean large-scale trading companies or deliveries beyond Asia.[285] Asian traders often use the discouraged "waterway" Incoterms® for containerised sea freight because they have not experienced significant problems,[286] contrary to the ICC's opinion.

The usage of these terms for containerised sea freight is not unanimous; some problems can occur from the misuse of FOB and FCA, especially if FOB is agreed upon and the goods are delivered to the carrier and not on board.[287] As explained above,[288] a primary focus of Incoterms® is passing risk and costs.[289] "On board" means that the goods must be delivered onto the vessel, which also marks the moment of passing of risk. If the goods are delivered in a container, FOB is unsuitable because the goods pass through a container terminal and are not directly delivered onto the vessel.[290] If the parties choose combined or

282 Lee and Huh "A study on standard types of Free Carrier (FCA) on Incoterms for seaborne container goods transportation: Korean trade companies' perspective" 2017 *Journal of International Trade & Commerce* 51 60; Yang "A study on the reasonable choice and utilization of Incoterms 2020 rules from the perspective of logistics and supply chain management" 2021 *Journal of Korea Trade* 152 154.

283 Lee and Huh (n 282) 61; Yang (n 282) 153.

284 Bergami (n 225) 170. This is the position in Australia as well. See Taylor "Cargo interest in Australia: standing on the edge – imbalances that permeate international sale contracts, carriage contracts and recovery right" 2008 *Australian and New Zealand Maritime Law Journal* 56; Yang "A study on the reasonable criterion in the choice of Incoterms 2010 rules" 2013 *The Korean Academy for Trade Credit Insurance* 227–254; Yang (n 282) 162.

285 Lee and Huh (n 282) 56.

286 Lee and Huh (n 282) 57. Also see Sheikh, Miah, Hasan, Zitu, and Hosain "Optimising international trade: the examination of Incoterms selection by exporters and importers" 2024 *Review of International Business and Strategy* 562.

287 Hemmings and Zeller "Is the ship's rail really significant?" 2005 *Nordic Journal of Commercial Law* 2; Jimenez *Guide to Export-Import Basics: Vital Knowledge for Trading Internationally* (2008) 104; Lee and Huh (n 282) 58.

288 See the discussion in par 1.

289 Vogt and Davis "The state of Incoterm® research" 2020 *Transportation Journal* 304.

290 Bergami (n 225) 167–168; Coetzee (n 19) 569; Hemmings and Zeller (n 287) 1; Kim "Some critical & controversial issues on Incoterms 2020 for international trade"

container transport, the goods are delivered to a CY or Container Freight Station (CFS).[291] In this case, the seller must bear the risk of damages or even the loss of the goods during the period in which they are not under the seller's control, having already been delivered to a domestic location. If this situation arises, the seller cannot fulfil their obligation.[292] This is not the only problem that can arise. Problems can also occur with the transport insurance. If FOB is stipulated, the buyer is responsible for the contract of carriage,[293] which is often completed with transport insurance that may also include clauses covering the transportation between the seller's premises and the vessel.[294] The problem is that the seller cannot claim under the buyer's insurance policy because the seller is not a party to the contract.[295]

Another problem is that the seller often uses FCL, meaning that the goods are delivered to the seller's own warehouse, where a carrier allocates the container for loading. In this case, the delivery point must be the seller's warehouse and not the vessel because the seller assumes the risk from the warehouse until the goods are loaded onto the vessel[296] and not only until the goods are stored in the container at the seller's premises. Under consideration of the B/L, which often devolves the seller's obligation of delivery to the carrier at the CY, the seller cannot claim damages from the carrier for loss or damage occurring during the period that the goods are between the warehouse and the CY.[297]

It is not only the passing of risk and the delivery which can cause trouble, but also the transport documents. As a result of the different document requirements under FOB and FCA, the seller has to offer different documents, with the B/L being of particular importance.[298] In maritime container transport, the seller hands the goods to the carrier and usually receives the forwarder's cargo receipt (FCR) or the received Bill of Lading (Received B/L).[299] These documents might be sufficient for FCA but not for FOB. For FOB, the L/C issued

2022 *Global Trade and Customs Journal* 44 45; Lee and Huh (n 282) 58; Yang (n 282) 163.

291 Hoel, Giuliano, and Meyer (eds) *Intermodal Transportation: Moving Freight in a Global Economy* (2010) 47; Lee and Huh (n 282) 52; Lim and Lee "Evaluating modal shift policies for inland container transport in Korea: a GIS-based approach" 2013 *International Journal of Shipping and Transport Logistics* 605 611; Yang *The Practice and Regulations of Container Intermodal Transport* (2021) 18.

292 Lee and Huh (n 282) 59.

293 Jeon (n 269) 209; Kim (n 290) 47.

294 *Cf* Yang (n 282) 162, who avers that "there is a gap in liability between the time of delivery and the loading on-board" when the FOB is used.

295 Lee and Huh (n 282) 59.

296 Kim "The comparative study of Incoterms 2020 and 2010 in international physical distribution" 2022 *Journal of Distribution Science* 101 106; Yang (n 281) 154.

297 Lee and Huh (n 282) 59.

298 Wolff (n 4) 128.

299 Lee and Huh (n 282) 60.

in terms of the ICC's Uniform Customs and Practice for Documentary Credits (UCP) 600[300] requires the goods to be loaded on board – an on-board or shipped B/L is necessary.[301] The background of using L/Cs is that the conclusion of the contract of sale precedes the eventual shipping and payment for the goods.[302] Therefore, it is in the parties' interest to ensure strong security protecting the transaction. The L/C is a promise from a bank to pay in the buyer's name on receipt of certain stipulated documents (such as the B/L and commercial invoice).[303] The advantage for the seller/exporter is the assurance of payment upon shipment of goods,[304] as reliance is placed on the bank's undertaking rather than on the buyer directly. The buyer can minimise the risk of non-contractual delivery (since the seller will receive payment only upon furnishing documents).[305] In this context, the problem of using FCA for containerised sea freight (as recommended by the ICC) as opposed to FOB is that the documents issued under the FCA term are insufficient to receive payment under the L/C.[306] In effect, the trading parties "solve" this problem by performing, in essence, FCA under FOB so that they can issue a shipped or on-board B/L.[307] Against this background, South Korean exporters argue that the FCA clause should be split up to expand the use of this Incoterm for containerised sea freight.[308] Four FCA terms align with the ICC recommendation in this context.

The first is the term "FCA Factory". This term should be used if the seller delivers FCL goods to their own warehouse.[309] FCA Factory is the appropriate term when the seller requests an empty container from the carrier, which the latter delivers to the former's premises or warehouse. Subsequently, the seller loads the goods into the container before the carrier collects them from the exporter's warehouse.[310] FCA Factory would be very similar to EXW, with the difference being that the transport documents and the export formalities would

300 International Chamber of Commerce (ICC) *Uniform Customs and Practice for Documentary Credits – UCP 600: ICC Publication 600E* (2006). The UCP almost invariably governs letter of credit transactions throughout the world. See Sharrock (n 176) 403.

301 art 20, par 2.

302 See Sharrock (n 176) 407; Wolff (n 4) 129.

303 See the definitions by McKendrick *Goode on Commercial Law* (2010) 1059; Schwenzer, Hachem and Kee (n 20) 464.

304 See Hugo (n 20) 3 *et seq*.

305 Sharrock (n 176) 408-409.

306 Kim "The Incoterms 2020 revision: unsolved problems on FCA rules" 2021 *Dong-A Journal of International Business Transactions Law* 85 92.

307 Lee and Huh (n 282) 60; Yang (n 282) 162. In 2018, FCA accounted for 11.1% of Korea's international trade, while FOB accounted for 56.8%. See Kim and Park "A trade statistics and survey on the use of Incoterms in Korea" 2020 *The International Commerce and Law Review* 219 232.

308 Lee and Huh (n 282) 61.

309 Lee and Huh (n 282) 61.

310 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par A2 (FCA); Lee and Huh (n 282) 61.

be modified under FCA Factory. Under FCA Factory, the responsibility is passed on to the carrier at the CY, which is named in the B/L. However, one must be careful to establish the delivery point agreed between parties to the contract of sale, which is the seller's factory. Consequently, the risk passes from the seller to the buyer at the former's factory; the latter carries the risk beyond this point.[311] The seller is also not obliged to pay for the domestic handling charges. Essentially, this term would be the most advantageous for the seller.

The second term is "FCA Station". If the parties agree upon this term, the seller has to load the goods in containers and transport them by truck to the train station, where the containers are handed over to the carrier. The train station signifies the point at which risk and costs are transferred from the seller to the buyer. The seller is not necessarily required to transport the goods personally from their warehouse to the train station, as this responsibility may be outsourced to a freight forwarder.[312] In Europe and the United States, trains are often used to carry containers inland to the coast to be shipped internationally. This applies less to South Korea, where the train infrastructure remains underdeveloped. Therefore, this term will only gain firm acceptance once rail connections are more extensively developed.

The third term is "FCA ICD".[313] It is not uncommon that a seller is unable to sell sufficient goods to fill the container completely. Such partially loaded containers are called "less-than-container load" (LCL). The procedure in this situation is usually that the LCL cargo is delivered to a CFS ICD, where the goods are combined with others, resulting in a FCL. Subsequently, the FCL container will be delivered to the CY. Under FCA ICD, the seller is obliged to deliver the goods to the depot by truck, where they are combined with other goods and handed over to the carrier nominated by the buyer. The point of delivery is also the time at which risk passes.[314]

Finally, there is the term "FCA CT".[315] Under this term, the seller delivers the goods to a CY or CFS in the harbour's CT.[316] As in the case of FCA, the buyer will be responsible for the contract of carriage and will have to notify the seller when and where the goods must be delivered and handed over to the carrier.[317] The seller will not be responsible for unloading the goods from the truck and will bear the costs and risks only during the loading process onto the truck.[318]

In summary, the misuse of Incoterms® can cause differences in the interpretation and determination of the passing of risk and the point of

311 Lee and Huh (n 282) 61.
312 Lee and Huh (n 282) 61.
313 Inland Container Depot (ICD).
314 Lee and Huh (n 282) 62.
315 Container Terminal (CT).
316 Lee and Huh (n 282) 62.
317 International Chamber of Commerce (ICC) *Incoterms® 2020* (n 3) par B10 (FCA).
318 Lee and Huh (n 282) 62.

delivery.[319] The exporter might be liable for damage or loss of the goods even when they are not under the seller's control. In addition, problems might arise with transport documents[320] where a L/C is used since the provisions of the UCP 600 need to be complied with. The South Korean merchants also support the ICC's intention in the 2020 revision not to use "waterway" Incoterms® for containerised sea freight.

12 Considerations in the Revision of Incoterms® 2020[321]

Several issues were considered during the revision process of the Incoterms® 2020.[322] For the first time, Australia and China were represented in the drafting committee, which European countries had previously dominated.[323] The drafting committee convened periodically to address the issues raised by the member countries of the ICC. These concerns were initially addressed at the national level before being referred to the international headquarters.[324] The primary aim of the 2020 revision is to ensure greater clarity and practicality.[325] In the previous version, Incoterms® 2010, certain areas were unclear, which could lead to potential misunderstandings. The revision sought to provide users with universally comprehensible terms through clear, simple language complemented by illustrative examples.[326] It is important to note that the drafting committee aimed to make the Incoterms® more user-friendly and accessible. In retrospect, the effort to enhance the clarity and usability of the rules has been largely

319 Lee and Huh (n 282) 63.

320 Lee and Huh (n 282) 63.

321 The authors wish to express their heartfelt gratitude to Mr Patrick Corbin, President of the International Chamber of Commerce South Africa, Johannesburg, for his insightful and thought-provoking discussions on this topic, which greatly enriched our understanding.

322 See, in this regard, Intradebook "Incoterms 2020: possible changes" at https://blog.intradebook.com/en/incoterms-2020-possible-changes/.

323 Llamazares "Incoterms 2020: main changes" at https://www.globalnegotiator.com/blog_en/incoterms-2020-main-changes/; and http://globalnegotiator.com/files/Incoterms-2020-changes.pdf; iContainers "What changes to expect for Incoterms 2020" at https://www.icontainers.com/us/2018/09/11/what-changes-to-expect-incoterms-2020/.

324 See Intradebook (n 322); Trade Finance Global "Incoterms 2020 – how should we prepare for huge Incoterms changes in 2019?" at https://www.tradefinanceglobal.com/freight-forwarding/incoterms-2020/.

325 O'Connor (n 81) states: "I can say that a general focus will be on making the rules easier to understand and use, to try to reduce misuse of the Incoterms rules, which can lead to costly consequences."

326 In fact, Roberto Laurino, Global Business Development Manager at iContainers (iContainers (n 323)), states: "Most issues with Incoterms we come across are due to a lack of knowledge of them or not knowing how to apply them properly. So going forward, it will not only help to have clearer and more differentiated Incoterms but also more enforcement to ensure they're being used correctly and adequately."

successful, with improvements as noted above.[327] Inexperienced users now have easier access to the content of the various Incoterms®, reducing the potential for misuse.

The ICC has maintained its recommendation regarding the applicability of the "waterway" Incoterms® for containerised sea freight. Furthermore, in the 2020 revision, the "multimodal" Incoterms® are designated for use with containerised sea freight. Given that the ICC Drafting Committee for Incoterms® stipulates that the risk transfers to the overseas buyer before shipment, the obligations of the contracting parties may be disproportionately allocated, particularly in the context of containerised sea freight.[328] This arrangement has generated dissatisfaction among both exporters and international importers. The central issue, therefore, is why the ICC continues to oppose the recommendation of the "waterway" Incoterms® for containerised sea freight. While it is acknowledged that the seller may face challenges in fulfilling the obligation to supply, one must question whether this justifies deeming these terms unsuitable, particularly when they are inherently intended for sea freight.

One potential avenue for future revisions of the Incoterms® could be for the ICC to reconsider its stance and allow the "waterway" Incoterms® to apply to containerised sea freight. The authors argue that although this change would not resolve the seller's duty to deliver the container on board or alongside the vessel, it would simplify the process of selecting terms for merchants and contribute to a more balanced allocation of obligations between sellers and buyers. However, the likelihood of such a change in the ICC's recommendation remains low. By introducing the new option in FCA B6, the ICC has indicated that future trends are unlikely to alter the current stance. If the ICC were to reconsider its position, the optional practice in B6 would likely have been incorporated into the FOB terms. Under FOB, the seller can deliver the container to the terminal only when applied to containerised sea freight. At this point, the carrier will not issue an on-board B/L, leaving the seller in the same position as under FCA. The seller can obtain an early shipped B/L only through an agreement with the buyer. Apart from the FCA B6 option, the Incoterms® 2020 offer minimal improvements over the Incoterms® 2010 with respect to containerised sea freight. Ultimately, the "waterway" Incoterms® are unlikely to play a significant role in one of the most critical sectors of cross-border trade.

327 See the discussion in par 2.

328 See Corbin (n 14).

Unmitigated Exorbitance of Assumed Jurisdiction under Malawian Private International Law

*Richard Mlambe**

1 Introduction

I had the privilege of meeting Professor Christopher Forsyth in November 2018 at the University of Johannesburg (UJ) during a conference on commercial private international law in India and South Africa. His paper was on how easy/difficult it was to enforce an Indian judgment in South Africa. I recall that during one of the coffee breaks, we had a conversation and upon learning that I was from Malawi, he shared with me about some of the assignments he had performed for the Malawi government, particularly in the area of administrative law. He encouraged me to be an active participant in private international law scholarship with a focus on Africa. Given this background, I feel not only pleased, but also obliged to respond to the invitation and join the Southern African private international law community in contributing to this *Festschrift*, in recognition of Prof Forsyth's distinguished scholarship in the subject. Let me also extend my deep gratitude to the first editor of this scholarly work, Professor Neels (who, apart from triggering my interest in the subject as my LLM supervisor at UJ, remains a great academic mentor), for inviting me to participate in the same and for bringing together scholars to deal with problems peculiar to our region within the continent.

I take this opportunity to engage with one aspect of the Malawian private international law system: assumed jurisdiction. Malawi being a common law system, it would be pertinent to begin by looking at the common law approach to jurisdiction *in personam*. In common law jurisdictions, the primary consideration in determining whether a court can hear and decide a case with foreign elements is the presence or absence of a defendant within the jurisdiction of the court seized with the claim. Traditionally, at common law, a court possesses jurisdiction over a defendant who is present within its territorial jurisdiction at the time of service of the summons.[1] If the defendant

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1 This was previously known as a "writ" in Malawi.

is not within the territory of the court, it lacks jurisdiction over him. As Briggs observes:

> Common law jurisdiction draws a fundamental distinction between cases where the defendant is and is not within the territorial jurisdiction of the court when the proceedings are commenced. For the jurisdiction of a court is established by the service of process, and the how and when of service of process depends on where the person to be served actually is. A claimant is entitled to serve process on a person who is present in England: jurisdiction may be established as of right. The common law takes the view that any person present in England is liable to be summoned to court by anyone else.[2]

This is also the position in Malawi. As stated by the High Court:

> … in so far as jurisdictional analysis is concerned, for actions *in personam* … this Court would exercise jurisdiction due to the presence of the defendant in Malawi and the fact that he was served with the summons here in Malawi despite the foreign factors connected to the case at hand. That is the common law rule on conflict of laws as established in the highly persuasive case of *Maharanee of Baroda v Wildenstein* [1972] 2 All ER 689. This Court finds no good reason for departing from the reasoning in this highly persuasive case. This persuasive decision reflects our own jurisprudence on the matter….[3]

The rationale for this position is that any person present within the court's jurisdiction owes allegiance to the sovereign of the country and is entitled to the protection of the laws of the territory. Accordingly, it is fitting and proper that they should also be subject to the jurisdiction of the courts of the territory.[4] For this reason, the common law confers on the court jurisdiction over any defendant present within its territorial jurisdiction even where their presence is temporary, casual, or in no way connected with the subject matter of the litigation.[5]

It has been contended that the mere presence of a defendant is an objectionable basis of jurisdiction in that it is too weak a connection for the court to assume jurisdiction over a defendant who, although present, is neither

2 A Briggs *The Conflict of Laws* (2013) 112.

3 *Pearson Holdings Southern Africa (Pty) Ltd v Nigel Doyle* [2021] MWHC 293 par 23. I had the privilege of providing expert advice on the private international law questions and argued this case on behalf of the claimant upon being instructed by the claimant's law firm, Messrs Mlauzi Legal Solutions.

4 *Colt Industries Inc v Sarlie* [1966] 1 WLR 440; *Calvin's Case* (1608) 7 Co Rep 1a.

5 *Watkins v North American Land and Timber Co Ltd* (1904) 20 TLR 534 (HL).

resident in nor otherwise sufficiently connected with the territory of the court.[6] Three issues may be stated in response to this concern. Firstly, the presence rule provides a measure of certainty.[7] A person who is present in any country should expect that the laws of the country are to govern some affairs as long as he is within the country's territory and that, accordingly, its courts should have jurisdiction over him in appropriate cases. Secondly, a measure of mitigation against the perceived excessiveness of jurisdiction conferred on the courts by the rule is available through the application of the doctrine of *forum non conveniens*.[8] Finally, jurisdiction based on the defendant's presence is exercisable only where the presence of the defendant within the territory of the court is voluntary and not where the defendant was tricked or forced into the jurisdiction.[9]

Apart from presence of the defendant, another recognized basis of jurisdiction at common law is the defendant's submission to the court's jurisdiction. The defendant's submission may be manifested by agreeing in advance to submit to the jurisdiction of a given court to resolve any dispute(s) arising out of his contractual relationship with the claimant, or by not objecting to the jurisdiction of the court that otherwise lacks jurisdiction. Indeed, in some common law courts, residence of the defendant is another recognized basis of jurisdiction.[10] In Canada, the courts have developed the common law and have adopted the "real and substantial connection" as an additional ground of jurisdiction.[11]

2 Adoption of Rules on Service Outside the Jurisdiction

Since the jurisdiction of the court was traditionally based on the presence of the defendant, it meant that the court had no jurisdiction over a defendant who was absent from the jurisdiction regardless of any connection, however strong,

6 T Hartley *International Commercial Litigation: Text, Cases and Materials on Private International Law* (2009) 78.

7 *Cf* the arguably less certain "real and substantial connection" test, which is a ground of jurisdiction under Canadian private international law.

8 Hartley (2009) (n 6). For the doctrine in general, see *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (England), *Amchem Products Inc v British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897 (Canada), *Gulf Oil Corp v Gilbert* 330 US 501 (1947) (United States), *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (Australia). The existence of the doctrine of *forum non conveniens* under South African law has been doubted – see *Agri Wire (Pty) Ltd v Commissioner, Competition Commission* 2013 5 SA 484 (SCA). It must also be noted that there are various formulations of the test to be applied in the *forum non conveniens* analysis. In particular, there are differences in the tests applied in England, Australia and the United States. Notwithstanding such differences, the bottom line is that the court engages in a comparative analysis of the relative appropriateness of itself and the alternative foreign court(s) as a forum to deal with the case in the interests of the parties and the ends of justice.

9 J O'Brien *Conflict of Laws* (1999) 183.

10 See R F Oppong *Private International Law in Commonwealth Africa* (2013) 64.

11 *Club Resorts Ltd v Van Breda* [2012] SCC 17.

between the defendant or the matter and the territory of the court. Therefore, the courts declined to exercise jurisdiction in cases that were sufficiently connected to their territories merely because the defendant was not physically present within the territory. This prompted some legislative interventions aimed at mitigating the deficiencies of the common law in this regard. In the words of Hartley:[12]

> Under the original common law, service of the claim form on the defendant within England was the only means of establishing jurisdiction. In the nineteenth century, however, the legislature intervened to make it possible to serve a claim form outside England and thus to obtain jurisdiction over persons outside the country.... Under this, a claim form could be served in a wide range of situations in which a connection existed either between the defendant and England or between the claim and England.

Apart from England, many other common law jurisdictions also adopted their own statutory rules to fill in the gaps of the common law and define the circumstances under which the courts could exercise jurisdiction over defendants who were not present within their territories. Under such statutory rules, the courts were given the power to issue a summons and order this summons to be served outside their territorial jurisdiction against defendants. Once service was effected, the courts were regarded as properly seized of the matter and could try the matter and enter judgment. The jurisdiction conferred on the courts over defendants outside jurisdiction through this legislative intervention is what is known as *assumed jurisdiction*. In Malawi, the relevant rules were provided under Order 11 of the Rules of the Supreme Court.[13] Therefore, like in other common law jurisdictions, the courts in Malawi were able to exercise jurisdiction over defendants not present in Malawi on the basis of any of the jurisdictional gateways under Order 11 of the Rules of the Supreme Court (hereinafter referred to as "O.11 RSC").

As was the case with common law rules, the statutory rules for service of summons outside jurisdiction have not escaped criticism. In particular, the rules were said to confer on the courts excessive or, as will be referred to in this paper, *exorbitant* jurisdiction. To mitigate the perceived exorbitance of jurisdiction, the doctrine of *forum non conveniens* was introduced into the rules, by which the courts were able to decline to exercise jurisdiction founded on the rules of service out of jurisdiction in favour of foreign courts which were deemed to be better suited to handle the matter in any particular case before them. As Oppong states:

12 Hartley (2009) 96.

13 These rules are no longer in force. They were replaced by the rules that are the subject of discussion in this paper.

> In all the common law countries, a plaintiff is not entitled to have a writ issued for service abroad or to be served abroad – it is within the discretion of the court to so order and it is a discretion which is exercised with care and caution. The courts have reasoned that this is necessary not only because of the seemingly "extra-territorial" nature of the exercise of the respective jurisdiction, but in most cases, the application is also made *ex-parte* and the defendant is not before the court. In the words of one Nigerian judge, the court owes a duty to determine whether the person sought to be served out of the jurisdiction can be conveniently tried elsewhere.[14]

Ultimately, it became well established that a court had inherent and discretionary power to decline to exercise jurisdiction in favour of a foreign court deemed more appropriate to hear and determine the matter, whether jurisdiction was based on presence of the defendant at common law or by way of assumed jurisdiction.

As stated above, the court's power to permit service of summons out of Malawi to found jurisdiction was statutorily provided under O.11 RSC. Those rules provided for a number of situations under which the court could permit service of writ outside Malawi. To succeed, the applicant had to establish three issues: firstly, that there was a serious issue to be tried; secondly, that the matter fell within at least one of the specified jurisdictional gateways (for example, that the contract in issue was breached in Malawi or that the action concerned land situated in Malawi); and, lastly, that Malawi was an appropriate forum to try the matter.[15] Accordingly, under those rules, service of writ outside Malawi was not as of right. It was for the court to determine whether any given case was a proper one in which to grant permission to serve writ outside Malawi in the exercise of its judicial discretion. Therefore, the court was not bound to grant permission to serve writ outside Malawi even where one or more of the jurisdictional gateways were established by the applicant. Indeed, in all other common law jurisdictions permitting service of summons *ex-juris*, the courts' power to order such service is discretionary in nature.

3 The Current Rules

In October 2017, O.11 RSC was replaced by Order 8 Rule 30 of the Courts (High Court) (Civil Procedure) Rules (hereinafter referred to as "these rules" or "the rules").[16] These rules represent the current law on service of summons outside Malawi, to which I now turn.

14 Oppong (2013) 67.

15 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

16 See also Section 11(a) of the Courts Act (Ch 3:02 of the Laws of Malawi), which gives the High Court general jurisdiction to order service out of the jurisdiction in accordance with the present rules of court.

For purposes of clarity, the rules are reproduced in their entirety. They provide as follows:

> 30.(1) A party may apply to the Court for an order that a summons in the Court be served outside Malawi.
>
> (2) The Court shall, on application, order that a summons or other process be served outside Malawi where the Court is satisfied that the party seeking permission has a good and arguable case for the relief sought by the party in the proceeding, and –
>
> (a) the claim concerns land in Malawi;
>
> (b) an Act of Parliament, deed, will, contract, obligation or liability affecting land in Malawi is sought to be interpreted, rectified, set aside or enforced;
>
> (c) the claim is against a person who is domiciled or ordinarily resident in Malawi;
>
> (d) the claim is for the administration of an estate of a person who was domiciled in Malawi at the date of the person's death;
>
> (e) the claim is for the execution of a trust, the person to be served is the trustee, and the trust concerns property in Malawi;
>
> (f) the claim concerns a contract made in Malawi or governed by the law of Malawi;
>
> (g) the claim is based on a breach of contract committed in Malawi, whether or not the contract was made in Malawi;
>
> (h) the claim is based on a tort committed in Malawi;
>
> (i) the claim is for damage suffered in Malawi, whether or not the tort causing the damage happened in Malawi;
>
> (j) the claim is for an amount payable under any law to a public institution in Malawi;
>
> (k) the proceeding is brought against a person in Malawi and the other person outside Malawi is a necessary party to the proceeding;
>
> (l) the proceeding is for an injunction ordering the person to do or not do anything in Malawi, whether or not damages are claimed; or
>
> (m) for any other reason the Court is satisfied that it is necessary for the claim to be served on a person outside Malawi.
>
> ....
>
> (3) An order that a summons or other process be served outside Malawi shall be on such terms and conditions as the Court considers appropriate.

A quick observation on the rules is that, like O. 11 RSC, the applicant for permission to serve summons outside Malawi must show that there is *a good and*

arguable case, and that the case falls within at least one of the specified heads of jurisdiction. The question that arises is whether there is also discretionary power, on the part of the courts, to consider whether the Malawian court is the appropriate forum to determine the matter and whether the order should accordingly be granted. For reasons that will be given below, it is the present author's view that the contents of the rules suggest that the court does not have such powers.

4 Interpreting the Rules

Firstly, it should be noted that the rules are framed in mandatory terms. They state that "[t]he Court *shall*, on application, order that a summons or other process be served outside Malawi where the Court is satisfied [that any one of the jurisdictional gateways is established and that the applicant has a good arguable case]". It is a settled principle of statutory interpretation that, where a rule stipulates that a certain act *shall* be done by any person, the specified act becomes mandatory, unlike where the prescription is that the act *may* be done.[17] In the latter case, it is up to the person upon whom the power is conferred to decide whether to exercise the power or not. In that case, the power is only conferred, but not required to be exercised. There is nothing, in the present author's view, to suggest that the use of the term "shall" in these rules and, in particular, under order 8 rule 30(2) of these rules, was accompanied by any intent, on the part of the drafters, to convey anything different from the natural and ordinary meaning of the term "shall" as generally understood in law.

In coming to this conclusion, I am alive to the fact that there are several other provisions in the rules giving the court discretionary powers. For example, the courts are given discretionary powers to make orders where there is failure to comply with the rules by any party.[18] They have the power to extend or abridge time,[19] the power to make an order that a case shall not undergo mandatory mediation[20] and they can make orders as to costs.[21] In all these cases, the rules provide that the court *may* exercise those powers, which means that the powers are discretionary and that, if it appears to the court that there are good reasons, the court is entitled to refuse to exercise such powers even where it is moved by a party to exercise the powers. Therefore, there is no doubt that a court faced with an application for an order to serve summons outside Malawi has no discretion to refuse that order and is bound to grant it because the law states that the court *shall* do so. Once an application for an order that summons be

17 R Sullivan *Statutory Interpretation* (2007). The learned author states: "The word 'shall' … is used in legislation to impose a duty on persons or to indicate the binding character of conditions or rules. 'Shall' is always imperative in the sense that it always imposes binding duties or requirements."

18 Order 2 rule 3.

19 Order 3 rule 5.

20 Order 13 rule 1(2)(d).

21 Order 31 rule 3.

served outside Malawi is filed, the court's analysis and consideration is limited to determining whether any one of the heads of jurisdiction is applicable to the applicant's case and whether there is a good, arguable case. If the answers to these questions are positive, the court *must* grant the order. The court is not at liberty to carry out an inquiry into the appropriateness of the Malawian court to hear and decide the case on the basis of the common law doctrine of *forum non conveniens* or otherwise. After all, under Malawian law, common law is subject to statutory law.[22]

It is interesting to note that while the courts do not have the discretion to consider whether they are appropriate forums when an application for service of summons *ex-juris* is filed, the courts have retained and, in fact, exercise the discretion to carry out a *forum non conveniens* analysis in matters where the defendant was present in Malawi at the time of service. The case of *Pearson Holdings Southern Africa (Pty) Ltd v Nigel Doyle*,[23] referred to above, demonstrates this. In this case, the defendant had been served with summons in Malawi. He made an application that the court should decline to exercise jurisdiction in favour of South African courts on the basis, *inter alia*, that South African courts were more appropriate to determine the matter than Malawian courts. The claimant opposed the application and maintained that Malawian courts were the appropriate forum. In its ruling, the court categorically stated as follows:

> As indicated by the claimant, the defendant having raised the issue of *forum non conveniens* then bore the burden of showing that there is another jurisdiction that is more appropriately suitable to determine the present matter. Having considered the factors present in this matter, this Court agrees with the claimant that it is more suitable in the interests of the parties and the ends of justice that this Court exercises its jurisdiction to try this matter. The defendant has therefore failed to prove his claim of *forum non conveniens* given that he is resident here and carries on his business here and it is most convenient that this matter be tried here. Should the claimant succeed on its claims, it will also be easier to enforce the decision in this matter rather than commencing proceedings in South Africa or England and then coming here to go through the process of registration of a foreign judgment.[24]

Therefore, the law is settled that where the defendant is served within Malawi, the courts have the discretion to decline jurisdiction in favour of foreign courts if it is established that there is a clearly more appropriate foreign forum. This gives rise to the question whether the framers of these rules intended to remove such discretion only where permission was sought to serve summons outside Malawi. I do not think that the legislature intended this. To begin with, there

22 Section 48(2) of the Constitution of Malawi.

23 Civil Cause No. 298 of 2021 [2021] MWHC 293.

24 Pars 26 and 27.

is nothing in principle that justifies the differential treatment between cases in which the defendant was served in Malawi and cases in which service was effected on the defendant outside Malawi. The need to determine whether a Malawian court would be the appropriate court to deal with the case before it is as important where the defendant is served in Malawi as it is where service was effected out of the jurisdiction. It is, therefore, not correct, as seems to be presently the case under Malawian law, that the doctrine of *forum non conveniens* becomes irrelevant where the case before the court involves service of summons *ex-juris*.

The core function of the doctrine of *forum non conveniens* is to mitigate the perceived exorbitance of jurisdiction based on the presence of the defendant where the case is closely connected to another jurisdiction that is clearly the more appropriate forum. The same considerations, it is submitted, apply in cases involving service of summons outside Malawi. The heads of jurisdiction specified in the rules may, in some cases, be so weak that it would be in the interest of the parties and the ends of justice to allow the parties to litigate in another jurisdiction that the court finds to be a more appropriate forum. This paper finds the position that the doctrine of *forum non conveniens* is to apply only where the defendant was served in Malawi, and not when the summons is served outside Malawi, unsatisfactory.

It would perhaps be appropriate to illustrate, with a hypothetical scenario, how the mandatory requirement for the issuance of orders for service of summons *ex-juris* under the rules may lead to unacceptable consequences. Let us suppose that X (buyer) and Y (seller) enter into a contract for the sale of certain machinery. Both are resident, domiciled and conducting business in Kenya and have no establishments outside Kenya. The machine breaks down shortly after commissioning but after full payment was made by X. Later, X decides to take a vacation and spend three months as a tourist in Malawi. A week after his arrival in Malawi, he decides to sue Y for breach of contract. He discovers that clause 17 of his contract with Y provides that their contract is governed by the laws of Malawi.[25] Further, he learns that under Malawian law a court may make an order for service of summons outside Malawi and assume jurisdiction where a claim concerns a contract governed by the laws of Malawi.[26] He commences an action against Y in Malawi and founds jurisdiction on the fact that Malawian law governs the contract. Upon being served with the summons in Kenya, the defendant files an application before the Malawian court for it to decline

25 For present purposes, any question regarding the enforceability of the choice of Malawian law in this hypothetical case, seeing that all the relevant connecting factors are with Kenya alone, is not part of the discussion. What is at issue here is that the only relevant connection with Malawi is the choice of Malawian law to govern the contract. It should further be noted that the presence and residence of the plaintiff/claimant in Malawi is irrelevant for jurisdictional purposes both at common law and under the rules and is, therefore, not a basis of jurisdiction.

26 Order 8 Rule 30(1)(f) of the rules provides as such.

jurisdiction in favour of Kenyan courts on the basis that all relevant connecting factors – in particular, the residence and domicile of the parties, their places of business, the fact that the contract was entered into and was performed in Kenya, and that all witnesses were in Kenya – made Kenya the clearly more appropriate forum to try the matter for the interests of the parties and the ends of justice. In response, X contends that although, admittedly, Kenyan courts have jurisdiction to hear and determine the matter, and all relevant connecting factors point towards Kenya as the natural forum, the Malawian court ought to grant the order sought, and the same cannot be denied or subsequently set aside because Kenya is clearly the more appropriate forum, since the rules make the issuance of such orders mandatory.

Based on the clear provisions of the rules, the court would be bound to grant the order for service outside Malawi in favour of X, notwithstanding the overwhelming connection of the parties and the matter with Kenya. The defendant will be compelled to incur the expenses of defending the matter in Malawi and the Malawian court will be required to entertain a matter that has practically no connection with Malawi, adding to its backlog of cases. This was clearly not the intended effect of the rules by the framers. The rules were not intended to require the courts to deal with disputes between two private parties that have little or no connection with Malawi, such as the above hypothetical case.

How, then, should the consequences of the mandatory issuance of orders for service of summons *ex-juris* be addressed (since the rules are statutory)? It is an elementary rule of statutory interpretation that once the natural and ordinary meaning of a statute leads to unacceptable consequences/absurdity, the court is entitled to adopt another meaning that does not lead to absurdity. In that case, the literal interpretation of the statutory provision should be eschewed in favour of a different interpretation that avoids absurdity.

It must, however, be understood that the court's power to avoid absurd consequences of a statutory provision are exercisable where, within the terms of the statutory provision being interpreted, a different meaning, which is not absurd, is possible. In other words, an absurd interpretation will be avoided where there is another competing/alternative interpretation of the statutory provision which the provision in question is capable of bearing without introducing any changes to the legislative text. It does not give the court the power to amend the statutory provision. Courts must always be cautious in safeguarding the distinction between *interpretation* and *amendment* of laws. The former is certainly within their sphere, but not the latter. Accordingly, it is argued that the mandatory requirement of the rules that an order for service of summons outside Malawi must be granted when the stipulated requirements have been met by the applicant and that the court has no power to decline the order on the basis that there is a foreign court which is a clearly more appropriate forum to decide the case, cannot be cured by the courts' adoption of a different interpretation of the rules by holding that the courts have the

discretion to decline the orders. I am unable to see an alternative interpretation that leads to the avoidance of the mandatory nature of the rules.

A related, but different, contention may be that since the court has inherent jurisdiction to prevent abuse of its process, Malawian courts retain inherent jurisdiction to refuse to order service outside Malawi where Malawi is an inappropriate forum, as to do so would be tantamount to allowing the applicant to abuse its process. As Oppong aptly puts it:

> The power of courts to decline to exercise jurisdiction in circumstances where they already have jurisdiction is an important feature of the rules on jurisdiction in most of the countries under study. Arguably, this is part of the inherent jurisdiction of the courts since in none of the countries under study is this power directly provided for by legislation.[27]

It is important at this point to understand what inherent jurisdiction is. In the English case of *Grobbelaar v News Group Newspapers Ltd*,[28] it was defined as follows:

> The inherent jurisdiction of the court may be defined as being the reserve or fund of power, residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

In the Malawian case of *State (on Application of Esther Cecilia Kathumba) v the President of Malawi*,[29] the High Court stated that "[a]nother way of putting it is that inherent jurisdiction remains the means by which Courts deal with circumstances not prescribed or specifically addressed by rule or statute, but which must be addressed to promote the just, speedy, and inexpensive determination of an action".

It must be clear, therefore, that the inherent jurisdiction of the court exists and is exercisable where there is no prescribed rule, statutory or otherwise, on a point, and the existence of such rule is indispensable in order to, among other things, do justice between the parties.

For present purposes, it may be argued that since the mandatory requirement to make orders for service out of jurisdiction leads to the exercise of jurisdiction by the courts in circumstances that compel the defendant to litigate before the Malawian court when there is a clearly more appropriate foreign

27 Oppong (2013) 106.

28 [2002] WLR 3024 , quoted from Jacob "The Inherent Jurisdiction of the Court" 1970 Current Legal Problems 23 51.

29 Judicial Review 22 of 2020 [2020] MWHC 8.

court, Malawian courts have inherent jurisdiction to decline to order permission for service outside Malawi, since to do so might be against the interests of justice. The question that arises is whether a court has inherent jurisdiction to refuse to exercise power that it is expressly *required* by statute. The present author does not think so. It is submitted that the rationale for allowing courts to exercise some residual inherent jurisdiction is to enable courts to fill gaps that were inadvertently left in legislative drafting. This is quite different from allowing courts to refuse to exercise power they are expressly bound to exercise. It is, therefore, our contention that the courts do not have inherent jurisdiction to contradict statutory provision. Indeed, there is support for this view in the decision of the Supreme Court of Canada in the case of *Baxter Student Housing Ltd v College Housing Co-operative Ltd*.[30] The court stated:

> In my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities which a court simply cannot do. … *Montreal Trust Company et al v Churchill Forest Industries (Manitoba) Limited* may well be cited as a paradigm of the exercise of judicial discretion but Chief Justice Freedman, speaking for all his colleagues, was careful to state, p. 547: "Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case."

It is, therefore, submitted that the courts do not have inherent power to decline to make orders that summons be served outside Malawi, since, under the rules, they are expressly mandated to do so. To hold otherwise would be tantamount to allowing the courts to refuse to exercise jurisdiction they are required to exercise by statute.

In view of the above discussion, it is concluded that under Malawian private international law, the courts have no power to decline to exercise assumed jurisdiction in favour of foreign more appropriate forums. Notwithstanding the exorbitance of assumed jurisdiction under the rules, the said rules preclude the courts from exercising discretion to decline exercising the jurisdiction when it is clearly unfair to the defendant to do so. It can therefore be argued, as I hereby do, that as the rules on assumed jurisdiction under Malawian private international law stand, they are in a state of *exorbitance* which is left *unmitigated*.

This position of the law is unsatisfactory in a number of respects. Firstly, as demonstrated above, the doctrine of *forum non conveniens* remains relevant even in cases involving service *ex-juris*. Where a case before a Malawian court

30 [1976] 2 SCR 475 480.

has foreign elements and the defendant was served outside Malawi, it is important for the court to approach the jurisdictional question with caution. The court should satisfy itself that at least one of the recognized grounds of jurisdiction has been established. Having been so satisfied, the court ought to take cognizance of the fact that other legal systems may have connections with the same matter and may similarly have jurisdiction to determine the matter. It is in view of this that the consideration of the appropriateness of the forum to hear and determine the matter arises. At common law, courts have taken the view, which the present author commends, that it is not proper for a court to insist on exercising jurisdiction in a matter where there is another forum that is more appropriate to determine the matter in the interests of the parties and the ends of justice.

The approach of the common law to the jurisdictional question is commendable as it demonstrates a balancing of the interests of both the claimant and the defendant in deciding whether to exercise jurisdiction. The adoption of the rules on service of summons outside jurisdiction, on the other hand, ensures that the absence of the defendant should not be a bar to the claimant's entitlement to commence the action within the forum. In that case, the claimant's right of access to justice is protected. However, the equality of the parties before the law demands that, while the court should be open to claimants who seek remedies through the machinery of the court, it should consider the position of the defendant and avoid subjecting him to jurisdiction which, although it may exist, would subject the defendant to unjustified expenses and other difficulties. The courts have the responsibility of preventing claimants from doing so by allowing defendants to present their case on why the court should decline jurisdiction in favour of a more appropriate forum. This should be the case whether the defendant was served with the summons within or outside of the jurisdiction.

It can be argued that another solution to the problem of unmitigated jurisdictional exorbitance under these rules is to limit the application of the mandatory requirement for the issuance of the orders to the stage at which the court is requested to consider an application (usually *ex-parte*) to make the order for service of summons outside Malawi, and that the same is without prejudice to the court's power to exercise its discretion where the defendant subsequently applies for the order to be set aside. Stated differently, where service has been effected on a defendant outside Malawi, the defendant may apply to the court to set aside the order and decline jurisdiction on *forum non conveniens* grounds and that, at that stage, the mandatory requirement does not apply and the court is entitled to exercise its discretion.

The current author is of the view that such an interpretation would have been possible only if the word used was "may" and not "shall". If that were the case, it would have been plausible to argue that, even in the absence of an express reference to the doctrine of *forum non conveniens* in the rules, it would have been open to the court to revisit/reconsider the exercise of its discretion in

determining the initial application since, being an application based on affidavit evidence and *ex-parte*, the defendant would not have had the opportunity to address the court and raise any objection to the jurisdiction available to him. However, the mandatory wording of the rules leaves no room for such discretion at any stage. Such an interpretation of the rules would also mean that there will be a distinction in the availability of the court's discretion to stay proceedings on the basis of the *forum non conveniens* analysis depending merely on the stage at which the court is considering the application whether summons should be served outside Malawi, which distinction I find to be irrational and arbitrary.

Order 8(3) of the rules is another interesting provision that deserves attention in this discussion. The rule provides that "[a]n order that a summons or other process be served outside Malawi shall be on such terms and conditions as the Court considers appropriate". Does this provision confer on the court any power to decline to order service of summons outside Malawi on the basis of *forum non conveniens*? My view is that it does not. This view is taken because the provision presupposes that the *terms and conditions* referred to would be imposed by the court and would appear in the order for service of summons *ex-juris*. In other words, when the court decides to grant the order for service of summons out of Malawi, this provision gives it the power to impose any terms and conditions that it deems appropriate and these have to be complied with by the parties in handling the order. Such terms and conditions may include the means of service of the order or any requirements for proof of service of the order.

A look at the contents of the provisions governing the service of process out of Malawi in the magistrate courts buttresses the above understanding of the meaning and effect of Order 8(3) of the rules. The magistrate courts in Malawi have also been given the power to order service of summons outside Malawi based on specified heads of jurisdiction. Under Order IX rule 1(2) of those relevant rules it is provided that "[a]ny order giving leave to effect such service shall direct in what mode service is to be effected and how such service may be proved".[31] My view is that the provision that gives the court the power to *order that a summons or other process be served outside Malawi on such terms and conditions as the court considers appropriate* was intended to give the court the power to stipulate how the court's order may be handled on such matters as the means and proof of service and any other matters, as the court may deem appropriate. Therefore, Order 8(3) does not provide any basis for the exercise of discretion to decline to grant the order on *forum non conveniens* grounds.

In conclusion, it is the position taken here that the court's powers to decline jurisdiction in favour of a foreign clearly more appropriate forum is not capable of being exercised under the rules, as the current wording of the rules does not make such an interpretation possible. The only possible way to achieve it is by effecting an amendment to the rules, as will be recommended below.

31 Subordinate Courts Rules enacted under sec 59 of the Courts Act, Ch 3:02 of the Laws of Malawi.

5 Other Problems in the Rules

Before the discussion is concluded, the paper proceeds to discuss two other issues, namely, (a) jurisdiction based on necessity, and (b) (in)adequacy of the listed jurisdictional bases.

With regard to jurisdiction based on necessity, the rules provide that the court may order service of summons outside Malawi if "for any other reason the Court is satisfied that it is *necessary* for the claim to be served on a person outside Malawi".[32] Notwithstanding the above lamentation on the unmitigated exorbitance of jurisdiction created by these rules through the total exclusion of the *forum non conveniens* analysis, this provision appears to confer on Malawian courts the power to act as *forums of necessity*. The rules, however, do not define or provide any guidance on what amounts to necessity for jurisdictional purposes.

According to Walker, "[a] court may exercise jurisdiction as a forum of necessity even though none of the traditional bases of jurisdiction exists when the proceedings cannot possibly be instituted elsewhere or where the institution of such proceedings elsewhere cannot reasonably be required".[33]

The question, therefore, is whether the Malawian legislature intended to include this novel and highly controversial ground of jurisdiction in the rules and, if so, what its precise meaning is (*viz* what test are the courts to apply in order to find that necessity is established).

It is hereby submitted that the rules should not maintain this ground of jurisdiction for a number of reasons. To begin with, the predecessor rules did not provide for this ground of jurisdiction and the experience of Malawian courts in the litigation before them does not exhibit any need for this additional ground of jurisdiction in Malawi. Further, a survey of the rules on service *ex-juris* obtaining in other common law countries demonstrates that necessity, generally, does not enjoy acceptance/support as a legitimate ground of jurisdiction in private international law, whether as a traditional basis of jurisdiction or under the rules for service outside jurisdiction. The author looked at the rules of services out of jurisdiction for England, Gambia, Ghana, Kenya, Nigeria, Sierra Leone, Uganda, and Zambia. In none of these jurisdictions is necessity recognized as a ground of jurisdiction under the applicable rules. At common law, necessity has been doubted as a legitimate ground of jurisdiction. As Fentiman has observed, "English law [including the common law] has no general doctrine of *forum necessitates*".[34]

Perhaps the conspicuous exception in the common law is Canada. In the celebrated case of *Club Resorts Ltd v Van Breda*,[35] the Supreme Court of Canada hinted at the possibility of adopting the forum of necessity doctrine. After

32 Order 8 rule 30(2)(m) of the rules.

33 J Walker "*Muscutt* Misplaced: The Future of Forum of Necessity Jurisdiction in Canada" 2009 *Canadian Business Law Journal* 135 137.

34 R Fentiman *International Commercial Litigation* (2015) 586.

35 2012 SCC 17.

discussing the "real and substantial connection" test as a basis of jurisdiction *simpliciter* at common law in Canada, the court stated:

> To recap, to meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. In these reasons, I have listed some presumptive connecting factors for tort claims.... If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors exist or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or stay the action, *subject to the possible application of the forum of necessity doctrine,* which I need not address in these reasons. If jurisdiction is established, the claim may proceed, subject to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*....[36]

It is to be seen how the courts in Canada shall continue to handle contentions that they have jurisdiction on the basis of necessity.[37] Outside Canada, the forum of necessity doctrine has not found favour. It is, therefore, unlikely that the Malawian legislature intended to adopt this doctrine in the Malawian private international law system. The present author submits that Malawi should be slow to move towards recognizing necessity as a ground of jurisdiction in the absence of strong and compelling justifications. It is recommended that this ground of jurisdiction should not be recognized in Malawi under the current circumstances.[38]

I now turn to the problem of (in)adequacy of the listed heads of jurisdiction. It would be pertinent at the outset, on this point, to consider a fundamental question, namely: what was the basis for identifying each of the jurisdictional gateways contained in the rules as a proper connecting factor to found jurisdiction in Malawi? Are the listed heads of jurisdiction adequate? Are there no other equally appropriate (or even more appropriate) connecting factors that were not included?

This brings us to the observations of Oppong on the same questions. He submits:

> Given that the common law does not allow for service out of jurisdiction and with the growing complexity of international litigation, it is open

36 Par 100 (my emphasis).

37 It must be noted that even in Canada courts seldom accept jurisdiction on this basis.

38 For a detailed discussion of the forum of necessity doctrine in Canada and the European Union (in the context of business and human rights litigation), see L Roorda and C Ryngaert "Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction" 2016 *The Rabel Journal of Comparative and International Private Law* 783–816.

> to question whether the existing heads of service out of jurisdiction are adequate. Indeed, there is a strong case to be made that the list of grounds upon which such service may be allowed needs to be expanded. For example, there is currently no head which allows for a writ to be served out of the jurisdiction in respect of an action to enforce a foreign judgment or arbitral award. Furthermore, the tort and contracts heads are currently worded in such a way that they appear to exclude restitutionary claims. Indeed, a Zambian court has held that an action to recover money paid by mistake of fact is not an action arising in any way from contract – it is also certainly not an action in tort and whatever cause of action it may be appears not to be covered under the current heads in any of the common law countries. The law in England, on which all the service out of jurisdiction provisions are based, has undergone significant changes since these common law countries borrowed from it. The time has therefore come for the law in these common law countries to be updated to reflect current needs.[39]

The present author can only echo these sentiments with regard to Malawian rules on service *ex-juris*. It is hereby contended that there are certain important and appropriate factors that present strong connections with Malawian courts for purposes of founding jurisdiction which are not included in the rules. For example, there is no rule providing that service outside Malawi may be ordered where the defendant is a party to a contract in which a choice of Malawian courts as a forum for litigation is contained or where recognition and enforcement of foreign judgments and arbitral awards against an absent defendant with assets in Malawi is sought.

In this connection, I call upon the Malawian legislator to effect a revision of the rules with the view to assessing their adequacy in providing for bases of jurisdiction in cases involving absent defendants. With increasing globalization and interconnectedness of legal systems in commerce and other areas of life, the various jurisdictions of the world ought to take a realistic approach to the framing and development of their rules of international jurisdiction under their private international law systems. Malawi, like every other jurisdiction, ought to take into account the demands of international commercial litigation and, in that regard, the country has the obligation to frame rules of international jurisdiction that do not lead to the denial of access to her courts by claimants who demonstrate a sufficient connection between the matter and Malawi. This will give foreign investors and businesses the confidence that they will be able to assert and enforce their rights under the Malawian courts where a real connection exists between their transactions and Malawi. However, in identifying the additional bases of jurisdiction, caution should be exercised to ensure that the listed jurisdictional gateways are those that are generally

39 Oppong (2013) 68.

regarded as legitimate bases for international competence by an appreciable number of other jurisdictions and the theories of private international law.

Before I conclude, I find it pertinent to briefly discuss the latest developments in Australia relevant to the discussion herein.[40] The Supreme Court Amendment Rules 2024 (Western Australia) (hereinafter referred to as RSC 2024 (WA)) have been adopted to amend the Rules of the Supreme Court 1971 (RSC 1971). RSC 2024 (WA) will be the applicable rules on service of originating process outside Western Australia effective 9 April 2024. A number of observations relevant to the present discussion can be made. Firstly, the court is not required to issue an order of service of originating process out of jurisdiction. The court may do so in its discretion and has the power to dismiss or stay proceedings or set aside service of originating process in the exercise of its discretion.[41] Secondly, the rules have adopted some bases of jurisdiction that were previously not recognized. In particular, service of originating process outside Australia may be effected when the person to be served submitted to the jurisdiction of Australian court,[42] when it is sought to recognize and enforce any judgment and arbitral awards[43] and when the claim is founded on a cause of action arising in Australia.[44] Thirdly, there is no provision that the court may make an order for service of originating process out of jurisdiction on the basis of necessity – *ie*, the court deems it necessary to do so for any reason. Further, it is worth noting that when service outside jurisdiction is not allowed under the specified heads of jurisdiction, an originating process may nevertheless be served outside Australia with leave of the court if it is satisfied that the claim has *a real and substantial connection with Australia*. In this regard, Western Australia joins Canada in recognizing the "real and substantial connection" as an independent basis of jurisdiction.[45] All in all, as observed by Dr Douglas,

40 After submission of what would have been the final version of this paper but before publication, new rules for service outside jurisdiction were introduced in Western Australia. Those rules were published in March 2024 and became effective on 9 April 2024. I am grateful to the editors for granting my last-minute request to add a few points to the discussion herein in view of the new Australian rules. For a brief overview of the background of the rules of service outside jurisdiction in Western Australia and some of the changes effected by the new Australian rules, see M Douglas "New rules for extra-territorial jurisdiction in Western Australia" published on conflictoflaws.net (27 March 2024) available at https://conflictoflaws.net/2024/new-rules-for-extra-territorial-jurisdiction-in-western-australia/comment-page-1/#comment-482514.

41 O.10 r.6(1) and (5); r.7 (1) and (2).

42 O.10 r.5(k).

43 O.10 r.5(m) and (q)(ii).

44 O.10 r.5(n).

45 While the basis of the "real and substantial connection" test in Western Australia is statute, in Canada it was adopted by the courts as a development of the common law; see n 36 above. For my discussion of the "real and substantial connection" test in the context of recognition and enforcement of foreign judgments, see

while these changes will be welcomed by some, they will be lamented by others. In the main, I applaud these developments. I recommend that the Malawian rules of service of summons outside jurisdiction move in the same direction.

6 Conclusion

In view of the discussion above, the following conclusions can be drawn.

Firstly, issuance of orders for service of summons outside Malawi by the courts is mandatory. The rules on service of summons outside Malawi do not give the court the discretion to consider whether to decline to exercise jurisdiction in favour of a foreign court on the ground that the latter court is a clearly more appropriate forum. Once an application for the order is filed, and the applicant shows that one of the specified heads of jurisdictions is established on the pleaded facts, and that there is a good and arguable case for the relief sought by the applicant, the Malawian court *must* grant the order.

Secondly, the rules have introduced a novel and controversial head of jurisdiction – jurisdiction based on necessity. Apart from Canada, all other common law jurisdictions that the author has examined in this study do not recognize necessity as a basis of jurisdiction. Under the traditional common law rules, necessity has not been generally accepted as a ground of jurisdiction.

Lastly, the adequacy of the listed heads of jurisdiction under the rules is doubtful.

Accordingly, the following is recommended. Firstly, the rules should be amended. The power of the court to order service out of Malawi should not be mandatory. The court should be allowed to decline, or set aside, an order for service of summons outside Malawi where an alternative forum possesses jurisdiction and is clearly more appropriate to decide the case in the interests of the parties and the ends of justice. The rules should be amended to provide that, in granting the order that summons be served outside Malawi, the Malawian court must have satisfied itself that it is a *forum conveniens*. This will not only be in line with the long and constant approach of the common law jurisdictions in such matters but will ensure that the perceived exorbitance of the rules on service of summons outside Malawi is mitigated.

Secondly, it is recommended that the rules should not make Malawi a forum of necessity. It is recommended that any adoption of necessity as a basis of international jurisdiction should be by way of judicial development and not subsidiary legislation, such as these rules. Should the courts decide to adopt it, it will certainly be informed by the experience of other courts, and the

R Mlambe "Presence as a basis for International jurisdiction of a foreign court under Nigerian private international law" published on conflictoflaws.net on 16 December 2020, available at https://conflictoflaws.net/2020/presence-as-a-basis-for-international-jurisdiction-of-a-foreign-court-under-nigerian-private-international-law/.

jurisprudence of those courts shall provide a proper basis for assessing whether it is a desirable basis of jurisdiction, generally, and in Malawi, particularly.

Lastly, the listed bases of jurisdiction need to be revised and provide for additional jurisdictional gateways that demonstrate a strong connection with Malawian courts, such as choice of Malawian courts to determine disputes in contracts.

Direct International Jurisdiction under OHADA Law

*Justin Monsenepwo**

1 Introduction

Created in 1993, the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*[1] (Organisation for the Harmonisation of Business Law in Africa, hereinafter referred to as OHADA) is an intergovernmental organisation which aims at unifying business law in Africa. The preamble of the OHADA Treaty affirms the determination and the desire of the member states "to reinforce legal and judicial security in the region of the Organisation for the Harmonisation of Business Law in Africa, in order to guarantee a climate of trust that will contribute to making Africa a centre of development". For that purpose, considerable efforts have been invested in the reinforcement of legal certainty via the adoption of Uniform Acts and regulations. Indeed, nearly thirty-one years after its creation, OHADA has adopted ten Uniform Acts which unify several areas of business law such as company law, general commercial law (including international sales agreements), arbitration and mediation, bankruptcy law, the law of security interests, the law of enforcement proceedings and accounting law.

However, less effort has been invested to ensure judicial security in the OHADA region. Indeed, except for the provisions governing the jurisdiction and the functioning of the Common Court of Justice and Arbitration (hereinafter referred to as CCJA), on the one hand, and the jurisdiction of national courts over specific situations foreseen in some Uniform Acts, on the other hand, there are no unified rules under OHADA law which courts of OHADA member states may use to determine if they have jurisdiction in international civil and commercial cases. Similarly, there are almost no unified provisions that ensure the rapid and simple recognition and enforcement of judgments given in an OHADA

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1 Treaty on the Harmonisation of Business Law in Africa (opened for signature 17 October 1993, entered into force 18 September 1995) J.O. OHADA 1, 1 November 1997, available at <http://www.ohada.com/traite/10/treaty-on-the-harmonisation-of-business-law-in-africa.html>. The OHADA Treaty was revised in Quebec on 17 October 2008 (available at <http://www.ohada.com/traite/937/treaty-on-the-harmonization-in-africa-of-business-law-signed-in-port-louis-on-17-october-1993-as-revised-in-quebec-on-17-october-2008.html>.

member state.[2] Consequently, the differences between and the vagaries of the national rules governing international jurisdiction, as well as the recognition and the execution of foreign judgments, remain, which significantly hampers the sound operation of the OHADA internal market.

This article first presents the purpose, the institutions, and the instruments of OHADA. It also examines the existing rules on direct international jurisdiction not only under OHADA law, but also under the national laws of the OHADA member states. Moreover, it also examines whether the domicile of the defendant is relevant for the application of the uniform provisions on direct international jurisdiction.

2 Presentation of the Organisation for the Harmonisation of Business Law in Africa (OHADA)

OHADA is an African supranational organisation which was created on 17 October 1993 by fourteen Central and Western African states[3] to increase their attractiveness to foreign investment. As per the preamble and article 1 of the Treaty on the Harmonisation of Business Law in Africa (hereinafter referred to as the OHADA Treaty), OHADA aims at creating simple, modern, and harmonised business regulations in Africa.[4] OHADA has five institutions: (i) The Conference of Heads of State and Government (*Conférence des Chefs d'Etat et de Gouvernement*);[5] (ii) the Council of Ministers (*Conseil des Ministres*);[6] (iii) the Common Court of Justice and Arbitration (the *Cour Commune de Justice et d'Arbitrage*, hereinafter referred to as CCJA);[7] (iv) the Regional Training Center

2 It is important to note that this paper focuses only on direct international jurisdiction under OHADA law. It does not examine the recognition and the enforcement of foreign judgments under OHADA law.

3 The initial fourteen states are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Mali, Niger, Senegal and Togo. Later, Guinea Bissau, Guinea Conakry, and the Democratic Republic of Congo became members of the organisation.

4 J Issa-Sayegh "Quelques Aspects Techniques de l'intégration juridique: l'exemple des Actes uniformes de l'OHADA" 1999 *Unif L Rev/I Rev Dr Unif* 5 20; and C M Dickerson "Harmonizing Business Law in Africa: OHADA Calls the Tune" 2005 *Columbia Journal of Transnational Law* 17.

5 Art 27(1) of the OHADA Treaty.

6 Art 27(2) to 30 of the OHADA Treaty; and J Issa-Sayegh, P Pougoué and F M Sawadogo *OHADA: Traité et Actes Uniformes commentés et annotés* (2014) 51 *et seq.*

7 Arts 14 to 26, 31, and 32 of the OHADA Treaty; Rules of Procedure of the Common Court of Justice and Arbitration of 18 April 1996 (*Règlement de Procédure de la Cour Commune de Justice et d'arbitrage*), J.O. OHADA n° 4; 01/11/97, 9 *et seq*; and Rule n° 001/2014/Cm Amending and Supplementing the Rules of Procedure of the Common Court of Justice and Arbitration of 18 April 1996 (*Règlement* n° 01/2014/Cm/OHADA *Modifiant et Complétant le Règlement de Procédure de la Cour Commune de Justice et d'arbitrage du 18 Avril 1996*). See Issa-Sayegh, Pougoué and Sawadogo (2014) 77 *et seq*, 1465 *et seq.*

for Legal Officers (*Ecole Régionale Supérieure de la Magistrature,* hereinafter referred to as ERSUMA);[8] and (v) the Permanent Secretariat (*Secretariat Permanent*).[9]

The Conference of Heads of State and Government has jurisdiction over all matters in respect of the OHADA Treaty.[10] The Council of Ministers determines the areas of business law to be harmonised and unanimously adopts Uniform Acts,[11] which are the main instruments of OHADA besides the regulations[12] and

8 Art 41 of the OHADA Treaty.

9 Art 40 of the OHADA Treaty.

10 I Fèviliyé "La Révision du Traité de l'OHADA" 2009 *Revue Congolaise de Droit et des Affaires* 1 40.

11 Uniform Acts are unified legal provisions that regulate a specific area of business law. See Art 2 of the OHADA Treaty for an indication of the areas which the concept of "business law" encompass under OHADA law. In its meeting which was held in Bangui in March 2001, the OHADA Council of Ministers decided to extend the list of areas that could be harmonised by OHADA. Pursuant to that resolution, the harmonisation program now embraces "competition law, banking law, intellectual property law, contract law and the law of evidence" (J.O. OHADA n° 12, 2003, 6). The text of the Conclusions of the 2002 meeting of the OHADA Council is available at <http://www.idcafrique.org/sites/default/files/journaux_officiels/12%20journal_officiel_n_12_0.pdf>. As of January 2019, the Council of Ministers have adopted ten uniform Acts: (i) the Uniform Act on the Law of Commercial Companies and Economic Interest Groups, which entered into force on 1 January 1998 (J.O. OHADA n° 2, 1 January 1997, 1 *et seq.*). This Uniform Act was revised on 5 May 2014; (ii) the Uniform Act on General Commercial Law, which entered into force on 1 January 1998 (J.O. OHADA n°23, 15 February 2011, 1 *et seq.*). This Uniform Act was revised on 15 May 2010; (iii) the Uniform Act on Secured Transactions, which entered into force on 1 January 1998 (J.O. OHADA n° 22, 15 February 2011). This Uniform Act was also revised on 15 December 2010; (iv) the Uniform Act on Simplified Procedures for Recovery and Enforcement, which entered into force on 10 July 1998 (J.O. OHADA n° 6, 1 June 1998, 1 *et seq.*); (v) the Uniform Act on Collective Proceedings for the Clearing of Debts, which entered into force on 1 January 1999 (J.O. OHADA n° 7, 1 July 1998, 1 *et seq.*); (vi) the Uniform Act on Arbitration Law, which was adopted on 23 November 2017 (J.O. OHADA, *numéro spécial*, 15 December 2017, 15 *et seq.*). This Uniform Act has replaced the Uniform Act on Arbitration Law of 11 March 1999; (vii) the Uniform Act on the Organisation and Harmonisation of Accounting of Companies, which was revised on 26 January 2017 (J.O. n° 10, 20 November 2000, 1 *et seq.*); (viii) the Uniform Act on Contracts of Carriage of Goods by Road of 22 March 2003 (J.O. OHADA n° 13, 31 July 2003, 3 *et seq.*) which entered into force on 1 January 2004; (ix) the Uniform Act on Cooperatives of 15 December 2010, which entered into force on 16 May 2011 (J.O. OHADA n° 23, 15 February 2011); and (x) the Uniform Act on Mediation, which was adopted on 23 November 2017 (J.O. OHADA *numéro spécial*, 15 December 2017, 5 *et seq.*).

12 Regulations are adopted by the Council of Ministers to complete and to implement the OHADA Treaty (art 4 of the OHADA Treaty). They are of the same nature as the OHADA Treaty: J Issa-Sayegh and J Lohoues-Oble *Harmonisation du droit des affaires, Collection Droit uniforme africain* (2002) 112. They are directly applicable in all member

the decisions.[13] The Permanent Secretariat is the executive body of OHADA. It is directed by a Permanent Secretary, who represents OHADA and assists the Council of Ministers. Attached to the Permanent Secretary of OHADA is ERSUMA, which is a training and documentation center on OHADA law. As regards the CCJA, it has four main functions. First, it controls the consistency of the drafts of the Uniform Acts with the OHADA Treaty before the Council of Ministers adopts them. Secondly, it plays the role of an arbitration centre. As such, it supervises the institutional arbitration pursuant to the OHADA Treaty and the Arbitration Rules of Procedure of the CCJA. Thirdly, the CCJA may be consulted by any member state, the Council of Ministers, or any national court for the interpretation of the OHADA Treaty, the regulations, the Uniform Acts, and the decisions of OHADA. Fourthly, the CCJA rules on decisions in civil and commercial matters which are taken by appellate courts of the member states in all matters pertaining to the application of OHADA law.[14]

3 Rules on Direct International Jurisdiction in the OHADA Region

3.1 The Uniform Rules on Direct International Jurisdiction of the National Courts under OHADA Law

Except for the Uniform Act on the Harmonization of the Accounts of Enterprises, all the Uniform Acts encompass provisions determining under which conditions the national courts have jurisdiction over a situation involving several OHADA member states or even non-OHADA states.[15] These uniform rules on international jurisdiction under OHADA law can be divided into four categories: firstly, those which directly determine the international jurisdiction of national courts; secondly, provisions which aim at ensuring the effectiveness of choice of court agreements; thirdly, those which determine territorial elements to be

states. As of January 2018, the Council has adopted the following regulations: (i) Rules of Procedure of the Common Court of Justice and Arbitration of 18 April 1996, as amended by Rule No. 001/2014/CM of 30 January 2014; (ii) the Arbitration Rules of the Common Court of Justice and Arbitration as amended on 23 November 2017; (iii) the Financial Regulations of the OHADA Institutions; and (iv) the OHADA Staff Regulations.

13 P Diedhou "L'article 10 du Traité de l'OHADA: quelle portée abrogatoire et supranationale?" 2007 *Revue de droit uniforme* 265; J Issa-Sayegh "La portée abrogatoire des Actes Uniformes de l'OHADA sur le droit interne des Etats-Parties" 2001 *Revue Burkinabè de Droit* 51 57; and D Abarchi "La Supranationalité OHADA" 2000 *Revue Burkinabé de Droit* 9.

14 K Linhart *Internationales Einheitsrecht und einheitliche Auslegung* (2005) 137.

15 Please note that this paper analyses only provisions giving jurisdiction to a court, and not to a judicial authority within a national court. For example, that is the case in arts 4-4, 5-2, 5-3, 11, and 14 of the Uniform Act on Collective Proceedings for the Clearing of Debts, which govern the powers of the *president of the competent court* (*president de la jurisdiction compétente*) over specific matters.

taken into account for the determination of the international jurisdiction of national courts; and fourthly, those which simply refer to national provisions.

3.1.1 *Uniform Rules Directly Determining the International Jurisdiction of National Courts in International Situations*

Some uniform rules directly determine when the court of an OHADA member state has jurisdiction over an international situation. For instance, under article 3-1 of the Uniform Act on Collective Proceedings for the Clearing of Debts, the court which has jurisdiction to adjudicate all procedures covered by the Uniform Act is that of the member state where the individual debtor has its principal establishment or where the debtor company's registered office is located. If the principal place of business or registered office is located abroad, the procedure must take place before the court of the member state where the main centre of operations of the individual debtor or company is located.[16] Further, under article 3(1) of the Uniform Act on Collective Proceedings for the Clearing of Debts, the court which deals with bankruptcy proceedings has jurisdiction over conciliation, preventive settlement, reorganisation of assets, and asset liquidation.[17] Moreover, pursuant to article 4-17 of the same Uniform Act, the competent court under articles 3 and 3-1 has jurisdiction to determine the compensation of the expert in preventive settlement or even to put an end to the preventive settlement in the absence of an arrangement.[18] As per article 15 of the same Uniform Act, the competent court under articles 3 and 3-1 has jurisdiction to confirm the proposed arrangement after the preventive settlement. That court also has jurisdiction to appoint a trustee or controllers to monitor the execution of the confirmed arrangement.[19] Moreover, if the debtor dies

16 This provision must be read in conjunction with art 3 of the same Uniform Act, which provides that each member state must, based on its internal judicial organisation, designate the courts which have jurisdiction to adjudicate procedures governed by the Uniform Act on Collective Proceedings for the Clearing of Debts. Title I of the Uniform Act on Collective Proceedings for the Clearing of Debts deals with the judicial administrator (arts 4 to 4-23 of the Uniform Act).

17 Art 3(1) must be read in conjunction with art 3-1(3) of the same Uniform Act, which provides that the court where the registered office or principal place of business of the legal entity is located shall have jurisdictional competence to rule on the preventive settlement, reorganisation or assets liquidation of jointly and severally liable individuals for its debts. According to art 3(2) of the same Uniform Act, that court also has jurisdiction to collect information on all disputes arising out of the bankruptcy procedure, those on which the bankruptcy proceedings have a legal influence as well as those related to personal bankruptcy and other sanctions except for disputes which are exclusively within the jurisdiction of the administrative, criminal and social courts.

18 See also arts 4-18 and 4-19 of the Uniform Act on Collective Proceedings for the Clearing of Debts.

19 Art 16(1) last sentence of the Uniform Act on Collective Proceedings for the Clearing of Debts.

insolvent, the competent court under articles 3 and 3-1 may open proceedings for the reorganisation or the assets liquidation within one year from the date of death.[20]

Additionally, under the *chapeau* "competent jurisdiction for interstate transportation" (*juridiction compétente en matière de transport inter-États*), chapter 5 of the Uniform Act on Contracts of Carriage of Goods by Road contains provisions that clearly define when the court of an OHADA member state has jurisdiction over an international dispute arising from the application of that Uniform Act. Article 27(1) of the Uniform Act on Contracts of Carriage of Goods by Road provides that claims arising from a contract of carriage of goods subject to the Uniform Act must be brought before the court of the member state where: (i) the defendant has its habitual residence or its headquarters; (ii) the branch or agency through which the carriage of goods agreement was concluded is located; (iii) the collection of the goods occurred; or (iv) the delivery of the goods is planned.[21]

3.1.2 Choice of Court Agreements

Article 27(1) of the Uniform Act on Contracts of Carriage of Goods by Road provides:

In the event of any dispute arising from an interstate transportation subject to this Uniform Act *and for which the parties have not assigned jurisdiction to a specific arbitral or State court* [my emphasis], the applicant may bring its claim before the courts of the country in which: a) the defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made; b) the goods were taken over by the carrier or the place designated for delivery is situated.

The phrase "for which the parties have not assigned jurisdiction to a specific arbitral or State court" allows parties to a contract of carriage of goods by road to depart from the provision in article 27(1) by designating the state court that would have jurisdiction over their dispute. It is important to underline that the choice of law under article 27(1) of the Uniform Act on Contracts of Carriage of Goods by Road is effective only if it is related to a dispute arising from a contract of carriage of goods by road subject to that Uniform Act. As regards the scope of application of the Uniform Act on Contracts of Carriage of Goods by Road, article 1(1) of the Uniform Act provides that it applies when the place of collection of the goods and the place designated for delivery, as specified in the agreement, are located either within the territory of an OHADA

20 Art 30 of the Uniform Act on Collective Proceedings for the Clearing of Debts.

21 See *Brasseries du Burkina (Brakina) v La Société Locamat Sarl and Carron Charles Christian* [2006] Tribunal de Grande Instance de Ouagadougou, Judgment n° 153/2006 of 5 April 2006.

member state, or within the territory of two different states, of which at least one is an OHADA member.[22]

Similarly, article 132 of the Uniform Act on General Commercial Law also contains a provision allowing parties to choose the court that will have jurisdiction over any dispute arising from their commercial lease agreement. It reads:

> *Unless otherwise agreed by the parties* [my emphasis], disputes arising from the application of the provisions of Title I of this Book shall be brought, at the request of the most diligent party, before the competent court, ruling expeditiously, in the jurisdiction where the leased premises are located, unless otherwise stipulated in this Book.

Although the phrase "unless otherwise agreed by the parties" is more concise than the rule formulated in Article 27(1) of the Uniform Act on Contracts of Carriage of Goods by Road, it allows the parties to choose a court which would have jurisdiction over any dispute arising from their commercial lease agreement. This provision in Article 132 of the Uniform Act on General Commercial Law raises four observations which must be elaborated on. First, besides article 27(1) of the Uniform Act on Contracts of Carriage of Goods by Road, it is the only provision that allows parties to choose the competent court. Therefore, under OHADA Uniform Acts, the possibility for the parties to choose the court that has jurisdiction over their dispute is limited to two types of contracts: contracts of carriage of goods by road, on the one hand, and commercial lease agreements, on the other hand. For all other contracts, such as international sales agreements, the choice of court will be governed by the domestic law of the relevant member state.[23] This creates two different regimes for choice of court agreements in the OHADA region. To rectify this

22 Note that the Uniform Act applies regardless of the domicile and nationality of the parties to the agreement. Moreover, the Uniform Act does not apply to the transportation of dangerous goods, funerary consignment, moving services or carriage performed under the terms of international postal conventions (art 1(1) of the Uniform Act on Contracts of Carriage of Goods by Road). See *La Compagnie Delmas v Compagnie Axa Assurances Côte D'ivoire (Ex-Union Africaine)* [2007] Supreme Court of Côte d>Ivoire, Judgment n° 204/07 of 12 April 2007, Actualités Juridiques n° 57 153.

23 For instance, with respect to choice of court agreements in commercial matters, art 51(2) of the Code of Civil Procedure of Burkina Faso provides: "Any clause which, directly or indirectly, derogates from the rules of territorial jurisdiction shall be deemed unwritten, unless it has been agreed between the persons who have all contracted as traders and such clause has been specified in a very clear manner in the commitment of the parties." The original version in French reads: "Toute clause qui, directement ou indirectement, déroge aux règles de compétence territoriale est réputée non écrite, à moins qu'elle n'ait été convenue entre les personnes ayant toutes contracté en qualité de commerçants et qu'elle n'ait été spécifiée de façon très apparentée dans l'engagement des parties à qui elle s'impose." See also *Sobitraf v*

situation and improve legal and judicial certainty, this paper suggests that OHADA adopt uniform rules that give effect to the choice of court agreements in civil and commercial matters.[24] Secondly, it is important to highlight that Article 27(1) of the Uniform Act on Contracts of Carriage of Goods by Road applies to *international* situations. This is evidenced by the *chapeau* of chapter 5, which reads "competent jurisdiction for *interstate* transportation" (*juridiction compétente en matière de transport inter-États*). Conversely, article 132 of the Uniform Act on General Commercial Law does not contain any element indicating that its scope of application is limited to international situations. Therefore, it can be contended that article 132 of the Uniform Act on General Commercial Law applies only to domestic situations and determines the territorial jurisdiction of the courts within a single member state. Only under exceptional circumstances can it apply to international situations, and then only by way of *extension* of the rules on domestic jurisdiction to international situations.[25] Thirdly, it is worth noting that allowing choice of court agreements for immovable property leases in international situations is unusual since conferring jurisdiction on a court other than the court where the immovable property is situated can lead to an evasion of the public policy rules that may exist in the member state where the immovable property is situated in respect of which the lease is concluded. In principle, if the chosen court did not apply the public policy rules of the member state where the leased immovable property is located, it would be almost impossible to recognise and enforce the judgment in the member state where the immovable property is situated. This is so because OHADA law does not provide for rules that ensure that any judgment rendered by the chosen court must be recognised and enforced in all the OHADA member states. If the situation is purely domestic, the problem does not arise. However, if the situation is international, the court of the member state where the leased premise is located can deny the recognition and the enforcement of the chosen court's judgment based on a manifest incompatibility with its public policy. Fourthly, because of their concise formulation, article 27(1) of the Uniform Act on Contracts of Carriage of Goods by Road and article 132 of the Uniform Act on General Commercial Law do not contain further rules to give effect to choice

Banque of Africa (BOA) [2008] Tribunal de Grande Instance de Ouagadougou (Burkina Faso), Judgment n° 074/2008 of 9 April 2008.

24 OHADA member states or even OHADA itself could also consider joining the Hague Convention of 30 June 2005 on Choice of Courts Agreements: Hague Conference on Private International Law *Proceedings of the Twentieth Session – Choice of Court* (2010).

25 As mentioned below, the extension of the provisions on domestic jurisdiction to international situations is used in several OHADA member states which do not have particular provisions on direct international jurisdiction. For instance, Art 988 of the *Code des personnes et de la famille* in Burkina Faso provides: "Unless otherwise provided, the rules of internal territorial jurisdiction determine the international jurisdiction of the Burkinabe courts." The CCJA has also applied purely internal jurisdiction provisions to international situations. See *SDV-Cote D'ivoire v Sté Rial Trading* [2004] CCJA, Judgment n° 021/2204 of 17 June 2004.

of court agreements under OHADA law. For instance, do these provisions apply only in international cases? Do they apply to non-exclusive choice of court agreements or solely to exclusive choice of court agreements? Are there any formal requirements for the validity of the choice of court agreement? On what grounds can a designated court decline to exercise its jurisdiction? On the other hand, under which conditions can a non-chosen court exercise jurisdiction? Does that provision require or preclude the granting, refusal, or termination of interim measures of protection by a court of an OHADA member state? The Uniform Act on Contracts of Carriage of Goods by Road and the Uniform Act on General Commercial Law do not address these questions. Pursuant to article 10 of the OHADA Treaty and an opinion of the CCJA,[26] national rules will apply to these issues. However, the domestic provisions of most member states do not expressly address these questions.[27] For example, under Congolese law, there is no legal provision on choice of court agreements in international civil and commercial contracts. Consequently, to remedy this situation and promote greater legal certainty for international trade and investment, OHADA should adopt uniform rules that give effect to choice of court agreements in civil and commercial matters.[28] As an alternative, the seventeen OHADA member states could join the Hague Convention of 30 June 2005 on Choice of Courts Agreements.[29]

3.1.3 Uniform Rules Containing Mere Territorial Criteria

The OHADA Uniform Acts encompass numerous provisions that merely contain territorial criteria. For instance, article 132 of the Uniform Act on General Commercial Law provides that, unless otherwise agreed by the parties or

26 CCJA Advisory Opinion n° 001/2001/EP of 30 April 2001.

27 For instance, under Congolese law, there is no provision that expressly regulates choice of court agreements in domestic or international situations. See *Loi organique* n° 13/011-B du 11 avril 2013 *portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire*; Decree of 7 March 1960 (*Moniteur Congolais* 1960, 961; erratum 1351). Nevertheless, courts generally recognise such agreements pursuant to art 33 of the Decree of 30 July 1888 on Contracts and Contractual Obligations (1888) 109, which is a substantive law provision according to which agreements legally entered into operate as law for those who engaged in them. See, for instance, *Société Prinsel Mail International PMI SARL v Société TNT Express (Belgium) et al* [2015] Court of Appeal of Kinshasa/Gombe, RCA 31.791/31.826. For more details on the rules governing choice of court agreements under Congolese law, see J Monsenepwo "Des accords exclusifs d'élection de for en droit congolais: Apport de la Conférence de La Haye de droit international privé" in Y Manzanza and J Monsenepwo (eds) *Droit, bonne gouvernance et développement: Mélanges en l'honneur du Professeur Jean-Michel Kumbu ki Ngimbi* (2018) ss 725 *et seq*.

28 As mentioned above, the seventeen OHADA Member States or OHADA could also join the Hague Convention of 30 June 2005 on Choice of Courts Agreements.

29 See J Monsenepwo "Apport des instruments de la Conférence de La Haye au droit des affaires dans l'espace OHADA" 2016 *Schriftenreihe Junges Afrikazentrum* 1 19.

otherwise provided in the Uniform Act, disputes arising from the application of the provisions on commercial lease agreements must be brought, at the request of the most diligent party, before the court of the member state where the leased premises are located.[30] Likewise, article 3 of the Uniform Act Organising Simplified Recovery Procedures and Enforcement Measures provides that the request for a payment order must be addressed to the court of the domicile or the place where the debtor (or one of them, in the case of a plurality of debtors) actually resides. Additionally, article 13 of the Uniform Act on Mediation gives jurisdiction to the court that has appointed the mediator to fix the costs in agreement with the parties and to order the payment of advances on costs. Further, article 13 of the Uniform Act on Arbitration provides that the state courts have jurisdiction to order provisional or conservatory measures as long as such measures do not imply an examination of the merits of the case. Article 14 of the same Uniform Act provides jurisdiction to state courts to order conservatory seizures and judicial sureties.

It is important to stress that these provisions do not primarily intend to specifically govern direct international jurisdiction in cross-border situations. Rather, they first apply in pure domestic situations and aim at identifying, within a member state, the court that has jurisdiction over an internal or domestic situation. However, they can also apply to international situations by way of extension. As indicated above, the extension of provisions on jurisdiction over internal situations to international cases is already used in most OHADA member states where there are no specific rules on international jurisdiction. In these member states, provisions on jurisdiction over purely domestic cases are extended to international situations (*extension à l'ordre international des règles internes de competence*).[31] Hence, in a situation involving several member states, the territorial criteria of these rules determine which court has jurisdiction. For instance, to determine which of the Ivorian and the French courts had jurisdiction over a recovery procedure against a debtor domiciled in France, the CCJA applied the territorial criteria in article 3 of the Uniform Act on Simplified Procedures for Recovery and Enforcement.[32]

3.1.4 Uniform Rules Referring to National Provisions

In addition to the OHADA provisions which directly regulate the international jurisdiction of national courts, or which contain mere territorial criteria, the Uniform Act on General Commercial Law merely refers to the national provisions on international jurisdiction in some instances. For instance, article 1(4) of the Uniform Act on General Commercial Law allows any interested party to file a motion with the competent court to order a natural person or a

30 See also arts 44, 46, and 159 of the Uniform Act on General Commercial Law.

31 F Melin *Droit international privé* (2005) 39 *et seq.*

32 *SDV-Côte d'Ivoire v Sté Rial Trading* [2004] CCJA, Judgment n° 021/2204 of 17 June 2004. See also *Etablissements Thiam Baboye "ETB" v Compagnie Française et Financière "CFCF"* [2001] CCJA, Judgment n° 001/2001 of 11 Octobre 2001.

legal entity to comply with the new provisions of the Uniform Act. Likewise, article 281(1) of the Uniform Act on General Commercial Law provides that any party to a contract of a commercial sales agreement is entitled to petition for its termination before the competent court for total or partial non-execution of the obligations of the other party. Similarly, article 282 of the Uniform Act on General Commercial Law provides that if the seller does not seem to have executed its obligation to deliver the goods within the prescribed time limit because of inadequate capability of manufacturing or a maladjustment of its production resources, the buyer may seek authorization from the competent court to defer the fulfillment of its payment obligation. Moreover, under Article 285 of the same Uniform Act, if the buyer does not seem able to pay the full price due to insolvency or cessation of payments, the seller may request the competent court to defer the execution of its delivery obligations. In addition, article 259 of the 1998 version of the Uniform Act on General Commercial Law used the same expression: "The seller may petition the *competent court* to terminate the contract …" (my emphasis). However, for all these provisions, the Uniform Act does not provide any elements allowing to determine the "competent court". Consequently, the national provisions on jurisdiction will apply to make such determination.[33]

In this regard, the CCJA has highlighted that rules on (international) jurisdiction are not yet mentioned in article 2 of the OHADA Treaty as part of the harmonisation project of OHADA. Hence, the reference by the Uniform Act to national provisions on jurisdiction is a recognition of the sovereignty of the member states, which may freely determine the rules governing the jurisdiction of their courts over domestic and cross-border situations. Any measure of the OHADA legislator in that area must be only by way of exception:

> Unless the Uniform Acts have laid down specific rules of procedure which specially designate the courts which have jurisdiction over the disputes arising from their application, the determination of the competent court, a term often used by the OHADA community legislator, is governed by domestic law and in particular by the juridical organisation of each Member State. Consequently, … it is the responsibility of the national court which is seized of an application to … search in its national law.[34]

33 This is in line with Art 10 of the OHADA Treaty and the CCJA Advisory Opinion No 001/2001/EP of 30 April 2001.

34 The original excerpt in French reads: "Sauf si les Actes uniformes ont eux-mêmes fixé des règles propres de procédure qui ont spécialement désigné les juridictions compétentes pour statuer sur les différends nés de leur application la détermination de la juridiction compétente, expression consacrée et souvent employée par le législateur communautaire OHADA, relève du droit interne et en particulier de l'organisation de chaque Etat partie. En conséquence, […], il incombe à la juridiction nationale, saisie d'une demande […] de rechercher dans les règles du droit interne"

Nevertheless, it may be contended that this reference to the national provisions on jurisdiction is not without disadvantages since it may lead to legal uncertainty and unpredictability. Indeed, as already mentioned, national provisions on jurisdiction differ from one OHADA member state to another. Therefore, different (and even conflicting) rules can apply depending on the member state whose courts are seized. Moreover, some member states do not have specific rules on direct international jurisdiction: they simply extend provisions on jurisdiction in respect of domestic situations to international situations. For example, Article 853 of the Senegalese Family Code provides: "[T]he Senegalese courts also have jurisdiction over disputes between foreigners when the defendant is domiciled in Senegal or when the connecting element referred to in Articles 34 to 36 of the Code of Civil Procedure give jurisdiction to a specific court located in Senegal."[35] Similarly, Article 988 of the *Code des personnes et de la famille* in Burkina Faso provides: "Unless otherwise provided, the rules of internal territorial jurisdiction determine the international jurisdiction of the Burkinabe courts."[36]

In addition, the rules on jurisdiction of some member states favour their nationals by conferring jurisdiction to their courts based on exorbitant jurisdiction.[37] For instance, such exorbitant forum provisions can be found in articles 14[38] and 15[39] of the Civil Code in the Ivory Coast.

3.2 International Jurisdiction of the CCJA

Issues in respect of the international jurisdiction of the CCJA arise only in situations involving third states. Indeed, situations related to exclusive OHADA member states do not raise specific difficulties since the jurisdiction of the CCJA

(CCJA Avis n° 1/2003/EP of 4 June 2003). See also *Drabo Bia et six autres C/ Mme Toure Magbe* [2005] CCJA–, judgment n° 039/2005 of 2 June 2005.

35 The original version in French reads: "(..) [L]es tribunaux sénégalais sont également compétents dans les litiges entre étrangers lorsque le défendeur est domicilié au Sénégal ou lorsque l'élément de rattachement auquel se réfèrent les articles 34 à 36 du code de procédure civile pour donner compétence à un tribunal déterminé se trouve situé au Sénégal."

36 The original version of that provision in French reads: "Les règles de compétence territoriale interne déterminent, sauf disposition contraire, la compétence internationale des juridictions Burkinabé."

37 L Idot "Eléments d'un droit international privé africain: l'exemple de la côte d'Ivoire" 1990 *Revue Juridique Africaine* 7 23.

38 Art 14 of the Civil Code in Ivory Coast provides: "L'étranger, même résidant en Côte d'Ivoire, pourra être cité devant les tribunaux ivoiriens, pour l'exécution des obligations par lui contractées en Côte d'Ivoire avec un Ivoirien; il pourra être traduit devant les tribunaux de Côte d'Ivoire, pour les obligations par lui contractées en pays étrangers envers des Ivoiriens."

39 Art 15 of the Civil Code in Ivory Coast provides: "Un Ivoirien pourra être traduit devant un tribunal de Côte d'Ivoire, pour des obligations par lui contractées en pays étranger, même avec un étranger."

covers the whole OHADA region pursuant to article 14 of the OHADA Treaty. However, issues in respect of the international jurisdiction of the CCJA arise in situations which involve an OHADA member state and a non-OHADA state. In this regard, it is important to determine whether or not the situation is related to international arbitration. In respect of international arbitration, the Uniform Act on Arbitration and the Arbitration Rules of Procedure of the CCJA contain rules which allow the CCJA to determine jurisdiction in cases involving non-OHADA states. In respect of so-called *ad hoc* arbitration,[40] according to article 1 of the Uniform Act on Arbitration, the CCJA has jurisdiction if the seat of the arbitral tribunal is located in one of the OHADA member states. With respect to so-called institutional arbitration, it can be inferred from articles 21 of the OHADA Treaty and 2.1 of the Arbitration Rules of Procedure of the CCJA that the court has jurisdiction if one of the parties has its domicile or habitual residence in one of the OHADA member states, or if the contract is executed or must be executed in whole or in part in the territory of one or several OHADA member states.[41]

Furthermore, for cases not related to international arbitration, the international jurisdiction of the CCJA is anchored to that of the member states' courts. Indeed, except for cases related to international arbitration, the CCJA can be seized as a court of final appeal only against a judgment of a court of appeal of a member state (article 14(3) of the OHADA Treaty).[42] Consequently, it is first the courts of the member states which will have to apply either the Uniform Acts or their national provisions to determine whether they have jurisdiction. Hence, the jurisdiction of the CCJA as a court of final appeal depends on that of the member states' courts. For instance, in a case regarding debt collection and involving Ivory Coast and France,[43] the CCJA considered that it had jurisdiction pursuant to article 14(3) of the OHADA Treaty since the parties (Rial Trading and SDV-Côte d'Ivoire) chose the *Tribunal de 1ère Instance* of Abidjan (Ivory Coast) to have jurisdiction over any dispute arising from their contract.

40 Under OHADA law, parties have the choice between an institutional arbitration administered by the CCJA under the Arbitration Rules of Procedure of the CCJA, or an *ad hoc* arbitration under the Uniform Act on Arbitration.

41 It is important to note that this section does not deal with the administrative powers of the CCJA as an arbitration centre in the institutional arbitration. Instead, it addresses the jurisdictional powers of the CCJA under Chapter III of the Arbitration Rules of Procedure of the CCJA.

42 Note that this paper does not analyse the jurisdiction of the CCJA when it is requested to provide an interpretation of the OHADA Treaty or other instruments of OHADA pursuant to Art 14(1) and (2) of the OHADA Treaty.

43 *SDV-Cote D'ivoire v Sté Rial Trading* [2004] CCJA, Judgment n° 021/2204 of 17 June 2004.

4 Relevance of the Domicile of the Defendant

It is worth noting that most of the aforementioned OHADA provisions apply to any situation falling within the material scope of the relevant Uniform Act, regardless of the domicile of the defendant or the fact that the case relates to OHADA member states only (*situation communautaire*), or even to at least one OHADA member state and other non-OHADA states (*situation semi-communautaire*). For instance, in case of international bankruptcy proceedings, if the principal place of business or registered office of the debtor is located abroad, article 3-1 of the Uniform Act on Collective Proceedings for the Clearing of Debts still applies: the procedure must take place before the court of the member state where the main centre of operations of the individual debtor or company is located. Similarly, in case of a dispute arising from a contract on the carriage of goods by road, the domicile of the defendant in a non-OHADA member state does not impede the application of the provisions in article 27(1) of the Uniform Act on Contracts of Carriage of Goods by Road. Indeed, even if the debtor is domiciled in a non-OHADA member state, the court where the branch or agency through which the carriage of goods agreement was concluded is located may exercise jurisdiction. Alternatively, the court where the collection of the goods occurred, or where the delivery of the goods is planned, also has jurisdiction. Moreover, if it is a contract for the carriage of goods by road, the chosen court of an OHADA member state will exercise jurisdiction regardless of the domicile of the defendant. In addition, pursuant to article 27(1) of the Uniform Act on Contracts of Carriage of Goods by Road, a non-chosen court of an OHADA member state will suspend or dismiss proceedings regardless of the domicile of the parties.

In comparison, article 6(1) of the recast Brussels I*bis* Regulation[44] provides: "If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State." Therefore, the principle is that the Brussels jurisdiction regime applies to defendants domiciled in the European Union (hereinafter referred to as EU). As indicated in article 6(1) of the recast Brussels I*bis* Regulation, there are, however, a few exceptions whereby non-EU defendants are caught within the provisions of the regulation. First, under article 25 of the recast Brussels Regulation, European courts have jurisdiction under the regulation if the parties have agreed to give jurisdiction to it, regardless of the domicile of the parties.[45] Secondly, article 24 of the recast Brussels Regulation gives exclusive jurisdiction to the courts of a particular member state based on the subject matter of the dispute, regardless

44 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) OJ 20 December 2012, L. 351/1, effective on 10 January 2015.

45 This contrasts with the 2001 Brussels Regulation which required one of the parties to be domiciled in an EU member State.

of the domicile of the parties. Moreover, article 24(2) of the recast Brussels Regulation provides, in substance, that where the proceedings have as their object the validity of a company's constitution or the decisions of its organs, the EU member state of the company's seat will have exclusive jurisdiction over those proceedings.[46] In addition, an employer which is not domiciled in the EU can be sued in the European member state where the employee habitually carries out his or her work.[47] Likewise, a consumer claim against a non-EU business can be brought in the European member state in which the consumer is domiciled under some circumstances, including when the business directs its activities to that country.[48] It is also important to note that where an employer, business (in respect of consumer claims) or an insurer is not domiciled in the EU but the dispute arises out of the operations of a branch, agency or establishment in a European member state, it will be deemed to be domiciled in that member state.[49]

In light of the above, it appears that the OHADA provisions on international jurisdiction apply in principle regardless of the domicile of the defendant.[50] Conversely, under the recast Brussels Regulation, a defendant that is not domiciled in an EU member state should in general be subject to the national rules of jurisdiction applicable in the territory of the member state of the court seized; nevertheless, to respect the autonomy of the parties, to ensure the protection of consumers and employees, and to safeguard the jurisdiction of the courts of the member states in situations where they have exclusive jurisdiction, certain rules of jurisdiction of the regulation apply regardless of the defendant's domicile. This difference in approach between OHADA law and European law may be explained by the objectives which the Uniform Acts and the recast Brussels Regulation pursue. Indeed, subject to few exceptions, European law generally aims at "simply" regulating intra-community situations, leaving other situations (with third states) subject to national law. Conversely, under articles 1, 2, 5, and 10 of the OHADA Treaty, OHADA law aims at replacing national provisions, so that its provisions apply in all situations falling within the material scope of its Uniform Acts. This is emphasised by the provision in article 10 of the OHADA treaty, which indicates the repealing effect of OHADA law over existing and future national provisions.[51] In other words, in its relationship with national provisions, OHADA law is more "intrusive" than

46 See *Koza Ltd v Akcil* [2017] EWCA Civ 1609.

47 Art 21(2) of the recast Brussels Regulation.

48 Art 18(1) of the recast Brussels Regulation.

49 See articles 19 and 21 of the recast Brussels Regulation.

50 Art 3-1 of the Uniform Act on Collective Proceedings for the Clearing of Debts and Art 27 1° of the Uniform Act on Contracts of Carriage of Goods by Road.

51 CCJA Advisory Opinion No. 001/2001/EP of 30 April 2001; *Société Elf Oil Côte d'Ivoire (Total Fina Elf) v Société Cotracom* [2002] CCJA, Judgment n°012/2002 du 18 April 2002, Juriscope.org, Ohada.com/Ohadata J-02-65; and *Société Kossi v Paroisse Saint-Paul des Bois* [1999] Court of Appeal of Port-Gentil, 9 December 1999, Penant 2001 345.

European law, as the OHADA provisions apply to all situations falling within their scope of application.[52] Moreover, the difference in approach between the EU and OHADA can be explained by the fact that the OHADA provisions address international jurisdiction for particular situations, whereas the recast Brussels Regulation contains a more general jurisdictional regime that applies to civil and commercial matters falling within its scope of application. Therefore, it can be assumed that an overall Uniform Act on international jurisdiction in civil and commercial matters would be founded on the principle that jurisdiction is generally based on the defendant's domicile, subject to exceptions.

5 Conclusion

OHADA aims at reinforcing legal and judicial security in Africa *inter alia* by facilitating access to justice, particularly through the establishment of measures relating to judicial cooperation in civil matters. The provisions described above indicate that OHADA has attempted to unify rules related to international jurisdiction. However, this unification is only partial since it relates only to the CCJA in respect of international arbitration; international bankruptcy proceedings subject to the Uniform Act on Collective Proceedings for the Clearing of Debts; commercial lease agreements under the Uniform Act on General Commercial Law; and contracts for carriage of goods by road subject to the Uniform Act on Contracts of Carriage of Goods by Road. Under OHADA law, there are no overall unified provisions that govern the international jurisdiction of national courts in civil and commercial matters. Some differences between and the vagaries of national rules governing international jurisdiction hamper the sound operation of the OHADA internal market.

To reinforce judicial security and legal predictability with respect to international jurisdiction in the OHADA region, this paper suggests that OHADA should unify rules on international jurisdiction in civil and commercial matters. To do so, the Council of Ministers needs to extend the list in article 2 of the OHADA Treaty to add international jurisdiction as one of the areas which OHADA can unify.[53] This will allow the preparation and the adoption of an instrument on international jurisdiction in civil and commercial matters which will be binding and directly applicable in all the member states. As regards the form of that instrument, it is important to underline that the Conference of Heads of State and Government decided that, alongside the Uniform Acts, OHADA may also

52 See, for instance, *SDV-Côte d'ivoire v Sté Rial Trading* [2004] CCJA, Judgment n° 021/2204 of 17 June 2004, based on Art 3 *et seq* of the Uniform Act Collective Proceedings for the Clearing of Debts, which went as far as to determine the international jurisdiction of courts of Cote d'Ivoire in a case related to a non-OHADA state.

53 The Council of Ministers extended the list in art 2 of the OHADA Treaty in 2002. See J.O. OHADA n° 12, 2003, 6. The text of the Conclusions of the 2002 meeting of the OHADA Council is available at <http://www.idcafrique.org/sites/default/files/journaux_officiels/12%20journal_officiel_n_12_0.pdf>.

adopt model laws. OHADA has adopted no model law so far.[54] For the effective unification of the rules on international jurisdiction, a Uniform Act would be more adequate. Further, such an instrument could also include, alongside provisions on international jurisdiction, rules pertaining to the recognition and the enforcement of foreign judgments in civil and commercial matters. Additionally, it is imperative that such a Uniform Act takes into account the basic legal and judicial culture of the OHADA member states. Moreover, OHADA could also join (or at least be inspired by) international conventions, such as the Hague Convention of 30 June 2005 on Choice of Courts Agreements[55] and the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.[56]

54 See R Masamba "L'Optimisation du Processus d'Harmonisation du Droit des Affaires en Afrique" 2008 *Revue de Droit International et de Droit Comparé* 253 265. However, that form was envisaged for the Uniform Act on the Law of Obligations. For more details on the Preliminary Draft Uniform Act on the Law of Obligations, see J L Neels "The Role of the Hague Principles on Choice of Law in International Commercial Contracts in the Revision of the Preliminary Draft Uniform Act on the Law of Obligations in the OHADA Region" 2018 *THRHR* 464.

55 Joining the Convention of 25 October 1980 on International Access to Justice and the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents could also help further enhance access to justice in the OHADA region.

56 https://www.hcch.net/en/news-archive/details/?varevent=683.

Novel Aspects of the Proposed African Principles on the Law Applicable to International Commercial Contracts

*Jan L Neels**

1 Introduction

The drafting of the African Principles on the Law Applicable to International Commercial Contracts[1] is a project of the Research Centre for Private International Law in Emerging Countries at the University of Johannesburg. A first draft was published some years ago in the *Uniform Law Review*.[2] At the end of 2023, the African Principles were re-published by UJ Press,[3] with a limited number of changes.[4] The Principles are intended to be used by

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1 Hereafter "the African Principles".

2 J L Neels "The African Principles on the Law Applicable to International Commercial Contracts – A First Drafting Experiment" 2020 *Uniform Law Review/Revue de droit uniforme* 426 (hereafter Neels (2020a)).

3 J L Neels *African Principles on the Law Applicable to International Commercial Contracts* (2023) (hereafter Neels (2023a)). This publication was dedicated to Prof C F Forsyth KC (University of Cambridge) and Prof E A Fredericks (University of Johannesburg) for their continuing friendship and inspiration.

4 Neels (2023a) 2-3 n 13. On the African Principles, in general, see J L Neels "International Commercial Law Emerging in Africa" 2022 *Potchefstroom Electronic Law Journal* (Special Edition: *Festschrift Charl Hugo*) par 5.1-5.4; J L Neels "The Southern African Development Community and the African Principles on the Law Applicable to International Commercial Contracts" in M R Phooko, L T Chigowe and H 'Nyane (eds) *The Development and Application of SADC Community Law in Member States* (2023) (hereafter Neels 2023b) ch 8; J L Neels and E A Fredericks "An Introduction to the African Principles of Commercial Private International Law" 2018 *Stell LR* 347; and J L Neels and E A Fredericks "The African Principles of Commercial Private International Law and the Hague Principles" in D Girsberger, T Kadner Graziano and J L Neels (gen eds) *Choice of Law in International Commercial Contracts. Global Perspectives on the Hague Principles* (2021) 239. Also see A Nachtergaele "Harmonization of Private International Law in the Southern African Development Community" 2014/2015 *Yearbook of Private International Law* 365; J L Neels "Characterisation and Liberative

national parliaments in Africa in domestic legislation, and by organisations as the African Union in regional instruments of a soft or binding nature.[5] They could also be considered by courts and arbitral tribunals in the interpretation, supplementation and development of private international law of contract.[6] The project was introduced to the African Union at various occasions, but a formal endorsement of the project is still outstanding. The Principles will in any event continue as an academic project.

The most important models for the African Principles were the Hague Principles on Choice of Law in International Commercial Contracts[7] and the Rome I Regulation on the Law Applicable to Contractual Obligations,[8] but many other instruments were considered.[9] However, in this contribution, some of the novel aspects of the Principles are indicated via a comparison of the relevant provisions in the Rome I Regulation, the Hague Principles and the African Principles.

2 Partial and Multiple Choice of Law

The Rome I Regulation determines that the parties to a contract may select the law applicable to the whole of the contract or to a part of the contract.[10] The Hague Principles contain the same provision,[11] but expressly add that different laws may be chosen for different parts of the contract.[12] The African Principles confirm that the parties may choose the law applicable to the whole contract or one or more parts thereof, but – following an example in the official commentary on the Hague Principles[13] – add that the parties may choose the law applicable to one or more *aspects* of the contract.[14] They also confirm that

Prescription (the Limitation of Actions) in Private International Law – Canadian Doctrine in the Eswatini Courts (the Phenomenon of Dual Cumulation)" 2021 *Journal of Private International Law* 361 par H; J L Neels "South African Perspectives on the Hague Principles" in Girsberger, Kadner Graziano and Neels (eds) (2021) 350 (hereafter Neels (2021a)) 351; R F Oppong *Legal Aspects of Economic Integration in Africa* (2011) 302–303 and 306–307; P P Penasthika *Unravelling Choice of Law in International Commercial Contracts. Indonesia as an Illustrative Case Study* (2022).

5 See par 2 of the preamble to the African Principles.

6 See par 3–4 of the preamble to the African Principles.

7 (2015) (hereafter "the Hague Principles"). On the Hague Principles, in general, see Girsberger, Kadner Graziano and Neels (eds) (2021).

8 (2008) (hereafter "the Rome I Regulation"). On the Rome I Regulation, in general, see G Calliess *Rome Regulations. Commentary* (2015); R Plender and M Wilderspin *The European Private International Law of Obligations* (2015).

9 See Neels (2023a) 3–4.

10 Art 3(1) of the Rome I Regulation.

11 Art 2(1)(a) of the Hague Principles.

12 Art 2(1)(b) of the Hague Principles.

13 Hague Conference on Private International Law *Principles on Choice of Law in International Commercial Contracts* (2015) par 2.9, illustration 2.2.

14 Art 3(1)(a) of the African Principles.

the parties may choose different laws for different parts of the contract, but add, likewise based on examples in the official commentary on the Hague Principles,[15] that the parties may choose different laws for different aspects of the contract.[16] The use of the word "aspect" makes clear that party autonomy is also recognised in respect of choice of law pertaining to specific types of provisions in a contract, for instance, clauses on indemnity of either or both parties, or the currency to be used for payment.[17]

3 Choice of "Rules of Law" or Non-State Law

The Rome I Regulation makes provision for the choice of the law of countries only, and not "rules of law" or so-called non-State law.[18] The Hague Principles stipulate general criteria for rules of law "that do not emanate from State sources"[19] to be chosen on the same level as the law of a country – the particular rules of law must be "generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise".[20] The use of general criteria in this regard may lead to legal uncertainty, as it is not immediately clear which instruments would qualify as non-State law, and which would not. The African Principles attempt to follow a *via media* in this regard in the balancing of party autonomy[21] and legal certainty[22] in that a closed list of instruments is provided that may be chosen to govern a contract on the same level as the law of a country. Article 4(1) of the African Principles list the following instruments in this regard: the UNIDROIT Principles

15 Hague Conference on Private International Law (2015) par 2.9, illustrations 2.3-2.4.

16 Art 3(1)(b) of the African Principles.

17 *Cf* Hague Conference on Private International Law (2015) par 2.9. Also see J L Neels "The Nature, Objective and Purposes of the Hague Principles on Choice of Law in International Contracts" 2013/2014 *Yearbook of Private International Law* 45 50-51; J L Neels "The Role of the Hague Principles on Choice of Law in International Commercial Contracts in the Revision of the Preliminary Draft Uniform Act on the Law of Obligations in the OHADA Region" 2018 *THRHR* 464 (hereafter Neels (2018a)) 468; J L Neels "Choice of Law in the Revision of the Mexico City Convention – Inspirations from the Hague Principles and Beyond" 2018 *THRHR* 661 (hereafter Neels (2018b)) 663-664; Neels and Fredericks (2021) 240-241.

18 See recital 13 and Art 3(3)-(4).

19 See Hague Conference on Private International Law (2015) par 3.1.

20 Art 3 of the Hague Principles.

21 See, in general, A Mills *Party Autonomy in Private International Law* (2018); J A Moreno Rodríguez "Advocating Party Autonomy in Private International Law – The 2015 Choice of Law Principles" in T John, R Gulati and B Köhler (eds) *The Elgar Companion to the Hague Conference on Private International Law* (2020) 349.

22 See, in general, T Kruger "The Quest for Legal Certainty in International Civil Cases" 2016 *Recueil des cours* 281. The recognition of party autonomy within clear parameters often leads to legal certainty – *cf* Hague Conference on Private International Law (2015) par I.1-3 and P.3. See, in general, A Bertolini *European Commercial Contract Law* (JURI Committee, European Parliament) (2023).

of International Commercial Contracts;[23] a treaty, as defined in the United Nations Convention on the Law of Treaties;[24] the Uniform Customs and Practice for Documentary Credits[25] and any instrument issued under the auspices of a regional economic integration organisation or an international, supranational or regional intergovernmental organisation.[26] The 2023 version adds, in the recognition of the unique role that OHADA plays in the unification of law in Africa: "including any instrument issued by the *Organisation pour l'harmonisation en Afrique du droit des affaires*".[27]

Neither the Hague Principles, nor the official commentary on the Hague Principles,[28] refer to the incorporation by reference of "rules of law" in a contract. However, recital 13 to the Rome I Regulation points out that the instrument "does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention". Nonetheless, no express indication is given as to which law must be applied to determine the effectiveness of the incorporation. In the pursuit of legal certainty, the same idea is articulated in a positive form and as part of the main instrument in Article 4(4) of the African Principles, which also indicates the applicable law: "The law applicable to the contract in terms of this instrument … determines whether the parties may incorporate by reference any set of rules or standard terms not listed in … [Article 4(1)]."

4 Tacit Choice of Law

The second sentence of Article 3(1) of the Rome I Regulation makes provision for both the express and a tacit choice of law by the parties: "The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case." As the word "demonstrated" may be construed to have a procedural connotation,[29] the Hague Principles, in the first sentence of

23 UPICC (2016) (hereafter "the UPICC").

24 (1969).

25 UCP 600 (2007) (hereafter "the UCP").

26 Art 4(1)(a)-(d) of the African Principles.

27 See Neels (2023a) 9. See, in general, J Monsenepwo "*Quo vadis*, OHADA private international law?" 2021 *Uniform Law Review/Revue de droit uniforme* 345. Also see F Adams *Choice of Non-State Law in International Commercial Contracts* (LLD thesis, University of Johannesburg) (2023); Neels (2018a) 468-469; Neels (2018b) 664-665; J L Neels and E A Fredericks "Revision of the Rome Convention on the Law Applicable to Contractual Obligations (1980): Perspectives from International Commercial and Financial Law" 2004 *Euredia Revue européenne de droit bancaire & financier/European Banking and Financial Law Journal* 173 175-179; Neels and Fredericks (2021) 242-243.

28 See Hague Conference on Private International Law (2015) par 3.1-3.15.

29 D Girsberger, T Kadner Graziano and J L Neels "Global Perspectives on the Hague Principles" in Girsberger, Kadner Graziano and Neels (eds) (2021) 3 60; Jan L Neels and E A Fredericks "Tacit Choice of Law in the Hague Principles on Choice of Law in International Contracts" 2011 *De Jure* 101 106.

Article 4, rather determine that "[a] choice of law … must be made expressly or appear clearly from the provisions of the contract or the circumstances". As the recognition of a tacit choice of law, although required by the concept of party autonomy, will inevitably involve a certain degree of uncertainty,[30] the threshold for such a choice of law was substantially intensified by Article 5(2) of the African Principles: "A tacit choice of law must be manifestly clear from the provisions of the contract, the circumstances of the case, or both."[31]

Although a similar provision is absent from the Rome I Regulation, the second sentence of Article 4 of the Hague Principles and Article 5(3) of the African Principles agree that "[a]n agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law".[32] Recital 12 to the Rome I Regulation indicates that an agreement between the parties to confer exclusive jurisdiction on a court of a Member State, should be one of the factors to be taken into account as to whether a tacit choice of law was made, thereby providing no guidance on either non-exclusive jurisdiction provisions or jurisdiction provisions in favour of the courts of a non-Member State.[33] Article 4 of the Hague Principles, more generally, implies that the choice of a court or a localised arbitral tribunal may be taken into account in a decision as to whether a tacit choice of law exists.[34] The African Principles contain an express provision in this regard, namely Article 5(4), which determines that "[a]n

30 Girsberger, Kadner Graziano and Neels (2021) 56–57.

31 See the proposal by Neels and Fredericks (2011) 104–106 and 108–110. Also see G J Bouwers *Tacit Choice of Law in International Commercial Contracts – A Global Comparative Study* (2021) 217–229 and 246–248; C F Forsyth *Private International Law. The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (2012) 325–329; Girsberger, Kadner Graziano and Neels (2021) 59–60; Neels (2018a) 469; Neels (2018b) 666–667.

32 Also see Bouwers (2021) 237–248; Forsyth (2012) 328; Girsberger, Kadner Graziano and Neels (2021) 65–67; Neels (2013/2014) 54–54; J L Neels "Choice of Forum and Tacit Choice of Law: The Supreme Court of India and the Hague Principles on Choice of Law in International Commercial Contracts (An Appeal for an Inclusive Comparative Approach to Private International Law)" in UNIDROIT (ed) *Eppur si muove: The Age of Uniform Law. Essays in Honour of Michael Joachim Bonell to Celebrate his 70th Birthday* (2016) 358; J L Neels "The Role of the Hague Principles on Choice of Law in International Commercial Contracts in Indian and South African Private International Law" 2017 *Uniform Law Review/Revue de droit uniforme* 443 446–447; Neels (2018a) 469–470; Neels (2018b) 667–668; Neels and Fredericks (2004) 179; Neels and Fredericks (2011) 107–108 and 108–110; Neels and Fredericks (2021) 244–245; C S A Okoli "The Significance of a Forum Selection Agreement as an Indicator of the Implied Choice of Law in International Contracts: A Global Comparative Perspective" 2023 *Uniform Law Review/Revue de droit uniforme* 197.

33 The recital also refers to "tribunals of a Member State", the meaning of which is not immediately clear.

34 Hague Conference on Private International Law (2015) par 4.11–4.12.

agreement between the parties to confer jurisdiction on a court or a localised arbitral tribunal may be taken into account in the determination of a tacit choice of law".[35] An exclusive jurisdiction clause should be awarded more relevance in this regard compared to a non-exclusive jurisdiction clause.[36]

5 Choice of Law in the Battle of Forms

The Rome I Regulation does not contain a specific provision on choice of law in the battle of forms. Article 6(1)(b) of the Hague Principles, in principle, employs the knock-out solution to the situation that a different choice of law provision appears in two sets of standard terms, meaning that it would, in these circumstances, be accepted that no choice of law exists. However, Article 6(1)(b) also determines, as an exception to the general rule, that where under both the purportedly chosen laws the same standard terms prevail, the law designated in the prevailing terms applies.[37] The *renvoi*-ish exception[38] is intended to uphold party autonomy even in this rather incidental or indirect sense. The disadvantage of the exception is its relative complexity. Application thereof may involve taking note of the domestic-law solutions in respect of the battle of forms in both countries involved. Moreover, the domestic position may not be clear, or perhaps no solutions already exist. On the other hand, the knock-out solution, without exceptions, has the advantage of simplicity and ease of application, leading to legal certainty.[39]

The latter approach is therefore found in Article 8(3) of the African Principles, which also provides for the scenario that a law is designated in one set of standard terms only. In addition, on the initiative of Professor Sieg (G T S)

35 *Cf* Neels (2018b) 668.

36 Girsberger, Kadner Graziano and Neels (2021) 67; H Kupelyants "South Caucasian Perspectives on the Hague Principles" in Girsberger, Kadner Graziano and Neels (eds) (2021) 650 654 (the report deals with the private international law of Armenia, Georgia and Azerbaijan).

37 Hague Conference on Private International Law (2015) par 6.10-6.27; T Kadner Graziano "Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: the Hague Solution" 2012/2013 *Yearbook of Private International Law* 71; T Kadner Graziano "The Hague Solution on Choice-of-Law Clauses in Conflicting Standard Terms: Paving the Way to More Legal Certainty in International Commercial Transactions?" 2017 *Uniform Law Review/Revue de droit uniforme* 351.

38 On *renvoi*, in general, see Forsyth (2012) 91-103; C F Forsyth "A Modest Defence of *Renvoi*" 2009 *TSAR* 135. On the exclusion of *renvoi* in South African legislation, see J L Neels "Die Gedeeltelike Uitsluiting van *Renvoi* in Resente Wetgewing" 1992 *TSAR* 739. Application of the doctrine of *renvoi* is excluded in Art 8 of the Hague Principles and Art 10 of the African Principles, unless the parties expressly provided otherwise in their agreement. *Cf* Art 20 of the Rome I Regulation.

39 Neels (2017) 447-448; Neels (2018a) 472; Neels (2018b) 669-670; Neels and Fredericks (2021) 245.

Eiselen,[40] and in pursuance of party autonomy, it was decided not to exclude the possibility of a tacit choice of law in the circumstances envisaged in Article 8(3). The 2023 version of Article 8(3) therefore reads as follows: "If the parties have used two sets of standard terms designating two different laws, or if a law is designated in one of the sets of standard terms only, there is no *express* choice of law."[41]

6 Substantive-Law Considerations

Inspired by (internationalist) substantive-law approaches to private international law (of contract), *inter alia* in the works of Leflar,[42] Juenger,[43] Hardjowahono,[44] and Peari,[45] the African Principles, in contrast to the Rome I Regulation and the Hague Principles, contain various provisions that provide a leading role to global substantive-law instruments.[46] The provisions referred to, nevertheless, feature within an essentially Savignian framework.[47]

Article 4(2) determines that, if an instrument of non-State law was chosen other than the UPICC, for instance the United Nations Convention on Contracts for the International Sale of Goods (when not *ex lege* applicable),[48] the UNIDROIT Principles of International Commercial Contracts may be used in its interpretation and even supplementation. Article 4(3), partially based on the preamble to the UPICC,[49] determines that, if the parties choose the general principles of law, the *lex mercatoria*, international commercial law or the like to govern their contract, the court or arbitral tribunal may (instead of, for example, ruling that the choice is invalid due to vagueness) apply, where relevant, the following instruments: the UPICC; the CISG, as interpreted and supplemented by the UPICC; and the Uniform Customs and Practice for Documentary Credits. Art 7 is perhaps the most far-reaching of the substantive-law-inspired

40 Neels (2023a) 2-3 n 13. See, in general, G T S Eiselen and S K Bergenthal "The Battle of the Forms: A Comparative Analysis" 2006 *CILSA* 214.

41 Neels (2023a) 12 (italics added).

42 R A Leflar, L L McDougal III and R L Felix *American Conflicts Law* (2001) 357-372 (and corresponding passages in previous editions).

43 F K Juenger *Choice of Law and Multistate Justice* (1993); F K Juenger "The Problem with Private International Law" in J Basedow *et al* (eds) *Private Law in the International Arena. From National Conflict Rule Towards Harmonization and Unification (Liber Amicorum Kurt Siehr)* (2000) 289.

44 B Hardjowahono *The Unification of Private International Law on International Commercial Contracts within the Regional Legal System of ASEAN* (2005).

45 S Peari *The Foundation of Choice of Law. Choice and Equality* (2018).

46 Also see Neels (2022) para 5.4; Neels and Fredericks (2021) 243; J L Neels, E A Fredericks and S Okorley "UNIDROIT and Africa – UNIDROIT Principles and African Principles" in B Köhler, R Gulati and T John (eds) *The Elgar Companion to UNIDROIT* (2024) ch 3.

47 See F C von Savigny VIII *System des heutigen römischen Rechts* (1849).

48 (1980) (hereafter "the CISG").

49 (2016), par 3 of the preamble.

provisions: "The law applicable to a contract by virtue of this instrument may be interpreted, supplemented and developed along the lines of the instruments listed in Article 4(3)", that is (again): the UPICC; the CISG, as interpreted and supplemented by the UPICC; and the UCP. Reference may also be made to the substantive rule of private international law in Article 9(1) of the African Principles, which is based on Article 5 of the Hague Principles. These provisions are discussed in the next section.

7 Formal Validity

Article 5 of the Hague Principles and Article 9(1) of the African Principles determine: "A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties." This is a so-called substantive rule of private international law: a rule of substantive law (no formalities are required for a choice of law) forming part of a conflicts instrument (the Hague Principles and the African Principles).[50] The Rome I Regulation does not have a specific provision on the formal validity of choice of law agreements. They are subject to the general conflict rules on the formal validity of contracts in Article 11.

The Hague Principles only pertain to choice of law (not to the law applicable in the absence of a choice of law)[51] and therefore make provision neither for the formal validity of other types of clauses in a contract, nor for the incorporation of Article 5 in a wider provision on formal validity. The African Principles facilitate such incorporation of Article 9(1) with the phrase "[w]ithout prejudice to paragraph (1)" in Article 9(2) (formal validity of contracts in general) and Article 9(3) (formal validity of contracts in respect of immovable property).

The formal validity of contracts, in general, is dealt with in Article 11(1)–(2) of the Rome I Regulation and Article 9(2) of the African Principles. The Rome I Regulation contains a specific rule for the formal validity of consumer contracts,[52] but the African Principles exclude consumer contracts from the scope of the instrument.[53] The two instruments also contain specific rules on the formal validity of contracts in respect of immovable property[54] – those are discussed at the end of the current section.

50 Hague Conference on Private International Law (2015) par 5.3 and 5.4. Also see Girsberger, Kadner Graziano and Neels (2021) 68–71; J L Neels "Article 5 of the Hague Principles on Choice of Law in International Contracts" in C Visser, J T Pretorius and M M Koekemoer (eds) *Essays in Honour of Frans Malan* (2014) 257; Neels (2018a) 470–471; Neels (2018b) 668–669; J L Neels "Indian Perspectives on the Hague Principles" in Girsberger, Kadner Graziano and Neels (eds) (2021) 475 483.

51 Hague Conference on Private International Law (2015) par I.14.

52 See Art 11(4) (read with Art 6) of the Rome I Regulation. The second sentence of Art 11(4) reads: "The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence."

53 Art 1(2)(a) of the African Principles.

54 Art 11(5) of the Rome I Regulation; Art 9(3) of the African Principles.

Both Article 11(1)-(2) of the Rome I Regulation and Article 9(2) of the African Principles employ a wide alternative conflicts rule,[55] including a reference to the law in general applicable to the contract (in common-law conflicts terminology: the proper law of the contract) in the list of validating legal systems.[56] The Hague Principles, similarly, provide that the law applicable to the contract must be one of the legal systems governing the formal validity thereof;[57] this provision does not preclude the application of any other governing law supporting the formal validity of the contract.[58]

For the scenario that the contract is concluded between persons who, or whose agents, are present in the same country at the time of its conclusion, Article 11 of the Rome I Regulation includes a reference to the law of the country where the contract was concluded.[59] If the contract was concluded between persons who, or whose agents, were in different countries at the time of its conclusion, the law of the presence of the parties (and their agents) and the law of the habitual residence of the parties take the place of the law of the country of the conclusion of the contract.[60] The African Principles also include the law of the country of the conclusion of the contract in its list of alternatively applicable legal systems in Article 9(2),[61] but this legal system is applicable in all cases, with special arrangements in Article 9(1) (choice of law provisions) and Article 9(3) (immovable property). Moreover, it is provided that the law of the country of the conclusion of the contract may be determined according to the law of the forum or the law in general applicable to the contract (the proper law), thereby providing legal certainty and probably widening the scope of the *lex loci contractus*.[62]

The African Principles add the following legal systems of general applicability[63] in respect of formal validity: the law of the country of the habitual residence of any one of the parties under the contract; the law of the country of the habitual residence of the agent of any one of the parties under

55 "A standard alternative bilateral conflicts rule employs two or more specific connecting factors to indicate two or more simultaneously applicable legal systems, in the sense that the relevant requirements of only one of the legal systems so indicated must be complied with" – J L Neels "An Experiment in the Systematization of South African Conflicts Rules" in S Omlor *Weltbürgerliches Recht. Festschrift für Michael Martinek zum 70.Geburtstag* (2020) 529 535-536. For a short comparative overview, see Girsberger, Kadner Graziano and Neels (2021) 71-72. Also see Forsyth (2012) 341-343.

56 Art 11(1)-(2) of the Rome I Regulation; Art 9(2)(b) of the African Principles.

57 Art 9(1)(e) of the Hague Principles.

58 See Art 9(2) of the Hague Principles.

59 Art 11(1) of the Rome I Regulation.

60 Art 11(2) of the Rome I Regulation.

61 Art 9(2)(a) of the African Principles.

62 Art 9(2)(a) of the African Principles. The *lex loci contractus* is the law of the country where the contract was concluded.

63 See the specific rules in Art 9(1) and 9(3) of the African Principles.

the contract; and the law of the country of the agreed place of any substantial performance under the contract.[64] These provisions are partially inspired by the Rome I Regulation,[65] the Civil Code of the Netherlands,[66] and the Mexico City Convention,[67] respectively.

Article 5 of the Hague Principles (formal validity of choice of law provisions) also applies to contracts in respect of immovable property.[68] The identical provision in Article 9(1) of the African Principles applies to immovable property via the phrase "without prejudice to paragraph (1)" in Article 9(3). The *lex situs*[69] plays a central role in both Article 11(5) of the Rome I Regulation and Article 9(3) of the African Principles. The main provision of Article 11(5) of the Rome I Regulation refers to contracts concerning a real right in, or a tenancy of, immovable property – the formal requirements for such agreements are governed by the law of the country where the immovable property is situated, if by that law "those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract"[70] and "those requirements cannot be derogated from by agreement".[71] The main part of Article 9(3) of the African Principles determines that "the formal validity of a provision in a contract with the subject matter of a right *in rem* in immovable property, or of a tenancy of immovable property, is governed by the law of the country where the immovable is situated".

8 Overriding Mandatory Rules

Article 11 of the African Principles is inspired by Article 9 of the Rome I Regulation, but there are significant differences between the provisions.[72] For instance, article 11(2) of the African Principles makes it clear that the overriding mandatory rules of the proper law of the contract are in principle applicable.

64 Art 9(2)(c)-(e) of the African Principles.

65 Article 11(2) of the Rome I Regulation, in respect of the situation that "[a] contract is concluded between persons who, or whose agents, are in different countries at the time of its conclusion".

66 Article Art 10:12(3) of Book 10 of the *Burgerlijk Wetboek* (Book 10 is in effect as from 1 January 2012).

67 Article 13 of the Mexico City Convention on the Law Applicable to International Contracts (1994) (hereafter: "the Mexico City Convention").

68 The text of Art 5 and the official commentary on Art 5 (Hague Conference on Private International Law (2015) par 5.1–5.8) do not distinguish between movable and immovable property.

69 The law of the country where the immovable property is situated.

70 Art 11(5)(a) of the Rome I Regulation.

71 Art 11(5)(b) of the Rome I Regulation.

72 See, in general, J L Neels and E A Fredericks "Covid-19 Regulations as Overriding Mandatory Provisions in Private International Law – A Comparison of Regional, Supranational and International Instruments with the Proposed African Principles on the Law Applicable to International Commercial Contracts" in M Watney (ed) *The Impact of Covid-19 on the Future of Law and Related Disciplines* (2022) 1.

Authors as Lando and Neilson are of the opinion that such a stipulation would be superfluous.[73] Indeed, it is generally accepted that the (overriding) mandatory rules of the proper law of the contract must be employed as part of the law generally applicable to the contract;[74] and neither the Hague Principles nor the Rome I Regulation therefore contain a similar provision. Article 11(2) of the African Principles may, nevertheless, be useful as a guide to a court or arbitral tribunal, leading to greater clarity, especially in an instrument to be utilised primarily[75] in emerging jurisdictions.[76]

Article 9(3) of the Rome Regulation refers to "the law of the country where the obligations arising out of the contract have to be or have been performed",[77] but Article 11(3)(b) of the African Principles, more specifically, indicates the relevant system as "the law of the country of the agreed place of any substantial performance[78] under the contract (including the country of commencement, continuation or completion of such performance".[79] The Hague Principles merely refer the relevant issues to the private international law of the forum;[80] in respect of arbitral tribunals the Principles determine: "These Principles shall not prevent an arbitral tribunal … from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so."[81] The same provisions in the Hague Principles also apply in respect of the issue discussed directly below.

Article 11(4) of the African Principles provides a solution to the longstanding controversy regarding the application of the overriding mandatory

73 O Lando and P A Nielson "The Rome I Regulation" (working paper, Bergen meeting of the *Groupe Européen de droit international privé*, 2008) www.gedip-egpil.eu/en/documents par 14 (last accessed 30 November 2023). Also see Hague Conference on Private International Law (2015) par 11.14.

74 See *eg* Forsyth (2012) 344; Girsberger, Kadner Graziano and Neels (2021) 113; Neels and Fredericks (2022) 11–12 (and the authors referred to in 11 n 62). *Cf* K H Suk "South Korean Perspectives on the Hague Principles" in Girsberger, Kadner Graziano and Neels (eds) (2021) 662 672.

75 But not exclusively: see par 4 of the preamble to the African Principles.

76 Neels and Fredericks (2022) 11–12.

77 On the formulation "have to be or have been performed", see Neels and Fredericks (2022) 16–17. Art 11(3)(b), more clearly, refers to "the agreed place of any substantial performance under the contract".

78 *eg* payment and delivery under a contract of sale. See Neels and Fredericks (2022) 17.

79 Neels and Fredericks (2022) 16–17. Also see Forsyth (2012) 346–348; J L Neels "Geoorloofdheid van 'n Kontrak en Openbare Beleid in die Internasionale Privaatreg" 1991 *TSAR* 694 697–701. Contrary to Art 11(3)(b) of the African Principles, Art 9(3) of the Rome I Regulation further limits the application of the law of the country of performance by adding the following: "in so far as those overriding mandatory provisions render the performance of the contract unlawful".

80 Art 11(2) of the Hague Principles.

81 Art 11(5) of the Hague Principles.

rules of third countries (besides the *lex loci solutionis*),[82] which is either not allowed at all (this is the position under the Rome I Regulation),[83] or permissible only in limited circumstances.[84] The African Principles adopt a *via media* approach: it provides that, *in exceptional circumstances*, the overriding mandatory rules of a third country (besides the law of the country of performance) may be applied if there is a *manifestly* close connection of that law to the particular situation.[85] The original close connection test in the context of (overriding) mandatory rules originates from the Rome Convention on the Law Applicable to Contractual Obligations,[86] the predecessor of the Rome I Regulation.[87] In the African Principles, the close connection test appears in a much stricter form ("in exceptional circumstances"; "manifestly close connection"), namely for reasons of legal certainty.[88]

9 Damages

Article 13(2)(a)–(c) of the African Principles provide:

> (a) The law applicable to the contract by virtue of this instrument governs performance and the consequences of a total or partial breach of obligations, including the assessment of damages in as far as such is governed by rules of law.
>
> (b) However, a court or arbitral tribunal may refuse to award damages in terms of the law applicable by virtue of paragraph (a) to the extent that the damages would exceed compensation for actual loss (exemplary or punitive damages).
>
> (c) Nevertheless, a court or tribunal must take into account whether and to what extent exemplary or punitive damages in terms of the law applicable to the contract serve to cover costs and expenses relating to the procedure.

82 See, in general, Forsyth (2012) 324–325 and 345–348; Neels (1991) 697–701; Neels and Fredericks (2022) 17–20. The *lex loci solutionis* is the law of the country of the performance.

83 See Art 9(3) of the Rome I Regulation.

84 Girsberger, Kadner Graziano and Neels (2021) 107–108 and 115.

85 Art 11(4) of the African Principles.

86 (1980). See Art 7(1).

87 The rule still applies in Türkiye today: Art 31 of Law 5718 on Private International Law and Procedural Law of 2007. See the discussion in Nuray Ekşi "Turkish Perspectives on the Hague Principles" in Girsberger, Kadner Graziano and Neels (eds) (2021) 858 867–870. Also see Art 11(2) of the Mexico City Convention.

88 See Neels and Fredericks (2022) for a discussion of the cumulation of overriding mandatory rules (20–22) and the effect of overriding mandatory rules on contractual liability (22–24), which are issues perhaps not ready for codification.

The formulation used in Article 13(2)(b)–(c) is an attempt to incorporate into the architecture of private international law of contract, two principles found in the recent Hague instruments that (*inter alia*) deal with the recognition and enforcement of foreign judgments, namely Article 11(1)–(2) of the Hague Convention on Choice of Court Agreements[89] and Article 10(1)–(2) of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.[90] Due to this innovation, it will no longer be necessary to use public policy[91] as a method to curb exemplary or punitive damages, as was suggested in recital 32 to the Rome II Regulation on the Law Applicable to Non-Contractual Obligations[92] in the context of international delict. The Hague Principles and the Rome I Regulation do not contain a corresponding provision.

10 Conclusion

Although the African Principles are mainly based on the Rome I Regulation and the Hague Principles, there are substantial differences between the instruments. In future hard- or soft-law codifications of private international law of contract, on a national, regional or supranational level, whether in Africa or beyond, or even on the international level, the formulations used in the African Principles could perhaps be considered by the respective legislatures or formulating agencies. Such codifications include a possible future international instrument of the Hague Conference on Private International Law, probably in the form of a model law, that could conceivably be called the Hague Principles on the Law Applicable to International Commercial Contracts,[93] or the HCCH Principles on the Law Applicable to International Commercial Contracts.[94]

89 (2005).

90 (2019).

91 See, in general, Art 21 of the Rome I Regulation; Art 11(3)–(5) of the Hague Principles; Art 12 of the African Principles; Forsyth (2012) 120–123 and 460–468; Neels (1991) 696 699–701 and J L Neels and E A Fredericks "The Various Roles of Public Policy in Private International Law: Exclusion, Inclusion and Reform on the Basis of Constitutional Values" in C Hugo and T M J Möllers (eds) *Legality and Limitation of Powers. Values, Principles and Regulations in Civil Law, Criminal Law, and Public Law* (2019) 311.

92 (2007).

93 Girsberger, Kadner Graziano and Neels (2021) 127–128; Neels (2021a) 371–372.

94 *Cf* Girsberger, Kadner Graziano and Neels (2021) 5 n 1.

Commercial Private International Law in Mozambique, Angola and Beyond

The Portuguese-Speaking States in Southern Africa Compared to Brazil

*Carl Friedrich Nordmeier**

1 Introduction

It was a privilege to get to know Professor Christopher Forsyth on the occasion of a congress in Johannesburg, outstandingly organized by Jan Neels, one of the editors of the present *Festschrift*. My paper concerned the determination of the law applicable to contracts in Angola and Mozambique.[1] In a nutshell, one can state that the private international law of contract in these states is Portuguese law as it stood in the 1970s when Angola and Mozambique as former Portuguese colonies became independent.

Christopher Forsyth opened the discussion – I feared he would confront me with an in-depth knowledge of South African law. His question was as short as unexpected: "What about Brazil?" I managed to explain that Brazil took a different path than Angola and Mozambique – mainly for historical reasons, namely that the United Kingdom of Portugal, Brazil and the Algarves were governed from Rio de Janeiro during the years 1815 until 1820. I would like to avail myself of the opportunity *inter alia* to explore this point further now[2] and take a closer look at the roots of commercial private international law in Portuguese-speaking Africa, hoping that it may be of interest to Christopher Forsyth.

* Judge at the Civil Higher Regional Court in Frankfurt am Main, Germany. The author thanks Prof Rui Manuel Dias, University of Coimbra, Portugal, and Prof Augusto Jaeger Jr, Federal University of Rio Grande do Sul, Porto Alegre, Brazil, for important discussions on the topic of the present contribution, as well as for indications of material used in elaborating this text.

1 On this subject, see Rui Manuel Pinto Soares P Dias and Carl Friedrich Nordmeier "Private International Law of Contract in Angola and Mozambique" 2016 *Obiter* 132.

2 See par 3 below.

2 Historical Remarks on Commercial Private International Law in Portuguese-Speaking Africa

Portuguese is an official language in five African States: Angola, Cabo Verde, Guinea-Bissau, Mozambique and São Tomé and Príncipe. Outside of the African continent, it is an official language in Portugal, Brazil, Timor-Leste and Macao as a Special Administrative Region of China. A particularly interesting situation can be found in Goa as a State of the Republic of India. Together with Daman and Diu, the territory of Goa comprised Portuguese India until 1961 and therefore had the status of a Portuguese colony. It was annexed by India in this year. In 1987, Goa became a state of the Republic of India. The Goa, Daman and Diu Official Language Act, 1987,[3] determined that Konkani would be the official language for all or any official purposes. In addition, English remained an official language. However, the Portuguese Civil Code at the level of 1961 was not abolished and it is still the common Civil Code in force in the State.[4]

From a historical point of view, commerce – and going with it commercial law – was at the very centre of the Portuguese interests in Africa. Trading posts near the coasts were established and could be accessed by ship easily. On the other hand, the interior of the countries was not subject to Portuguese occupation. The Portuguese merchants preferred to trade with the original inhabitants near the coast – or to enslave them.[5] The geography of the countries reflects this structure until today. Many major cities are located at the coast of Angola, Mozambique and Guinea-Bissau. The same is true for Cabo Verde and São Tomé and Príncipe. As the present-day territory of which these two States consist were uninhabited archipelagos[6] at the time Portuguese navigators discovered them, they served as stopover points for shipping routes and were colonized by European settlers.

From a legal point of view, customary law applied by traditional authorities coexists with State law that is applied by State courts. Customary law has its roots in the traditions of the original inhabitants, while State law is based on Portuguese law that was in force before independence. Generally speaking, customary law primarily finds application in rural areas, while State law is the law of the cities.[7]

3 Act No 5 of 1987 (14 April 1987).

4 Supreme Court of India, *Smt Seema v Ashwani Kumar* [2006] INSC 74.

5 Brazil imported the largest number of enslaved Africans during the Atlantic slave trade area, mostly from Angola, see Ana Lucia Araujo "Introduction: Wounded Pasts" in Ana Lucia Araujo (ed) *African Heritage and Memories of Slavery in Brazil and the South Atlantic World* (2015) 1 7.

6 Cabo Verde is an archipelago of ten islands. São Tomé and Príncipe consists of two archipelagos.

7 Raul Araújo "A evolução constitucional e as justiças de Angola" in Boaventura de Sousa Santos and José Octávio Serra van Dúnen (eds) *Sociedade e Estado em Construção: Desafios do direito e da democracia em Angola* (2012) 161 172.

Although customary law does not distinguish between different subdivisions of the law, nevertheless, it primarily deals with family and succession law. Trade disputes are solved at best on a minor scale. Therefore, commercial private international law – understood as being the law that regulates cross-border trade – is State law in Portuguese-speaking African countries.

All these countries kept the Portuguese Civil Code (hereafter PCC) in force when they became independent.[8] Following the civil law tradition of codification, the Civil Code intended to cover civil law broadly. Therefore, it includes rules on the applicability of civil law norms in space – that is, on private international law.[9] These rules are found in the general part of the Civil Code (Article 14-65 PCC). They entered into force in Portugal in 1967 as part of a total revision of the Civil Code – the so-called "New Civil Code" (*Novo Código Civil*). The rules were drafted by António de Arruda Ferrer Correia, professor at the University of Coimbra, who can be considered the "father" of this codification.[10]

This PIL set of rules covers in its first part (Article 14-24 PCC) general PIL questions, such as classification in Article 15 PCC; *renvoi* in Article 16-19;[11] the public policy exemption (Article 22 PCC); and the interpretation and determination of foreign law (Article 23 PCC).[12] It is followed by a section on special questions regarding natural persons and corporate bodies (Article 25-34 PCC) and juridical acts (*negócios jurídicos*) (Article 35-40). Then there are rules on the law that apply to a contractual or extra-contractual obligation (Article 41-45 PCC) and the law applicable to movable and immovable property (Article 46-48 PCC). Finally, the Civil Code contains PIL rules on family matters (Article 49-61 PCC) as well as on succession (Article 62-65 PCC).

Although the wording of the rules – as they stood at the moment of the independence of the respective State[13] – continues to be the same, the rules are

8 On the extensions of the applicability to the then overseas territories, see Dias and Nordmeier (2016) 133.

9 An overview of the values underlying Portuguese PIL as of today is provided by Dário Moura Vicente "Sources and General Principles of Portuguese Private International Law: An Outline" in Dário Moura Vicente (ed) *Direito Internacional Privado Ensaios III* (2010) 412-428.

10 Ferrer Correia's views on the codification of private international law are explained in António de Arruda Ferrer Correia "Les problems de codification en droit international privé" in Hague Academy of International Law (ed) (1975) 145 *Recueil des Cours* 57-203.

11 On the problem of *renvoi*, see Dias and Nordmeier (2016) 137.

12 Dias and Nordmeier (2016) 134.

13 The Portuguese rules stayed unmodified since 1977, with the exception of a minor change in Art 51 PCC regarding marriages by Decree-Law (*Decreto-Lei*) n 324/2007 of 28.9.2007. In addition, Art 32 has been amended by Law n 49/2018 of 14.8.2018, which entered into force in February 2019; it concerns the law applicable to the personal affairs of Stateless minors.

applied in the constitutional framework of every State and, of course, interpreted by the national courts presided over by judges that are appointed by national organs. In that context, in 1979, the Court of Appeal (England and Wales) in the case of *Carvalho v Hull Blyth (Angola) Ltd*[14] refused to enforce an exclusive jurisdiction clause that conferred jurisdiction to the "District Court of Luanda", being entered into in December 1973, that is, before the Angolan independence, but was invoked in proceedings only after Angola became an independent state. The Court of Appeal per Browne LJ[15] noted that before its independence, Angola "clearly … had no separate legal system and there was no such thing as Angolan law except, perhaps, in some native customary courts". It went on to argue that with independence, the District Court of Luanda kept its name but "[i]t is now an Angolan court operating within the framework of the Angolan constitution and legal system and applying Angolan law".[16]

Nevertheless, since the time of colonial dependency on Portugal, there have been no major changes in the practical application of the statutes, which continue to be in force until today. Moreover, the courts in the former colonies rely on court decisions and doctrine from Portugal as well as from other countries where Portuguese is an official language for historical reasons. For example, the Regional Court of Praia, the capital of Cabo Verde, relies on Portuguese doctrine.[17] So does the Brazilian Superior Court of Justice (*Tribunal Superior de Justiça*),[18] which even borrowed from Portuguese property law the category of things of "historical cultural heritage" (*patrimônio histórico-cultural*) for Brazil.[19] Angolan scholars in various fields of the law cite Portuguese judgments and law books of Portuguese origin.[20] Remarkably, the reception of law is no one-way street from the former motherland Portugal to its former colonies. The Portuguese Supreme Court (*Supremo Tribunal de Justiça*) cites

14 *Carvalho v Hull Blyth (Angola) Ltd* [1979] 3 All ER 280.

15 *Carvalho v Hull Blyth (Angola) Ltd* (n 14).

16 *Carvalho v Hull Blyth (Angola) Ltd* (n 14).

17 Tribunal da Comarca da Praia, judgment of 23.3.2006, Direito e Cidadania [2005] 23 198.

18 Superior Tribunal de Justiça, judgment of 14.12.2004, Recurso Especial Nr 524.811 – CE (2003/0042093-7) 21. Superior Tribunal de Justiça, judgment of 26.6.2001, Recurso Especial Nr 323.007 – RS (2001/0053321-8) 21.

19 Superior Tribunal de Justiça, judgment of 26.6.2007, Embargos de Declaração no Recurso Especial Nr 842.050 – PE (2006/0073111-1) 26. On this subject, see Luís de Lima Pinheiro "Direito Privado da Cultura: Algumas Reflexões" in Carla Amado Gomes and José Luís Bonifácio Ramos (eds) *Direito da Cultura e do Património Cultural* (2011) 63 79-80.

20 Dias Marques de Oliveira *Manual de Direito Comercial Angolano I* (2009) 49 and 80-81; Pereira de Almeida *Direito Angolano das Sociedades Comerciais* (2010) 87; and Luís Manuel Teles de Menezes Leitão *Direito do Trabalho de Angola* (2013) 13.

Brazilian doctrine[21] or refers to the legal situation in Brazil[22] without feeling the necessity to explain why it does so. Therefore, in interpreting the conflict of laws rules of Portuguese origin in Portuguese-speaking Africa, one can rely on Portuguese sources as well as materials from other countries where Portuguese is an official language.

3 Commercial Private International Law in Portuguese-Speaking States in Africa

Commercial private international law is a broad field. In this section, three key questions will be analysed: the law applicable to international contracts; the treatment of foreign companies; and the enabling of international trade by international treaties.

3.1 The Law Applicable to Contracts

As already mentioned, the PCC contains rules on the law that applies to a contractual or extra-contractual obligation (Article 41-45 PCC), and so do the Civil Codes in force in the Portuguese-speaking countries of Africa.[23] According to Article 41 (1) PCC, the parties may explicitly choose the law that shall be applied to the contractual relationship established between them. An implicit choice is permitted as well. As the drafter of the rule, Professor Ferrer Correia, explains,[24] the field of contract law is especially apt to permit a choice of law in order to facilitate business. This view is accepted, for example, in Angolan doctrine.[25] Nevertheless, the choice of the law applicable as to contract is not unlimited. According to Article 41(2) PCC, it is necessary that either some of the elements of the contract that have relevance in private international law are connected with the law chosen or the parties show a serious interest (*interesse sério*) in the application of the law they have chosen. This rule orders a two-step test. First, one has to ask if there are elements connected with the law chosen. Such elements include: the place of the conclusion or the execution of the contract; the nationality or the habitual residence of a party; the situation of the object of the contract, especially the situation of immovable property; and a connection with other juridical relationships – for example, other contracts – established between the parties.[26] If no such elements or only elements of insignificant weight can be determined, the second step of the test demands a "serious interest" (*interesse sério*) in the choice of law. This second criterion is

21 Supremo Tribunal de Justiça, judgment of 27.11.2008, process n 08B2778; Supremo Tribunal de Justiça of 12.07.2005, processo n 05P2535.

22 Supremo Tribunal de Justiça, judgment of 24.4.2013, processo n 2424/07.3TBVCD.P1.S1.

23 Compare Dias and Nordmeier (2016) 134-136.

24 António de Arruda Ferrer Correia *Lições de Direito Internacional Privado* I (2000) 41-42.

25 Mateus Jaime Chitonga *Direito Internacional Privado* (2015) 101.

26 Dias and Nordmeier (2016) 135.

of importance mainly if the facts of the contract are connected to one country only. In this case the choice of law must be based on motives worthy of judicial protection.

If there is no explicit or implicit choice of the law applicable, the law of the common habitual residence of the parties (Article 42(1) PCC) is applied. If the parties do not habitually reside in the same country,[27] contracts without consideration – that is, gifts – are subject to the law of the habitual residence of the donor. For all other contracts, the place of their conclusion determines the law applicable (Article 42(2) PCC). In modern Portuguese doctrine, this connecting factor is criticized as being outdated and – in the face of modern communication technologies by which contracts are concluded – generating accidental results.[28]

Given its time of origin, the Portuguese PIL codification did not contain conflict rules for consumer contracts. Therefore, the law applicable to business-to-consumer contracts is determined by the conflict of law rules regarding contracts in general. Nevertheless, there is an Angolan Consumer Protection Act (ACPA)[29] of 2003 in force in Angola. This Act does not contain an explicit rule on its territorial scope or on the determination of the law applicable to consumer contracts. But it defines the "entrepreneur" in Article 3(2) ACPA as being any natural or legal person constituted under public or private law of national or foreign origin. According to Article 10(1) ACPA, a seller, producer or constructor of national or foreign origin, as well as an importer, are liable to the consumer for damages specified in this section. These rules were influenced strongly by the Brazilian Consumer Protection Act (BCPA)[30] of 1990. The Brazilian Act contains in Article 3 BCPA the same reference to the foreign origin of a person. Article 12 BCPA provides for the liability of a seller, producer or constructor of foreign origin as well as of an importer. The design of these rules is not based on the model of multilateralism employed by the PIL section in the Civil Code. Moreover, they order unilaterally the application of the material consumer protection rules for persons acting in the Angolan or Brazilian consumer market.[31]

27 For a body corporate, the place of the habitual residence is the centre of its administration – see Luís de Lima Pinheiro *Direito Internacional Privado* II (2015) 411 413.

28 Pinheiro (2015) 413.

29 Law n 15/03 of 22nd of June 2003.

30 Law n 8078 of 11th of September 1990.

31 On the distinction between multilateral and bilateral conflict of law rules, see Lea Brilmayer "The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules" in Hague Academy of International Law (ed) (1995) 252 *Recueil des Cours* 9 92.

3.2 International Company Law

For commercial private international law, the conditions under which a body corporate can be created, run or terminated, as well as specific rules for foreign body corporates, play an important role.[32] Two questions need to be distinguished: the first concerns the creation, existence and dissolution of a body corporate, that is, the recognition of a body corporate as such, as well as changes in its structure and decisions taken by its organs. The second question refers to special conditions established by law that apply to commerce with a foreign body corporate.

As to the first question, a conflict of law rule can be found in Article 33 PCC.[33] The law applicable to a body corporate is determined by its principal and effective centre of administration (*sede principal e efectiva da sua administração*). This approach follows the socalled "real seat theory" and thereby rejects the "incorporation theory",[34] which prevails in common law countries and refers to the place where the body corporate was incorporated as a relevant connecting factor. The main problem of the "real seat" approach lies in the determination of the place of the "principal and effective centre of administration". It is described as the place where the body corporate generates its activities; it may coincide with the place where the body corporate runs its business but does not necessarily have to.[35] In order to counter this problem of the determination of the centre, Portuguese doctrine suggests a presumption that a body corporate has its centre of administration at the place where it was incorporated.[36]

Portuguese-speaking countries in Africa have focussed on the regulation of the business activities developed by foreign body corporates in specific circumstances. For example, under Mozambican mining laws, a mining concession may be granted only to a body corporate constituted and registered in accordance with Mozambican laws.[37] Although the wording of the law might embrace companies with a centre of administration outside of Mozambique – given the fact that Article 33 of the Mozambican Civil Code is a law of Mozambique – it seems clear from the intention of the legislator that only body corporates to which Mozambican law applies may be granted a mining concession.

32 From a civil procedure point of view, see Manuel Pinto Soares P Dias *Pactos de Jurisdição Societários* (2018) 23-31.

33 This approach is repeated in Art 3(1) of the Portuguese Company Code (*Código das Sociedades Commerciais*) which, in addition, limits the application of foreign law to a company incorporated under Portuguese law – see Dias (2018) 455.

34 João Baptista Machado *Lições de Direito Internacional Privado* (2009) 334-334; Pinheiro (2015) 154 and 173.

35 Machado (2009) 344-345.

36 Pinheiro (2015) 175.

37 Art 42(1) of Law (Lei) n 20/2014 of 18.8.2014 and Art 45(3) Decree (Decreto) n 31/2015 of 31.12.2015.

3.3 International Treaties

The Portuguese-speaking states of Africa facilitate international commerce by ratifying international treaties in this area.

Joining the World Trade Organisation is a crucial first step in this regard. Angola became a member on 23 November 1996, Cabo Verde on 23 July 2008, Guinea-Bissau on 31 May 1995 and Mozambique on 26 August 1995. São Tomé and Príncipe has not acceded to the WTO yet.[38]

In addition, there are international treaties for sectorial questions of international commerce. For example, Angola has ratified the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague-Visby Rules), while Mozambique is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington Convention).

None of the Portuguese-speaking countries in Africa is a contracting party to the United Nations Convention on Contracts for the International Sale of Goods. The convention entered into force in Brazil on 1 April 2014[39] and became applicable in Portugal from 1 October 2021.[40] Until now, none of the Portuguese-speaking countries in Africa is a member of the Hague Conference on Private International Law, but Cabo Verde and São Tomé and Príncipe are contracting parties to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

4 Brazil – A Different Story

As already mentioned in the introduction,[41] the Brazilian legal situation differs significantly from the experience in Portuguese-speaking Africa. This is due to geographical and economic reasons, on the one hand, and historical reasons on the other hand.

Brazil is a country with an area of about 8.5 million square kilometres and 207 million inhabitants. As of 2017, it was the eighth-largest economy in the world, with a gross domestic product of around 2.05 trillion USD. The Portuguese-speaking countries in Africa are much smaller and have less economic power. For example, the Angolan territory amounts to 1.2 million square kilometres, with a population of 28 million. Its gross domestic product in 2017 was approximately 124 billion USD. The islands that form the territory of São Tomé and Príncipe are 924 square kilometers in extent, with a population of

38 São Tomé and Príncipe is an observer and applied to become a member of the WTO on 15.2.2005. The accession procedure has not progressed since then.

39 José Angelo Estrella Faria "Another BRIC in the Wall: Brazil Joins the CISG" 2015 *Uniform Law Review* 211–242.

40 The advantages of adhering to the CISG from a Portuguese point of view are revealed in Luca G Castellani "A adoção da CISG em Portugal: benefícios e perspetivas" 2013 *Revista Electrónica de Direito* 1 4.

41 See par 1 above.

approximately 200 000. The gross domestic product in 2017 amounted to about 682 million USD.

4.1 Historical Development

Legal differences from Portuguese law can be explained by historical reasons. Brazil became an independent country on the 7th of September 1822. As far back as November 1807, the prince regent, Dom João, later King João VI, and the Portuguese court fled from Lisbon to Rio de Janeiro to escape the Napoleonic troops that invaded Portugal. This moment can be considered a turning point in the development of a genuine Brazilian law – a law that differed from Portuguese law.[42] From that moment on, the Portuguese empire was governed from Rio de Janeiro, the presence of the court boosting culture and science. In post-Napoleonic times, the Portuguese empire became "the United Kingdom of Portugal, Brazil and the Algarves", as a result of the Congress of Vienna in 1815. In the summer of 1821, King João VI was forced to return to Portugal in order to defend his position as a monarch against a strongly growing republican movement. His son, who had stayed in Rio de Janeiro, declared independence in 1822 and became Emperor Pedro I of Brazil. It is not entirely clear if the declaration of independence had been approved by João VI beforehand. In any event, he did not intervene militarily against the independence declared by his son, and Portugal recognized Brazil as a sovereign state in 1825.

The presence of the court from 1807 until 1821, as well as the founding of Brazil as an independent State in 1822, led to the development of a Brazilian law in the 19th century that differed significantly from Portuguese law.[43] From an institutional point of view, the first two Brazilian law schools were established in 1827, in Olinda and São Paulo.[44] Augusto Teixeira de Freitas, one of the most important Brazilian lawyers in the 19th century, assembled a collection of all civil law Acts in force in Brazil (*Consolidação das Leis Civis*) and presented a draft for a Brazilian Civil Code. Although it was not a complete draft, it contained about 5 000 articles and served as a basis for the first Brazilian Civil Code that entered into force only in 1916.

As regards the field of commercial law, Brazil enacted a Commercial Code (*Código Comercial*) on the 2nd of May 1850.[45] It was the first commercial code adopted by a Latin American country that did not simply copy a European code,[46] but was influenced by French, Portuguese and Spanish law. For a long time, civil

42 Jan Peter Schmidt *Zivilrechtskodifikation in Brasilien – Strukturfragen und Regelungsprobleme in historisch-vergleichender Perspektive* (2009) 16.

43 An overview is given by Celso Campilongo "History and Sources of Brazilian Law" in Fabiano Deffenti and Welber Barral (eds) *Introduction to Brazilian Law* (2011) 1 4-7.

44 Nadia de Araujo *Contratos Internacionais* (2009) 93. The legal basis was a royal letter of law (*carta de lei*) signed by Emperor Pedro I on 11th of August of 1827.

45 Law n 556 of 25th of June 1850.

46 W R Swartz "Codification in Latin America: The Brazilian Commercial Code of 1850" 1975 *Texas International Law Journal* 347.

law and commercial law were different subjects from the Brazilian point of view: the Civil Code for the first and the Commercial Code for the second legal area.[47] Only an extensive reform of the Brazilian Civil Code, which led to the enactment of the "New Civil Code" (*Novo Código Civil*) in 2002, abolished this separation. The general part on obligations that was contained in the Commercial Code was transferred to the Civil Code and a new section on company law was inserted in the Civil Code. The Commercial Code continues in force but mainly contains rules on maritime trade.

4.2 Brazilian Commercial Private International Law Today – Some Remarks

Today, Brazilian commercial private international law is prospering. There are in-depth studies on this subject.[48] As to the determination of the law applicable to an obligation, Article 9 of the Introductory Act to the Rules of Brazilian Law (*Lei de Introdução* às *normas do Direito Brasileiro*, hereafter BIANBL)[49] refers to the law of the State in which the contractual relationship was constituted. Article 9 §2 BIANBL presumes that a contractual obligation is constituted at the place where the proponent resides. This conflict of law rule does not refer to the place where the contract was concluded, as is the position in the African states with Portuguese as an official language (Article 42(2) PCC). Nevertheless, the two connecting factors are similar insofar as they refer to a declaration or the declarations which lead to the formation of the contract. Article 9 BIANBL does not provide for the possibility to choose the law applicable to a contractual obligation. Nevertheless, Brazilian doctrine discusses if such choice can be permitted *de lege lata*.[50]

Brazilian company law that is to be found in the Brazilian Civil Code provides for the treatment of foreign companies. In principle, foreign companies are not allowed to exercise their activities in Brazil without prior permission of the Government (Article 1134 BCC, repeated in Article 11 § 1 BIANBL) and registration (Article 1136 BCC). The government has a large margin of discretion to grant the permission under conditions it deems apt to defend national interests (Article 1135 BCC).[51] Any modification of the articles of association of

47 Augusto Jaeger Junior "Das neue brasilianische Bürgerliche Gesetzbuch und das Unternehmensrecht" in Erik Jayme and Christian Schindler (eds) *Portugiesische – Weltsprache des Rechts* (2004) 217.

48 Araujo (2009).

49 Decree-Law (Decreto-Lei) n 324/2007 of 4.9.1942, originally named "Introductory Act to the Civil Code". An overview of the conflict of law rules contained in the Act in the English language is given by Carmen Tiburcio "Private International Law in Brazil: A Brief Overview" 2013 *Panorama of Brazilian Law* 11 21-28.

50 Araujo (2009) 116-120; and Tiburcio (2013) 23.

51 See Adriane Cláudia Melo Lorentz "A Sociedade Estrangeira e o Desenvolvimento da Atividade Empresarial no Brasil" in Lier Pires Ferreira Júnior and Luis Ivani de Amorim Aráujo (eds) *Direito Internacional & As Novas Disciplinarizações* (2005) 46 55.

the body corporate is subject to governmental approval before producing its legal effects in Brazil (Article 1139 BCC). As to the law applicable to a foreign body corporate, Article 11 BIANBL orders as a principle that the body corporate is subject to the law of the State where it was founded; thereby, Brazilian law seems to follow the theory of incorporation. However, Article 1126 BCC defines a body corporate as being "national" – that is, Brazilian – if it is incorporated under Brazilian law and has its centre of administration in Brazil.[52] A combined reading of Article 11 BINABL and Article 1126 BCC shows that Brazilian law is not totally clear on the treatment of body corporates in private international law.

There is detailed legislation concerning the conduct of bodies corporate. For example, law 12846,[53] enacted in 2013, establishes *inter alia* the strict liability of a body corporate for undue influence on a national or foreign authority in charge of public tenders or public contracts.

5 Conclusion

Commercial private international law in Portuguese-speaking States in Africa is still deeply rooted in the Portuguese law in force before the independence of the respective States in the 1970s. In particular, the rules on private international law inherited from the Portuguese Civil Code are still valid. A distinctive development of the conflict of laws in these countries can be noted in the field of company law, where a sectoral approach leads to specific rules for body corporates acting in certain fields. Mainly for historical reasons, Brazil has moved further apart from Portuguese law, and therefore commercial private international law in Brazil differs significantly from the legal situation in Portugal and in African States with Portuguese as an official language.

Nevertheless, the Portuguese language remains a strong link – not only between Portugal as the former motherland and its former colonies but among all the Portuguese-speaking countries and territories in the world. The mutual influences in jurisprudence and doctrine show this link. From an institutional point of view, the Forum of the Presidents of the Supreme Courts of Justice of Portuguese-Speaking Countries and Territories (*Fórum dos Presidentes dos Supremos Tribunais de Justiça dos Países e Territórios de Língua Portuguesa*) was founded in 2003. According to Article 3(a) of the statutes of this forum, one of its aims is to enrich the common juridical heritage of the countries that are linked by Portuguese as an official language. One can expect that commercial private international law in Portuguese-speaking Africa will continue to develop mainly as the national law of the respective States. Nevertheless, the common historical background that resulted in Portuguese being an official language in these States will remain a basis for mutual influences in this field of the law.

52 The nationality of the shareholders and the origin of the funds have no relevance for the classification of a body corporate as national or foreign – see Brazilian Higher Court of Justice, Mandado de Segurança n 19.008-DF of 14.12.2016.

53 Law (*lei*) n 12846/2013 of 1.8.2013.

The Sheriffs and Civil Processes Act Does Not Apply to the National Industrial Court of Nigeria

*Chukwuma Samuel Adesina Okoli**

1 Introduction

It is a privilege to be invited to write an essay in honour of Professor Christopher Forsyth, who is well regarded as a leading expert in African conflict of laws and was the face of conflict of laws in Southern Africa when he was research active. His book on South African private international law is also unrivalled as the leading text on the subject.[1]

This essay focuses on an important development in Nigerian conflict of laws, and is therefore appropriate to honour Forsyth, an authority on comparative law. Although it does not make comparisons to South African law, recent developments in Nigerian conflict of laws might interest South African lawyers and scholars.

Nigeria is a common law country that operates under a Federal Constitution. It consists of 36 States[2] and the Federal Capital Territory, Abuja.[3] Thus, conflict of laws issues also arise at the inter-state level in Nigeria. The superior courts of record are structured as follows: Federal Courts are the Supreme Court, Court of Appeal, Federal High Court, and National Industrial Court of Nigeria. At the State level, there is a High Court for each State and the Federal Capital Territory, Abuja.

The Sheriffs and Civil Processes Act ("SCPA")[4] applies throughout Nigeria, *inter alia,* for service on defendants resident outside the jurisdiction of a State High Court or Magistrate Court. Over the last decade, a hotly debated issue in Nigeria has been whether the SCPA also applies to Federal Courts such as the Federal High Court and National Industrial Court of Nigeria.

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1 C F Forsyth *Private International Law – The Modern Roman Dutch Law including the Jurisdiction of the High Courts* (2012).

2 Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe and Zamfara. See sec 3 of the Constitution of the Federal Republic of Nigeria of 1999.

3 See secs 2 and 3 of the Constitution of the Federal Republic of Nigeria of 1999.

4 Cap S6 LFN 2004. This Act, formerly an Ordinance, was enacted in 1945.

In a recent landmark ruling, the Nigerian Court of Appeal held that the SCPA does not apply to the National Industrial Court of Nigeria.[5] This comment substantially agrees with the decision of the Nigerian Court of Appeal and makes some suggestions for the future.

2 Facts

The first respondent and the first appellant contested an election conducted for the post of president of the second appellant in its National Delegates Conference of Petroleum and Natural Gas Senior Staff Association of Nigeria (a labour union/organisation in Nigeria). The first appellant was declared the winner of the election. The first respondent was aggrieved and made a petition to the electoral panel constituted by the second appellant's National Delegates Conference. He was dissatisfied with the decision of the panel and therefore commenced an action against the second respondent and the appellants as defendants at the National Industrial Court, Calabar Division, and sought declaratory and injunctive reliefs. His originating processes showed that his cause of action arose in Abuja and that the appellants and the second respondent reside and carry on business in Lagos.

On being served with the originating processes, the appellants entered conditional appearance and filed a motion on notice to strike out the suit for want of jurisdiction on the basis that sections 97–99 of the SCPA[6] were not complied with in serving the defendants, who were argued to be outside the jurisdiction of the Calabar Division (since they reside and carry on business in Lagos State).

The trial court (National Industrial Court) held, *inter alia*, that it treats the Federation of Nigeria as one State for service of its processes and that sections 97 and 99 of the SCPA are applicable to the National Industrial Court only in respect of service of an originating process outside Nigeria. Finally, the trial court dismissed the appellants' application.

5 *Johnson* v *Eze* (2021) 2 NWLR (Pt 1759) 90.

6 "97. Every writ of summons for service under this Part out of the State or the Capital Territory in which it was issued shall, in addition to any other endorsement or notice required by the law of such State or the Capital Territory, have endorsed thereon a notice to the following effect (that is to say) – 'This summons (or as the case may be) is to be served out of the … State (or as the case may be) and in the … State (or as the case may be).'

98. A writ of summons for service out of the State or the Capital Territory in which it was issued may be issued as a concurrent writ with the one for service within such State or the Capital Territory and shall in that case be marked as concurrent.

99. The period specified in a writ of summons for service under this Part as the period within which a defendant is required to answer before the court to the writ of summons shall be not less than thirty days after service of the writ has been effected or if a longer period is prescribed by the rules of the court within which the writ of summons is issued, not less than that longer period."

The appellants were dissatisfied with the trial court's ruling and appealed to the Court of Appeal. During the hearing of the appeal, the Court of Appeal was informed that the suit had been transferred from the Calabar Division to the Abuja Division of the trial court (National Industrial Court).

3 Decision

The Court of Appeal began by considering Nigerian Supreme Court cases that initially held that sections 97–98 of the SCPA apply to all High Courts, including the Federal High Court.[7] It then considered more recent decisions where the Nigerian Supreme Court reached a contrary decision: that by virtue of section 19(1) of the Federal High Court Act[8] and Order 6 Rule 31 of the Federal High Court (Civil Procedure Rules, 2009),[9] the SCPA as a whole does not apply to the Federal High Court in inter-state matters within Nigeria. This is because the Federal High Court exercises jurisdiction throughout Nigeria. However, the SCPA applies to service on a defendant resident outside Nigeria.[10]

The Court of Appeal specifically considered section 21(1) of the National Industrial Act[11] (which is similarly worded to section 19(1) of the Federal High Court Act) and Order 7 Rule 15 of the National Industrial Court (Civil Procedure)

7 *Owners of the MV "Arabella" v Nigeria Agricultural Insurance* Corporation (2008) 11 NWLR (Pt 1097) 182; *Central Bank of Nigeria v Interstella Communications Ltd* (2018) 7 NWLR (Pt 1618) 294 326–327; *Izeze v Independent National Electoral Commission* (2018) 12 NWLR (Pt 1629) 110. See also *The Owners of the MV "MSC Agata" v Nestle (Nig) plc* (2014) 1 NWLR (Pt 1388) 270 291–292; *Peoples Democratic Party v Independent National Electoral Commission* (2018) 12 NWLR (Pt 1634) 533; *Omajali v David* (2019) 17 NWLR (Pt 1702) 438; and *Fayemi v Oni* (2020) 8 NWLR (Pt 1726) 222.

8 "The Court shall have and exercise jurisdiction throughout the Federation, and for that purpose the whole area of the Federation shall be divided by the Chief Judge into such number of Judicial Divisions (not less than four) as he may, from time to time, specify and he may designate any such Judicial Division or part thereof by such name as he may think fit."

9 "In this order 'Out of Jurisdiction' means out of the Federal Republic of Nigeria." The same provision is contained in the more current Order 6 Rule 31(1) of the Federal High Court (Civil Procedure) Rules of 2019.

10 *Biem v SDP* (2019) 12 NWLR (Pt 1687) 377 405–6. See also *Peoples Democratic Party v Uche* (2023) 9 NWLR (Pt 1890) 523 615. The Court of Appeal in *Johnson v Eze* (n 5) also held that, unlike the Federal High Court, the State High Courts and the FCT High Court are circumscribed by the territory each State occupies and the Federal Capital territory. See also *Akeredolu v Abraham* (2018) LPELR-44067 (SC) 57.

11 "The court shall have and exercise jurisdiction throughout the Federation, and for that purpose the whole of the Federation shall be divided by the President of the Court into such number of Judicial Divisions, as the President may, from time to time, by instrument in the Federal *Gazette* decide, and may, designate any such Judicial Division or part thereof by such name as he thinks fit."

Rules 2017.[12] In this connection, it followed the more current Supreme Court decisions and came to the same conclusion as the trial court that the Federation of Nigeria is one State for the purpose of service of its processes and that sections 97–99 of the SCPA are applicable to the National Industrial Court only in respect of service of a process originating outside Nigeria.[13]

The Court of Appeal further held that the act of the first respondent was a clear case of forum shopping because the cause of action arose in Abuja and the second respondent, sued as defendant together with other defendants, resides and carries on business in Lagos. Thus, there is/was no connection between the place that the cause of action arose, or any of the parties, and Calabar, where the first respondent chose to commence the suit. However, the Court of Appeal held that, since the suit had been transferred from the Calabar judicial division to the Abuja judicial division, it would be an academic exercise to comment further on this issue, and it is a settled principle that Nigerian courts do not deal with academic issues.

4 Comment

The Court of Appeal is substantially right. Section 21(1) of the National Industrial Act clearly states that the National Industrial Court shall have and exercise jurisdiction *throughout the Federation*, and for that purpose the Federation shall be divided into *judicial divisions* by the President of the Court. Order 7 Rule 15(1) of the National Industrial Court (Civil Procedure) Rules 2017 also clearly provides that the National Industrial Court has

> *one jurisdiction throughout the Federal Republic of Nigeria*; and is only divided by the President of the Court into *Judicial Divisions* or Registries for adjudicatory and administrative convenience …. All originating processes or other Court processes filed by any party before the Court shall be served on any other party in any part of the Federation *without leave of Court* (emphasis added).

Flowing from the above, it is obvious that the SCPA does not apply to the National Industrial Court and Federal High Court. A joint reading of sections 2,[14]

12 "(1) The National Industrial Court has one jurisdiction throughout the Federal Republic of Nigeria; and is only divided by the President of the Court into Judicial Divisions or Registries for adjudicatory and administrative convenience. (2) All originating processes or other Court processes filed by any party before the Court shall be served on any other party in any part of the Federation without leave of Court."

13 (n 10).

14 "Court" includes a High Court and a Magistrate Court.

19(1)[15] and 95(1)[16] of the SCPA clearly corroborates the idea that "court" includes the High Court and Magistrate Court. It further provides that "High Court" means "the High Court of the Federal Capital Territory Abuja or of the State". The exclusion of the National Industrial Court and Federal High Court from the list of courts to which the SCPA applies is deliberate. It takes into account the application of private international law in a Federal Constitution like Nigeria. In other words, the requirements to be complied with in the SCPA while serving a court process outside the State of issue do not apply to the National Industrial Court and Federal High Court. It is for this reason that we[17] respectfully submitted that the Supreme Court's decision in *MV "Arabella"*[18] (and cases that follow it)[19] were wrongly decided for holding that the SCPA applies to the Federal High Court.

Fortunately, in *Biem*, the Supreme Court reached a contrary decision – that the SCPA does not apply to the Federal High Court.[20] Unfortunately, there has been no Supreme Court decision that has gone as far as overruling *MV "Arabella"*, or explicitly stating that *MV "Arabella"* and the decisions that follow it were wrongly decided. It seems the word "overrule" – a legal principle that allows the Supreme Court to clearly depart from its previous decisions – is missing from judgments that consider the line of decisions in *MV "Arabella"*. Moreover, other lower court judges have not dared to declare *MV "Arabella"* as *per incuriam* probably due to the doctrine of judicial precedence in Nigerian jurisprudence. It is the failure by the Supreme Court to explicitly overrule *MV "Arabella"* that has given rise to further litigation as to whether the SCPA applies to the National Industrial Court and Federal High Court. If *MV "Arabella"* is not explicitly overruled, more uncertainty will be generated, and this will add to costs and delays for litigants.

However, the trial court stated *obiter* that the SCPA applies to the National Industrial Court in the service of court processes outside Nigeria. This appears to be endorsed by the Court of Appeal in this case. By way of analogy, some other Nigerian appellate judges have held that the SCPA applies to the Federal High Court in the service of court processes outside Nigeria.[21] It is submitted that

15 "Court" includes the High Court of the Federal Capital Territory Abuja or of the State.

16 "Court" means a court to which Parts III, IV, V, and VI apply.

17 See, generally, C S A Okoli and R F Oppong *Private International Law in Nigeria* (2020) 71.

18 *Owners of the MV "Arabella" v Nigeria Agricultural Insurance* Corporation (n 7).

19 (n 7).

20 *Biem v SDP* (n 10). See also *Samuel v Action Progressive Congress* (2023) 10 NWLR (Pt 1892) 195; *Peoples Democratic Party v Uche* (n 10); and *Boko v Nungwa* (2019) 1 NWLR (Pt 1654) 395.

21 *Touton SA v Grimaldi Compagnia Di Naviga Zioni SPA* (2011) 4 NWLR (Pt 1236) 1 21 – 22 (Okoro JCA, as he then was); *Biem v SDP* (n 10) 405–406 (Aka'ahs JSC); *PDP v Uche* (n 10) 615; *B L Lizard Shipping Co Ltd v M V "Western Star"* (2019) 9 NWLR (Pt 1678) 489;

these judges are wrong. The SCPA does not apply to service of court processes outside Nigeria;[22] it applies only to the State High Courts and Magistrate Courts for service of court processes *within Nigeria*. The SCPA clearly states in its long title that its purpose is to legislate for "the service and execution of civil process throughout Nigeria". Previous decisions of Nigerian appellate courts (including the Supreme Court) rightly established that the SCPA applies to service of a writ on the defendant that resides *outside a State but within Nigeria*.[23] The correct view is that it is the relevant Civil Procedure Rules that apply for the purpose of obtaining leave to issue and serve a writ of summons out of the jurisdiction of the court outside Nigeria. For example, Order 8 of the National Industrial Court (Civil Procedure) Rules 2017 applies to the service of court processes outside Nigeria.[24]

There is another point worth discussing. The case was transferred from the Calabar judicial division to the Abuja judicial division of the National Industrial Court because that is where the cause of action arose – the place where the election took place. The Court of Appeal mentioned that it was a clear instance of forum shopping for the case to be instituted in the Calabar judicial division when all the defendants were resident and carrying on business in Lagos and the cause of action arose in Abuja. I agree with the Court of Appeal that there was clear forum shopping by the first respondent in this case. By virtue of Order 2 of the National Industrial Court (Civil Procedure) Rules 2017, the first respondent should have instituted the action in "any Registry of the Court nearest to where the defendant or respondent resides or has presence or in which the defendant or respondent carries on business", which is the Lagos State Judicial Division in this case. Order 2 is a choice of venue rule that indicates which judicial division can entertain a matter within Nigeria. It does not use the connecting factor of cause of action, but residence, presence and place of business. This criterion

Purechem Ind Ltd v SPICA Shipping Co Ltd (2012) 3 NWLR (Pt 1287) 327; *Wari v Mobil Inc of America* (2013) LPELR-21996(CA); and *T/B "Sun Essex" v Bensam Maritime Oil & Gas Ltd* (2018) LPELR-51554(CA). See further *Nwaosu v Nwaosu* (2000) 4 NWLR (Pt 653) 351.

22 For cases that endorse this view see: *Alli v Okoloko* (2023) LPELR-60700(CA) 10-16; and *Ibrahim v Balogun* (1999) 7 NWLR (Pt 610) 254, 272-273 (Olagunju JCA).

23 *Derby Pools Ltd v Ocheme* (1991) 7 NWLR (Pt 203) 323 333 – 34; *Nwabueze v Okoye* (1988) 4 NWLR (Pt 91) 664 681; *Nigerian National Petroleum Corporation v Anwuta* (2000) 13 NWLR (Pt 684) 363 377; and *Muhammed v Ajingi* (2013) LPELR-20372 (CA). However, in the cases referred to, the applicability of the SCPA to service on a defendant resident outside Nigeria was not directly at issue. It is, however, submitted in this respect that these decisions are accurate with regard to their judicial statements on the applicability of the SCPA to service on a defendant in another State within Nigeria.

24 In addition, for example, Order 8 of the Lagos State High Court (Civil Procedure) Rules 2012, Order 10 of the Lagos State High Court (Civil Procedure) Rules 2019 and Order 8 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018, which all regard service "out of jurisdiction" to mean "out of Nigeria".

should be taken into account in future decisions, especially where there is a decision on whether to transfer a case that was wrongly instituted in a wrong judicial division, as in this case.

5 Conclusion

The Court of Appeal's decision in *Johnson v Eze*[25] is the first reported Court of Appeal decision to hold that the SCPA does not apply to the National Industrial Court of Nigeria. This decision might have been unnecessary if the Supreme Court's decision in *MV "Arabella"* and the line of cases following it had been explicitly overruled by subsequent Supreme Court decisions in a fully constituted panel. Indeed, it is high time for *MV "Arabella"*, which was wrongly decided, to be explicitly overruled in order to create certainty, reduce delays and litigation costs, and enhance the sound administration of justice for litigants.

Some Appellate Court judges – as in this case – simply get it wrong when they state that the SCPA applies to the service of court processes outside Nigeria for the National Industrial Court and Federal High Court. The truth is that the SCPA applies to the State High Court and Magistrate Courts in inter-state matters only within Nigeria.

Finally, the National Industrial Court Civil Procedure Rules clearly specify the venue for instituting actions. In future, this is the provision that should guide litigants and the court – as in this case – on the issue of which judicial division of the National Industrial Court of Nigeria an action should be commenced in.

25 *Johnson v Eze* (n 5).

Reforming Private International Law in African Countries

Looking Inward and Outward

*Richard Frimpong Oppong**

1 Introduction

Professor Christopher Forbes Forsyth is one of the "giants of scholarship" of private international law. This is an accolade he graciously bestowed on some scholars who preceded him.[1] His contributions to the development of the South African Roman-Dutch law on the subject have been monumental. The scope and breadth of his contributions are evident from the numerous judicial and academic references to his *magnum opus*, *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts*.[2]

Professor Forsyth is a champion of reform of private international law. Even a brief review of his said *magnum opus* makes this notion palpable. In it, he advocates for reform of the law on jurisdiction;[3] "a complete reform of the choice of law rule governing the proprietary consequences of marriage, not only for same-sex unions but for all unions";[4] reform of choice of law in torts[5] and the private international law issues affecting bills of exchange;[6] and he argues that there is ample scope for legislative reform of the rules regarding recognition and enforcement of foreign judgments.[7]

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1 C F Forsyth *Private International Law. The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (2012) vi.

2 Forsyth (2012). Professor Forsyth is also an expert in administrative law. His co-authored treatise *Administrative Law*, now in its twelfth edition, is published by Oxford University Press. It is indispensable to any administrative law scholar, legal practitioner, or scholar. I had the opportunity to study Comparative Public Law with Professor Forsyth while I was pursuing my LLM at the University of Cambridge, Faculty of Law, from 2003 to 2004.

3 Forsyth (2012) 20.

4 Forsyth (2012) 301.

5 Forsyth (2012) 362-364.

6 Forsyth (2012) 388.

7 Forsyth (2012) 417.

Increased international commercial interaction with African countries – a situation likely to be further boosted by the fact that the countries have adopted the Agreement Establishing the African Continental Free Trade Agreement (AfCFTA)[8] – makes the need for such reforms more urgent than ever. The AfCFTA seeks to create a geographic zone where goods, services and capital will move freely among member states. When we think of trade barriers, our minds often turn to the usual suspects, including tariffs, quotas, export and import bans, and technical barriers to trade. However, the rules for resolving cross-border commercial disputes and managing cross-border commercial (and indeed personal) relationships can also be significant barriers to trade. When properly attended to, the same rules can play a facilitative role in advancing trade liberalization and factor mobility. Thus, the existing national laws on cross-border commercial dispute resolution need reform if they are not to become barriers to trade under the AfCFTA.

According to the World Bank, legal reform has been a significant aspect of African countries' agenda to improve and encourage business. In 2019, the World Bank reported that Sub-Saharan Africa had the highest number of business-related regulatory reforms for six years in a row, captured by its Doing Business reports.[9] The World Bank reports are largely domestically focused; only a few benchmarks of private international law or conflict of laws significance, such as "whether valid arbitration clauses or agreements are enforced by local courts", are measured.[10] That said, there is no gainsaying that a robust private international law regime should be a vital aspect of any legal system that aims to encourage business, especially business with cross-border dimensions. The ability to enforce choice of law provisions in contracts, jurisdiction agreements, arbitration agreements, foreign judgments, and arbitration awards are essential considerations for cross-border business transactions.[11] As the great Roman-Dutch author Ulric Huber once noted, "nothing could be more inconvenient to the commerce and general intercourse of nations than that which is valid by law of one place should be rendered invalid elsewhere owing to a difference in law".[12] More recently, Moran and Kennedy have noted:

8 This Agreement entered into force on 30 May 2019. It has been ratified by 47 African countries.

9 World Bank Group "Doing Business 2019 – Fact Sheet Sub-Saharan Africa" https://www.doingbusiness.org/content/dam/doingBusiness/media/FactSheets/DB19/FactSheet_DoingBusiness2019_SSA_Eng.pdf.

10 World Bank Group *Doing Business* (2019) 117, https://www.doingbusiness.org/content/ dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf.

11 For a recent discussion on jurisdiction agreements, see Anthony Kennedy "Approaches to Jurisdiction Clauses in Anglophone African Common Law Countries: Principle and Policy" 2019 *African Journal of International and Comparative Law* 378-399.

12 Cited in D J L Davies "The Influence of Huber's *De Conflictu Legum* on English Private International Law" 1937 *British Yearbook of International Law* 49 59.

> With increased intra and extra-continental trade and increased continental consumption, inevitably the scope for the occurrence of commercial disputes has expanded and will only continue to expand. An increasing number of these disputes will possess international, cross-border characteristics and it is with these this work is concerned.
>
> Lawyers on the continent (and for present purposes, specifically in Anglophone jurisdictions) will need to be in a position to advise their clients on notoriously difficult questions, such as: when a court may lawfully be seized of an international commercial dispute; when a party must arrest a person or attach property as security for a claim in order to seize a court with jurisdiction; what pre-trial remedies are available to a party to an international dispute (for example, asset-freezing orders, search and seize orders, third party disclosure orders) and, in the event a party obtains a judgment against a person, whether and where that judgment is enforceable.[13]

This essay pays tribute to Professor Forsyth for his scholarship and highlights the need to reform private international law. In section two, I explore how African countries should engage with international processes to reform their respective private international law regimes. I argue for greater co-operation with the Hague Conference on Private International Law, the ratification of some of its conventions, and legislation based on selected provisions of conventions that are not ratified.

In section three, I examine some recent legislation and judicial decisions that have reformed private international law rules in several African countries. In this respect, legislation dealing with international arbitration, diminishing or negating the use of international arbitration or litigation in foreign countries as a means of resolving disputes with governments, and providing for choice of law rules in secured transactions, are noteworthy. Regarding judicial decisions, I examine the South African Constitutional Court's reform of the common law rules on judgment enforcement to allow for the enforcement of regional courts' judgments and the Ghanaian, Nigerian and South African courts' recent jurisprudence on anti-suit and anti-arbitration injunctions. I argue that through these decisions, one sees a willingness of judges to develop the law and advance it in hitherto untrodden directions. It is a sign of hope for the development of private international law in African countries.

Section four explores the role academics and researchers can play in advancing these reforms. It draws on comparative lessons from other parts of the world, where academic resources have been mobilised to advance private international law reform. Section five concludes the paper.

13 A J Moran and A J Kennedy *Commercial Litigation in Anglophone Africa: The Law Relating to Civil Jurisdiction, Enforcement of Foreign Judgments, and Interim Remedies* (2022) vii.

2 Engagement with International Processes

In 2006, I published a paper in the *Yearbook of Private International Law* entitled "The Hague Conference and the Development of Private International Law in Africa: A Plea for Co-operation".[14] It explored how Africa's engagement with the Conference can further develop the subject at both the national and continental levels and resolve conflict of laws problems.

At the time of writing that paper, Africa's engagement with the Conference was modest: at best, only three African states were members of the Conference (Egypt, Morocco, and South Africa), while only eighteen African countries were party to the Conference's various conventions. In the Hague Conference's work, African intellectual and academic investment was also minimal, with very few academic papers addressing the Conference's work from an African perspective. The paper advocated for increased co-operation between the Hague Conference and Africa, noting that the channels for co-operation are many and can be mutually beneficial.

Co-operation between the Hague Conference and Africa has increased significantly since 2006. Recent meetings of the Hague Conference's Council on General Affairs and Policy have noted the necessity of expanding the organisation's work globally, including throughout Africa. Since 2006, Burkina Faso, Mauritius, Namibia, Tunisia, and Zambia have become members of The Hague Conference. In October 2023, Rwanda applied to become a Member State of the HCCH.[15] Several African countries that were previously not party to any Hague Convention, such as the Republic of Congo, Gabon, Ghana, Kenya, and Rwanda, have also become party to at least one convention. There are currently over 21 African states that are party to one or more Hague Conventions, albeit mainly on family law and civil procedure issues.

That said, it is arguable that regardless of whether one is dealing with the countries that are members of the Hague Conference or just parties to its conventions, the influence of the Hague Conference on the domestic development of private international law in these African countries remains modest at best. Professor Forsyth anticipated that South Africa becoming a member of the Hague Conference in 2002 would enable the Conference to have a greater influence on local developments.[16] Traces of this anticipated effect exist, including numerous cases regarding the Hague Abduction Convention. However, there are still many areas of South African private international law that remain free of the Hague Conference's influence.

14 R F Oppong "The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation" 2006 *Yearbook of Private International Law* 189. For a recent discussion, see P N Okoli and R F Oppong "The HCCH's Development in Africa" in Thomas John, Rishi Gulati, and Ben Köhler (eds) *The Elgar Companion to the Hague Conference on Private International Law* (2020) 52–60.

15 https://www.hcch.net/en/news-archive/details/?varevent=941.

16 Forsyth (2012) 53.

This paper argues for greater collaboration between African countries and the Hague Conference to ensure the continuing development and reform of private international law in African countries, especially in fields of commercial significance. There are several important subject areas, such as the enforcement of judgments, choice of law and jurisdiction agreements, for which the Hague Conference's work could inspire domestic reform. Two recent initiatives at the Hague Conference should engage the attention of African countries in this regard. First are the Principles on Choice of Law in International Commercial Contracts, 2015 ("the Hague Principles"). Second is the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ("the Judgments Convention").

The Hague Principles are designed to affirm the principle of party autonomy and address issues related to it. Party autonomy is recognised in the private international law regimes of African countries, subject to some limitations. There are many dimensions of the subject on which no legislation or judicial decision exists or on which the law's position remains unclear in many African countries.[17] In this regard, the Hague Principles could provide a model for legislation to address those issues or serve as persuasive guidance to courts faced with such issues.

Some scholars have questioned the suitability of certain provisions of the Hague Principles for African countries. Still, many more have advocated for the Hague Principles' general potential to assist in the interpretation, supplementation, and development of choice of law in contracts in African countries.[18] The existing scholarly debate on the suitability of the Hague Principles for African countries is enriching and appropriate. I do not argue for the wholesale adoption of the Hague Principles. Rather, as Paraguay has done,[19] African countries can adopt specific provisions of the Principles suitable for their respective needs. In doing so, contentious provisions such as Article 3, which

17 For example, whether there is need for connection between the contract and the parties and their chosen law, and if yes, the nature of the connection required; whether a choice of law is implicit in a choice of forum agreement; whether parties can choose different laws to govern different issues in their contract; whether parties can choose non-State law as their governing law; and the scope of the applicable law.

18 J L Neels "The Role of the Hague Principles on Choice of Law in International Commercial Contracts in Indian and South African Private International Law" 2017 *Uniform Law Review* 443-451; and Justin Monsenepwo "Contribution of the Hague Principles on Choice of Law in International Commercial Contracts to the Codification of Party Autonomy under OHADA Law" 2019 *Journal of Private International Law* 162-185.

19 See generally José Moreno Rodríguez "The New Paraguayan Law on International Contracts: Back to the Past?" in UNIDROIT (ed) *Eppur si muove: The Age of Uniform Law – Essays in Honour of Michael Joachim Bonell to Celebrate his 70th Birthday* (2016) 1146-1178.

allows parties to choose non-State law as the applicable law of their contract, could be avoided. This would still leave it open for parties to incorporate non-State law as specific terms of their contracts, which would be enforced as such.[20]

The Judgments Convention is the product of years of negotiations. It is a potential "game changer" for the recognition and enforcement of foreign judgments.[21] Its objective, as set out in the preamble, is to facilitate rule-based multilateral trade and investment. A detailed assessment of the convention is beyond the scope of this paper.[22] That said, some of its provisions could advance the foreign judgment enforcement regimes in many African countries, as most of them have not seen any significant reformation. It remains to be seen how many African countries would ratify the convention.[23]

Even absent ratification, however, African countries can draw on the convention's provisions to reform their foreign judgment enforcement statutes. Sections 15, 16 and 17 of the Wills Act of Ghana[24] and section 22(4) of Zimbabwe's Wills Act are examples of this.[25] Apart from insignificant changes in wording, they appear to be wholly based on the United Kingdom's Wills Act 1963, which implemented the Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions. At the time of their enactment, these were significant reforms as they radically expanded the list of laws applicable to determining the validity of wills.

The practice of drawing on international treaties' provisions as model provisions for domestic legal reform is akin to how legislative draftspersons routinely borrow legislative provisions from sister countries or legislate based on international model laws. It has the advantage of reforming and advancing domestic law without the international commitments that come with ratification of international treaties. African countries should seriously consider this path to reforming their respective private international law regimes.

Indeed, this path to legal reform is already happening in several areas of substantive law. The UN Commission on International Trade Law (UNCITRAL)

20 *Eagle Super Pack (Nig) Ltd v ACB plc* (2006) 19 NWLR (Pt 1013) 20, in which the Nigerian court held that it cannot apply non-State law to the parties' transaction unless such non-State law has been incorporated into the Nigerian legal system. But the parties may choose to incorporate a non-State law into their contract, which the court would enforce.

21 A Bonomi and C M Mariotiini "A Game Changer in International Litigation? Roadmap to the 2019 Hague Judgments Convention" 2018/2019 *Yearbook of Private International Law* 537-567.

22 For a detailed discussion of the provisions of the convention, see Bonomi and Mariotiini (2018/2019) 537-567.

23 See, generally, Saloni Khanderia "The Hague Conference on Private International Law's Proposed Draft Text on the Recognition and Enforcement of Foreign Judgments: Should South Africa Endorse it?" 2019 *Journal of African Law* 413-433.

24 Wills Act, 1971 (Act 360).

25 Wills Act [Chapter 6: 06] Act 13 of 1987.

Model Law on Electronic Signatures, 2001 and the UNCITRAL Model Law on Electronic Commerce, 1996 have already informed legislation in Ghana, South Africa, Tanzania, and Uganda. Similarly, the UNCITRAL Model Law on International Commercial Arbitration, 1985, with amendments adopted in 2006, has informed legislation in Egypt, Kenya, Madagascar, Mauritius, Nigeria, Rwanda, Uganda, Zambia, Zimbabwe and, more recently, South Africa.

3 Legislation and Judicial Decisions

3.1 Recent Legislated Reforms

Collaboration between the Hague Conference and African countries obviously should not supplant the need for domestic reforms through legislation and judicial decisions. Such reforms are needed to facilitate increased cross-border transactions and investment in Africa. Recent notable examples of legislation that address private international law issues include Kenya's Movable Property Security Rights Act 2017, Zambia's Movable Property (Security Interest) Act 2016, and Zimbabwe's Movable Property Security Interests Act 2017. These statutes contain choice of law rules regarding the rights and obligations of debtors and secured creditors – a subject on which there is a paucity of jurisprudence in those countries.

Also noteworthy are Nigeria's Arbitration and Mediation Act 2023, South Africa's International Arbitration Act 2017, Zambia's Companies Act 2017 and Corporate Insolvency Act 2017, and Ghana's Companies Act 2019 and Corporate Insolvency and Restructuring Act 2020, all of which address several important conflict of laws issues.

Some of these legislated reforms are controversial, especially regarding their approach to party autonomy in international contracts and international arbitration. Since 2017, the Tanzanian parliament has passed laws that aim at protecting national resources. These laws include the Natural Wealth and Resources (Permanent Sovereignty) Act 2017, which provides that disputes arising from extraction, exploitation or the acquisition and use of natural wealth and resources shall be adjudicated by judicial bodies or other organs established in Tanzania and in accordance with Tanzanian laws. Similarly, under the Public Private Partnership (Amendment) Act, 2018, all public-private partnership agreements are now subject to local arbitration under the arbitration laws of Tanzania and subject to the Tanzanian courts' jurisdiction.

In South Africa, the Protection of Investment Act 2015 allows for disputes to be resolved using international arbitration. Still, it imposes two important conditions: "the exhaustion of domestic remedies" and the requirement that "such arbitration will be conducted between the Republic and the home state of the applicable investor". Similarly, the Namibian Investment Promotion Act 2016 provides that

> the jurisdiction over disputes relating to this Act lies exclusively with the courts of Namibia, but the Minister and investor or investment, as required by the circumstances of the alleged breach of rights or obligations may, by written agreement, agree to arbitration in accordance with the Arbitration Act, 1965 (Act No 42 of 1965) in Namibia.

Uganda's Investment Code Act 2019 provides for the settlement of disputes before the High Court of Uganda if an investor and the government are unable to mutually agree on the forum of arbitration. Some African countries have enacted legislation to ensure that certain government contracts are governed only by national law and not foreign law. Section 71(1) of Kenya's Public Private Partnerships Act, 2021, provides that "[p]roject agreements under this Act shall be subject to the provisions of the Laws of Kenya and any provision in a project agreement to the contrary shall be void". Similarly, section 62(1) of Ghana's Public Private Partnership Act, 2020, provides that "the governing law of a partnership agreement is the law of Ghana". And section 11(5) of Tanzania's Public Private Partnerships Act, 2011, provides that "[e]very agreement entered into under this Act shall be governed and construed in accordance with the laws of Mainland Tanzania". Therefore, a public-private partnership arrangement between the government or a state-owned entity and a private person under these statutes cannot be governed by foreign law.

Other statutes allow the parties to agree on foreign law as the applicable law, even though the starting point of the legislation is national law as the applicable law. For instance, section 44 of Zambia's Public Private Partnership Act, 2022, provides that "[e]very agreement shall be governed by and construed in accordance with the laws of Zambia unless otherwise provided in the agreement". Section 35 of Malawi's Public Private Partnership Act, 2022, provides that "[e]very PPP contract entered into under this Act shall, unless agreed otherwise between the parties, be governed by the Laws of Malawi". And, section 5 of Sierra Leone's Public Private Partnership Act, 2022, provides that "[a] PPP Agreement shall be governed by and construed in accordance with the laws of Sierra Leone, unless otherwise provided in the PPP Agreement".

These reforms are commendable. The exaltation of party autonomy and resort to international arbitration sometimes collides with the demands of development in African countries. Several African countries have become saddled with huge arbitration awards because of international arbitration agreements they executed. Others have had their public laws, including constitutional norms, displaced by foreign law as the applicable law. There have been many cases where arbitrators and judges sitting abroad have not managed to strike the right balance. Judge Abdulqawi A. Yusuf, former President of the International Court of Justice, spoke of the delocalisation of international arbitration in Africa and defined it as "the removal – both geographic and personal – of the process

of international arbitration from their shores".[26] I argue that these statutes are important steps towards repatriating arbitration and litigation involving African parties – States, companies, and other institutions – to Africa.

One subject in need of urgent reform is the recognition and enforcement of foreign judgments – a field bedevilled with outdated legislation and inconsistent judicial decisions. There are currently several regimes for enforcing foreign judgments in Africa. They include the common law, Roman-Dutch law, civil law, and statutory regimes. Without going into significant technical detail, these regimes suffer from significant issues that could undermine foreign judgment creditors' ability to secure enforcement of their judgments. These include the following: the narrow basis of international competence; uncertain and nationalistic defences; the requirement to enforce judgments only in local currency; the lack of designation of State beneficiaries under the statutory regimes; a restriction to the enforcement of only foreign money judgments; potential political interference in the statutory regimes; cost and timelines and complicated civil procedures for enforcement. All these can adversely affect the enforceability of foreign judgments in African countries. As Justice Oguntade once noted, "it is inimical to the interest of trade and commerce if judgments in foreign courts cannot be readily enforced".[27]

3.2 Some Recent Judicial Decisions

Courts are powerful institutions for legal reform. Although they are a reactive institution, in the sense that they can only answer questions when and if a litigant has asked them in the first place, every student of the common law knows that courts sometimes use these opportunities to make new law. In jurisdictions such as South Africa, the Constitution mandates the courts to "develop the common law". Novel cases that come before the courts expose gaps and deficiencies in the existing law and provide an opportunity for incremental development of the law. I have witnessed this in the recent private international law jurisprudence of African courts in relation to two subjects of commercial significance, namely anti-suit and anti-arbitration injunctions and the enforcement of judgments of international courts.

3.2.1 *Anti-suit and Anti-arbitration Injunctions*

Lord Justice Donaldson once described a Mareva or freezing injunction as "one of the law's two 'nuclear' weapons",[28] the other one being the Anton Piller order or search order. To this list, one can add the anti-suit injunction, although it is not of recent origin. It has its historical origins in the English legal system and the relationships that once existed between various courts, and the limited

26 A A Yusuf "The Contribution of Arbitration to the Rule of Law – The Experience of African Countries" (ICCA Keynote Speech, Mauritius, 9 May 2016) at https://www.arbitration-icca.org/media/ 7/30140359151636/yusuf_final.pdf.

27 *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR (Pt 1149) 309 338.

28 *Bank Mellat v Nikpour* 1982 WL 221059 [1985] FSR 85 88.

remedies they were able to grant.[29] In modern times, when detonated, this nuclear weapon of common law remedies has the power to change the course of litigation and could even force the parties into an immediate settlement. As Fentiman notes, "to obtain an anti-suit injunction may prevent a party from claiming, or counter-claiming, in its preferred forum, and may thwart that party's own attempt to force settlement favourable to itself by initiating proceedings in a forum disadvantageous to the other party".[30] Thus, an anti-suit or anti-arbitration injunction is important to have in the arsenal of anyone engaged in international litigation. However, there was hardly any jurisprudence from the African courts on the remedy[31] and no adequate treatment in the literature.[32] This has changed.

In the Ghanaian case of *Quantum Oils Terminals Ltd v International Finance Corporation*,[33] the parties had entered into several agreements that contained Ghanaian court jurisdiction agreements. In breach of those agreements, the International Finance Corporation (IFC) and the OPEC Fund for International Development (IFC) instituted proceedings against the applicant in London. In a very terse ruling that did not do justice to the subject's historic nature in the Ghanaian legal system,[34] Justice KA Asiedu granted an anti-suit injunction. It restrained the International Finance Corporation and the OPEC Fund for International Development from taking any step or steps to pursue, prosecute or progress any claims, suit or action in any court outside Ghana against the applicants.

29 *Turner v Grovit* [2001] UKHL 65 [22].

30 Richard Fentiman "Injunction" in J Basedow *et al* (eds) *Encyclopedia of Private International Law* vol 2 (2017) 924.

31 The first reported case this author has seen is *United Bank of Africa plc v Ade Coker* [1996] 4 NWLR 239, in which the Nigerian Court of Appeal reversed an earlier High Court decision restraining the appellant from further prosecuting their claim in the USA.

32 See Forsyth (2012) 246-249. In these pages, Professor Forsyth discusses interdicts (injunctions) and the jurisdiction of the court to grant injunctions to be carried out outside South Africa. He documents cases in which the courts have granted interdicts with extra-territorial effect, but not to restrain judicial or arbitral proceedings in a foreign country. He argues that "where the court has jurisdiction over the respondent it should, in proper cases, be willing to issue mandatory interdict requiring the performance of an act outside the jurisdiction; of course, it should not order the performance of an act illegal under the law of the place where it is to be performed". R F Oppong *Private International Law in Commonwealth Africa* (2013) 425-432 provides a general discussion of extra-territorial remedies. See, in detail, Moran and Kennedy (2022), 57-58, 101-104,160-163, 203-204, 276-278, 344-345, 392-395, 558-561, 607-609, 646-647, 714-716, 769-771, 825-827, 880-883 and 945-946.

33 *Quantum Oil Terminals Ltd v International Finance Corporation* Suit No Misc/00228/17 (Rulings of 8 January 2018 and 23 February 2018).

34 This appears to be the first time a Ghanaian court had issued an anti-suit injunction restraining proceedings abroad.

The South African case of *Vedanta Resources Holdings Limited v ZCCM Investment Holdings PLC*[35] involved an urgent application for interim interdictory relief (an anti-suit injunction) and declaratory orders, pending the final determination of arbitration proceedings. The applicant instituted the application against the first respondent in Johannesburg, seeking to restrain the first respondent from taking any further steps in pursuing winding-up proceedings pending before the Zambian High Court. The arbitration proceedings that the applicant intended to institute were founded on an arbitration clause in a shareholders' agreement between the parties, which had Johannesburg as the seat of arbitration.

The South African court had to deal with whether granting the anti-suit injunction would interfere with the Zambian courts' proceedings. The first respondent argued that "one sovereign state should not attempt to regulate the proceedings before the court of a different sovereign state".[36] In granting the injunction, the court rejected this argument. It held that "there is no good reason for diffidence in granting an interdict to restrain foreign proceedings on the clear and simple ground that the first respondent has promised not to bring them"[37] in the arbitration agreement.[38]

Adams J's reasoning is ground-breaking as far as the grant of an anti-suit injunction by an African court is concerned, and it is thus worth quoting extensively. He noted:

> [54] If a party to an arbitration agreement seeks to litigate a dispute to which the agreement relates in a court outside the country of the seat of arbitration, namely Johannesburg, his opposing party may seek an injunction to restrain him from bringing or continuing that suit. This principle emerges from the UK Supreme Court's decision in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35 (12 June 2013 [2014] 1 All ER 335, in which the court observed that an agreement to arbitrate disputes has "positive and negative aspects". Not only do parties to such an agreement undertake to seek relief in arbitration in whatever forum the agreement prescribes, the negative (often silent) aspect of the agreement means that the parties undertake the concomitant (negative) obligation not to seek relief in any other forum.
>
> [55] Importantly, a litigant seeking to enforce the negative aspect of the arbitration agreement by way of injunction may do so even if arbitration proceedings have not commenced and even if the party does not intend

35 [2019] ZAGPJHC 250 (23 June 2019).

36 *Vedanta Resources Holdings Limited v ZCCM Investment Holdings PLC* (n 35) 52.

37 *Vedanta Resources Holdings Limited v ZCCM Investment Holdings PLC* (n 35) 53.

38 The court had earlier found that the dispute between the parties was within the scope of the arbitration agreement. Because South Africa was the seat of the arbitration, the South African courts accordingly had supervisory jurisdiction over the arbitration.

to institute those proceedings at all. The court in AES expressed itself as follows:

"As a matter of interpretation of a straightforward agreement to arbitrate disputes in a particular forum (like that in this case …), there is no basis for any such limitation. The negative aspect of an arbitration agreement is a feature shared with an exclusive choice of court clause. In each case, the negative aspect is as fundamental as the positive. There is no reason why a party to either should be free to engage the other party in a different forum merely because neither party wishes to bring proceedings in the agreed forum ….

The case law also contains no support for JSC's argument that the negative aspect of an arbitration agreement is enforceable only when an arbitration is on foot or proposed. It is true that in most of the cases an arbitration was on foot, but none of the statements of principle identify this as relevant or critical."

[56] As noted by the court in AES, courts were initially reluctant to grant anti-suit injunctions. However, that position changed with the Court of Appeals decision in the *Angelic Grace* case. The court in AES traced, with approval, the development of the law and the reasons for that development, and commented in that regard as follows:

"[25] [I]n *Angeliki Charis Cia Maritime SA v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd's Rep 87 … the Court of Appeal held, citing *Pena Copper* and other authority, that courts ought not to feel diffident about granting an anti-suit injunction, if sought promptly. Without it the claimant would be deprived of its contractual rights in a situation where damages would be manifestly an inadequate remedy. The time had come, in Millett LJ's words (at 96), 'to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution'. An injunction should be granted to restrain foreign proceedings in breach of an arbitration agreement 'on the simple and clear ground that the defendant has promised not to bring them' ….

[26] Lord Hobhouse also encapsulated the principle in *Turner v Grovit* [2001] UKHL 65, [2002] IRLR 358, [2002] ICR 94, when he said:

"Under English law, a person has no right not to be sued in a particular forum, domestic or foreign, unless there is some specific factor which gives him that right. A contractual arbitration or exclusive jurisdiction clause will provide such a ground for seeking to invoke the right to enforce the clause. The applicant does not have to show that the contractual forum is more appropriate than any other; the parties' contractual agreement does that for him …."

[27] The applicant for a restraining order must have a legitimate interest in making his application and the protection of that interest must make it necessary to make the order. Where the applicant is relying upon a

> contractual right not to be sued in the foreign country (say because of an exclusive jurisdiction clause or an arbitration clause), then, absent some special circumstance, he has by reason of his contract a legitimate interest in enforcing that right against the other party to the contract."
>
> [57] I find myself in agreement with this approach by the English courts. When an injunction is granted, a Court does not direct the foreign court to do something or restrain from doing anything which it has no power to do. Rather it acts *in personam*, enjoining the party who seeks to litigate elsewhere from doing so, in order to enforce the contractual undertaking to arbitrate that that party has given. In acting in this way, it does not presume to tell a foreign court what it must or must not do.
>
> [58] I therefore agree with the submission on behalf of the applicant that the first respondent relies on a principle that has grown stale. In its place is a principle this court should apply which is based on a modern sophisticated appreciation of the true nature of anti-suit injunctions.

Some recent Nigerian and Ghanaian cases have also considered the jurisdiction of courts to grant anti-arbitration injunctions.[39] *Shell Petroleum Development Company Nigeria Ltd v Crestar Integrated Natural Resources Ltd ("Crestar")*[40] involved a dispute between Shell Petroleum Development Company (SPDC), Total E&P Nigeria Limited (Total) and Nigerian Agip Oil Company (Agip) on one side and Crestar Integrated Natural Resources Limited on the other. The dispute was in respect of a share purchase agreement (SPA) between the parties. Crestar sought to enforce the terms of the SPA in the Federal High Court. SPDC, Total and Agip filed an application seeking to stay further proceedings based on the arbitration clause in the SPA and referral of the dispute to arbitration in London. The Federal High Court refused to stay proceedings and dismissed the application. SPDC, Total and Agip appealed the decision and commenced arbitration proceedings against Crestar in London pursuant to the SPA arbitration clause. Crestar challenged, among other things, the arbitration clause in the SPA for being illegal and for violating the Nigerian Oil and Gas Industry Content Development Act, 2010. Crestar also filed an application seeking an injunction to restrain SPDC, Total and Agip from taking further steps regarding the arbitration pending the appeal. It contended that the continuation of the arbitration by the

39 For an earlier case on anti-suit injunctions, see *United Bank for Africa Plc v Coker* (1996) 4 NWLR 239. In this case, the Court of Appeal considered the granting of an anti-suit injunction to restrain proceedings in New York. The court, however, did not consider the case as an appropriate situation where it would exceptionally grant the remedy of an anti-suit injunction. The court attached considerable significance to considerations of comity (in view of the proceedings in the New York court), and the fact that the proceedings in New York were of a different nature. The court noted that it would not be prejudiced by considerations of patriotism (such as the nationality of the applicant) to grant an anti-suit injunction.

40 (2016) 9 NWLR (Pt 1517) 300.

respondents would prejudice the court's jurisdiction to effectively adjudicate the appeal and its challenge to the arbitration agreement.

The Court of Appeal granted Crestar's application for an anti-arbitration injunction. First, the court held that a Nigerian court has jurisdiction to grant an order of injunction enjoining *foreign* (but not domestic[41]) arbitration proceedings.[42] However, the court noted that the need for caution when granting such an injunction could not be over-emphasised; it should not be granted as a matter of course but only be granted in exceptional circumstances. In the instant case, the factors the court took into account included the following: the fact that the proceedings at the London arbitration tribunal were at its preliminary stages; the fact that there was a related proceeding before the Nigerian court, the outcome of which could affect the validity of the pending London proceedings; that allowing the arbitration to continue would not only involve Crestar engaging in duplication of work and incurring needless expenses, but also would expose Crestar to the risk of submitting to the jurisdiction of the arbitral tribunal in respect of the substantive matter before it; and that it would be oppressive for the applicant to face two parallel proceedings.

In *Zenith Global Merchant Ltd v Zhongfu International Investment (Nig) FZE* ("*Zenith Global Merchant*"),[43] Justice Akinyemi of the High Court of Ogun State summed up the law as follows:

> While the law is settled that Nigerian courts do not have jurisdiction to grant anti-arbitration injunctions in respect of domestic arbitration (see Section 34 of the Arbitration and Conciliation Act, and the cases of *State* [*sic*] *Oil Nig. Ltd v N.N.P.C.* … and *Nigerian Agip Petroleum Exploration v N.N.P.C.* … the position is now different in respect of international arbitrations. Recently in the case of *Shell Petroleum Co. of Nigeria Ltd v Crestar Integrated Natural Resources Ltd* … the Court of Appeal sitting at the Lagos division, while adopting the position in England held that the Federal High Court, acting pursuant to Section 13 of the Federal High Court Act, had the jurisdiction to grant an anti-arbitration injunction in respect of an international arbitration. The Court of Appeal then proceeded by virtue of section 15 of the Court of Appeal Act, to grant the said injunction, which it found to be necessary given the circumstances of the case.[44]

41 *Statoil (Nig) Ltd v Nigerian National Petroleum Corporation* (2013) 14 NWLR (Pt 1373) 1. See also *Nigerian AGIP Exploration Ltd v Nigerian National Petroleum Corporation* CA/A/628/2011 (unreported).

42 *Shell Petroleum Development Company Nigeria Limited v Crestar Integrated Natural Resources Limited* (n 40) 322; and *Zenith Global Merchant Limited v Zhongfu International Investment (Nig) FZE* (2017) All FWLR 1837.

43 (2017) All FWLR 1837.

44 *Zenith Global Merchant Ltd v Zhongfu International Investment (Nig) FZE* (n 42) 1923–24.

The issue in *Zenith Global Merchant* was whether the Ogun State High Court could grant an anti-arbitration injunction permanently to restrain the continuation of arbitration proceedings in Singapore. Following *Crestar*, the court granted the injunction.

In *Ecobank (Nig) Ltd v Aiteo Eastern E and P Co Ltd*,[45] the Court of Appeal held that it would be going outside its scope or jurisdiction were it to make orders to restrain persons within and outside Nigeria from giving effect to the order made by an English court or taking any or further steps in the proceedings on-going at the English court or compelling them to discontinue their claim before the English court. The court also held it has no power to restrain them from proceeding or continuing with the arbitration proceedings and to compel them to discontinue the ICC arbitration proceedings. While the court's decision was right in the face of the parties' arbitration agreement, to the extent that the decision denies the court's jurisdiction to grant an injunction restraining foreign court or arbitration proceedings, it is submitted that the decision is wrong and in fact contrary to the above-discussed precedents.

In *Cassius Mining Limited v The Government of the Republic of Ghana*,[46] the High Court of Ghana granted an anti-arbitration injunction restraining the respondent instituting or pursuing any arbitration outside Ghana under the parties' "Prospecting Licence Agreement" or taking any step whatsoever in international arbitration proceedings against the Government of Ghana until the arbitration instituted by the respondent against the applicant at the Ghana Arbitration Centre had been heard and determined. The court held that an applicant for injunctive relief must establish that it has a legal right that equity must protect, it will suffer actual or potential harm if the injunction is not granted and that the said harm cannot be remedied by any means, and the balance of convenience weighs in its favour.

A critique of the courts' jurisprudence above is the tendency to look to the requirements for granting injunctions in domestic cases in deciding whether to grant an anti-suit or anti-arbitration injunction.[47] The Nigerian courts have noted that such injunctions should be granted in "exceptional circumstances". The South African court has held that "there is no good reason for diffidence in granting an interdict to restrain foreign proceedings on the clear and simple ground that the first respondent has promised not to bring them".[48]

Notwithstanding these statements, it is submitted that courts should develop their distinct criteria for deciding whether to grant an anti-suit or anti-arbitration injunction. This is because there are often significant jurisdictional

45 *Ecobank (Nig) Ltd v Aiteo Eastern E and P Co Ltd* (2022) LPELR-56994 (CA).

46 *Attorney General v Cassius Mining Ltd* [2023] GHAHC 373 (31 July 2023).

47 See *Shell Petroleum Development Company Nigeria Limited v Crestar Integrated Natural Resources Limited* (n 40); *Vedanta Resources Holdings Limited v ZCCM Investment Holdings PLC* (n 35) 60-63; *Attorney General v Cassius Mining Ltd* (n 46).

48 *Vedanta Resources Holdings Limited v ZCCM Investment Holdings PLC* (n 35) 53.

issues as well as issues affecting the scope of such extraterritorial remedy, comity, and enforcement that are usually not present in domestic injunctions. Also, using the requirements for granting domestic injunctions for anti-suit injunctions risks constraining the remedy's availability. For example, in South African law, an essential requirement for granting a domestic injunction is "a *prima facie* right that might be open to doubt".[49] While this could be easily demonstrated in cases where the parties have jurisdiction or an arbitration agreement,[50] it is doubtful if there is a general "right" not to be sued abroad.

Several common law jurisdictions employ alternative regimes that distinguish between anti-suit injunctions and domestic injunctions. In Canada, an anti-suit injunction is generally available only when the foreign court has exercised exorbitant jurisdiction.[51] In contrast, English courts adopt a more flexible and case-by-case approach to anti-suit injunctions – essentially, they are granted where it is appropriate to avoid injustice.[52]

The affirmation of the jurisdiction to grant anti-suit and anti-arbitration injunctions and the willingness to grant them, albeit only in exceptional circumstances, is a positive development in the landscape of international commercial litigation in Africa. These injunctions are useful remedies for regulating forum shopping. In appropriate cases, they have been effectively deployed by foreign courts. African courts should not refrain from exercising similar jurisdiction when the circumstances demand it. English courts have consistently exercised power to grant anti-suit and anti-arbitration injunctions. It is positive to see African courts prepared to exercise the same jurisdiction in appropriate cases. Indeed, it is noteworthy that in *Crestar*, *Zenith Global Merchant*, and *Vedanta*, English jurisprudence was considered persuasive.

There are practical and legal challenges in enforcing anti-suit and anti-arbitration injunctions. As non-money judgments, these injunctions may not be enforceable in many common law jurisdictions where an enforceable foreign judgment must be for the payment of a fixed sum of money.

49 *City of Tshwane Metropolitan Municipality v Afriforum* [2016] ZACC 19; 2016 6 SA 279 (CC) [49].

50 *Vedanta Resources Holdings Limited v ZCCM Investment Holdings PLC* (n 35) 61.

51 See *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897 where the Supreme Court of Canada held that a court should only entertain an application for an anti-suit injunction (after the applicant has unsuccessfully applied for a stay of proceedings in the foreign forum) if a serious injustice will occur because of a failure of a foreign court to decline jurisdiction. In order to determine whether failing to decline jurisdiction results in a serious injustice, it is necessary to consider whether the foreign court departed from the Canadian test for *forum non conveniens* to a sufficient extent.

52 Lord Collins of Mapesbury (ed) *Dicey, Morris and Collins on the Conflict of Laws* (2012) par 12-080 to 12-089. For a discussion on the legal regime in Australia, see Michael Douglas "Anti-Suit Injunctions in Australia" 2017 *Melbourne University Law Review* 66-105.

Similarly, the prospect of an international arbitral tribunal disregarding the injunction is real. This is especially so where a state obtains an anti-arbitration injunction to prevent a private person from proceeding with an arbitration against the state. The anti-arbitration injunctions may be viewed as part of deliberately obstructionist tactics, aimed at disrupting the parties' agreed arbitral mechanism.[53] As the tribunal recognised in *Salini Costruttori SPA v Ethiopia*, international arbitration tribunals have discretion as to whether or not to comply with an anti-arbitration injunction. In the tribunal's words:

> The Tribunal has a duty *vis à vis* the parties to ensure that their arbitration agreement is not frustrated. In certain circumstances, it may be necessary to decline to comply with an order issued by a court of the seat, in the fulfilment of the Tribunal's larger duty to the parties.
>
> …
>
> This does not mean, however, that the arbitral tribunal should simply abdicate to the courts of the seat the tribunal's own judgment about what is fair and right in the arbitral proceedings. In the event that the arbitral tribunal considers that to follow a decision of a court would conflict fundamentally with the tribunal's understanding of its duty to the parties, derived from the parties' arbitration agreement, the tribunal must follow its own judgment, even if that requires non-compliance with a court order.
>
> To conclude otherwise would entail a denial of justice and fairness to the parties and conflict with the legitimate expectations they created by entering into an arbitration agreement. It would allow the courts of the seat to convert an international arbitration agreement into a dead letter, with intolerable consequences for the practice of international arbitration more generally.[54]

In an arbitration between the government of Ghana and Balkan Energy (Ghana) Limited before the Permanent Court of Arbitration, an anti-arbitration injunction granted by the High Court of Ghana against the claimant did not stop the arbitral proceedings.[55] In an interim award, given after the anti-arbitration

53 Gary Born *International Commercial Arbitration* (2020) §8.04 [A].

54 *Salini Costruttori SPA v Ethiopia,* Award Regarding the Suspension of the Proceedings and Jurisdiction, ICC Arbitration No 10623/AER/ACS, 7 December 2021 at [128], [142]-[143].

55 See *Attorney General v Balkan Energy Company LLL, Balkan Energy Ghana Ltd & Mr Philip David Elders* Order for Interlocutory Injunction, 24 June 2010, High Court of Justice (Commercial Division), Accra, Ghana; and *Attorney General v Balkan Energy Company LLL, Balkan Energy Ghana Ltd & Mr Philip David Elders* Ruling, 6 September 2010, High Court of Justice (Commercial Division), Accra, Ghana.

injunction was granted,[56] the tribunal rejected the government's plea for the tribunal to "defer to the courts of Ghana"[57] and uphold the injunction. Rather, the tribunal upheld its "obligation to give effect to the commitment of the Parties to arbitration".[58]

This suggests that for such injunctions to be effective, they must be backed by appropriate sanctions in the event of non-compliance. An arbitral tribunal that ignores judicial orders, especially orders from the court of the seat of the arbitration, imperils its award for the parties, as such an award may be set aside by the court that granted the injunction if it is a court of the seat of the arbitration. Similarly, a Nigerian court can refuse to enforce a judgment obtained in breach of an anti-suit injunction.[59] There is also the risk of personal penalties for non-compliance, such as the award of damages for contempt of court, threat of seizure of assets, or even imprisonment.[60] Furthermore, non-compliance with the injunction may prevent the non-complying party from taking part in the substantive proceedings pending before the court that granted the injunction. This potentially exposes such a party to the risk of a default judgment. All these considerations make the anti-suit injunction a powerful tool in international commercial litigation in African countries and a welcome addition to the arsenal of remedies available to African courts.

3.2.2 *Enforcing Judgments from Regional Courts*

An important addition to the landscape of international litigation in Africa is regional courts. These courts have been established under various regional economic integration agreements and are given jurisdiction to hear cases from individuals. Three notable examples are the East African Court of Justice, the COMESA Court of Justice, and the ECOWAS Court of Justice.

Whether individuals can enforce judgments from these courts in national courts is becoming an important issue, attracting both academic scrutiny[61] and judicial decisions. In the South African case of *Government of the Republic of Zimbabwe v Louis Karel Fick*,[62] the Constitutional Court reformed the common law regime on foreign judgment enforcement to allow for the enforcement of a judgment of a regional court; in this instance, the Southern African

56 *Balkan Energy (Ghana) Limited v The Republic of Ghana*, Interim Award on the 22 December 2014.

57 *Balkan Energy (Ghana) Limited v The Republic of Ghana* (n 56) 184.

58 *Balkan Energy (Ghana) Limited v The Republic of Ghana* (n 56) 190.

59 *International Finance Corporation v DSNL Offshore Ltd* (2008) 9 NWLR 606, 637 (Galadima JCA).

60 *Trafigura Pte Ltd v Emirates General Petroleum Corporation* [2010] EWHC 3007 (Comm).

61 M Adigun "Enforcing ECOWAS Judgments in Nigeria through the Common Law Rule on the Enforcement of Foreign Judgments" 2019 *Journal of Private International Law* 130–161; and R F Oppong "The High Court of Ghana Declines to Enforce an ECOWAS Court Judgment" 2017 *African Journal of International and Comparative Law* 127–132.

62 [2013] ZACC 22, 2013 5 SA 325 (CC).

Development Community (SADC) Tribunal. At issue in the case was whether an order for costs by the Tribunal constituted "a foreign judgment" that could be enforced at common law. The court was prepared to "develop the common law" so that a foreign judgment would include a judgment from the Tribunal and, by extension, "to the enforcement of judgments and orders of international courts or tribunals, based on international agreements that are binding on South Africa".[63]

The court proffered several reasons for why it found it necessary to develop the common law in this manner. It grounded its decision on the fact that (1) a foreign judgment enforcement regime is developed "to ensure that lawful judgments are not to be evaded with impunity by any State or person in the global village";[64] (2) South Africa was bound by the duty imposed by Article 32 of the SADC Tribunal Protocol to take "all measures necessary to ensure execution of decisions of the Tribunal" and that the "law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the State in which the judgment is to be enforced shall govern enforcement" of the Tribunal's decisions;[65] and (3) the right of access to courts and the concomitant right to an effective remedy are essential parts of the rule of law, which is a foundational value of the South African Constitution and Article 4(c) of the SADC Treaty.[66]

The jurisprudence of the South African court could have been beneficial to the Ghanaian court when it had to decide whether to enforce a judgment of the ECOWAS Court of Justice in Ghana. Unfortunately, it appears the South African case was not brought to the attention of the Ghanaian court. In the *Mba* case,[67] the applicant sought an order from the High Court of Ghana to enforce an $ 800 000 award (in damages) and 500 000 Naira (in costs) default judgment obtained from the ECOWAS Court of Justice. The applicant had successfully sued the government of Ghana for violations of his fundamental human rights. The central issue was whether a Ghanaian court can recognise and enforce the orders or judgment of the ECOWAS Community Court.

Neither the Protocol of the ECOWAS court nor the treaty establishing ECOWAS has been given the force of law in Ghana by the parliament of Ghana exercising its powers under Article 75(2) of the Republic of Ghana's Constitution (Constitution). The court rejected the applicant counsel's argument that the inaction of Parliament in enacting legislation to give effect to the ECOWAS Community Court's Protocols should not bar the Court from recognising and

63 *Government of the Republic of Zimbabwe v Louis Karel Fick* (n 62) par 53.

64 *Government of the Republic of Zimbabwe v Louis Karel Fick* (n 62) par 54.

65 *Government of the Republic of Zimbabwe v Louis Karel Fick* (n 62) par 57–59 and 69.

66 *Government of the Republic of Zimbabwe v Louis Karel Fick* (n 62) par 60–62.

67 *In the Matter of an Application to Enforce the Judgment of the Community Court of Justice of the ECOWAS against the Republic of Ghana and in the Matter of Chude Mba v The Republic of Ghana* Suit No HRCM/376/15 (High Court, Ghana, 2016) (unreported) (hereafter *Mba*).

enforcing the orders of the Court. The court also examined whether the ECOWAS Court judgment could be enforced under the statutory regime for enforcing foreign judgments in Ghana, specifically through the application of the Courts Act 1993 (Act 459), the High Court (Civil Procedure) Rules 2004 (CI 47) and the Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument 1993 (LI 1575). The statutory regime for enforcing foreign judgments in Ghana operates based on reciprocity. The President of Ghana has to designate a country to receive the benefit of that regime before judgments of that country's courts can be enforced in Ghana under the statutory regime. Unfortunately, as the court rightly noted, the ECOWAS Community Court is not stated as one of the Courts to which the legislation applies. In the light of these two palpable instances of legislative and presidential inertia, the court concluded that the ECOWAS Community Court orders cannot be enforced in Ghana.

Professor Forsyth has emphasised the value of comparative law in private international law. He distinguishes "comparison from necessity" and "comparison as virtue". In the former, a judge or legal practitioner confronted with a gap in the *lex fori* turns to foreign law as a matter of necessity in developing the law. On the other hand, comparison as a virtue is undertaken not really out of necessity but to advance the object of producing international uniformity in conflict of laws decisions.[68] Professor Forsyth extols the strengths of comparison as virtue and calls for its adoption instead of comparison for necessity.[69] His call is appropriate for advanced legal systems such as English and South African law, the focus of his illuminating essay (written with characteristic clearness and a stint of humour). However, for many African countries where there is a severe paucity of decided cases on conflict of laws issues, it is submitted that comparison for necessity is a good starting point.

Indeed, this is what one witnesses when reviewing conflict of laws decisions of African countries. As noted above, in their jurisprudence on the novel issues of anti-suit and anti-arbitration injunctions that came before them, the Nigerian and South African courts have found English case law persuasive. Their reliance on English law was mainly done to fill a gap in their jurisprudence. This is a positive first step. No one can predict how the Ghanaian court would have received *Fick* in its *Mba* decision, but the fact that it was not made available to the court through the industry of counsel is regrettable.

Judicial reform of private international law in African countries would be greatly facilitated by a comparative ethos, even if it is only a comparison of necessity. This can occur only if counsel and judges research to take full advantage of the jurisprudence in other countries – most of which is readily and freely accessible in various online sources. African judges and practitioners

68 See, generally, Christopher Forsyth "The Value of the Comparative Ethos to the Judicial Process in the Conflict of Laws" in Coenraad Visser (ed) *Essays in Honour of Ellison Kahn* (1989) 152–154.

69 Forsyth (1989) 154.

should certainly look to English law. However, they should not ignore the rich jurisprudence in sister African countries or other common law jurisdictions, such as Canada, Australia, and New Zealand.

As courts undertake reform of private international law in Africa, they should not forget the subject is not neutral: it has significant economic dimensions. For example, in an English case, a plea to the UKSC for a more liberal basis of indirect jurisdiction to ensure the avoidance of foreign judgments, Lord Collins responded that "the introduction of judge-made law extending the recognition and enforcement of foreign judgments would be only to the detriment of United Kingdom businesses without any corresponding benefit".[70] In other words, domestically informed cost-benefit analysis should not be avoided in judicial (and indeed legislative) reform of private international law rules.

4 Role of African Scholars

In a 2007 article, I observed that the development of private international law had stagnated in Africa. This was reflected in the neglected and undeveloped state of the subject and the near absence of African countries in international processes, academic forums, writings, and institutions that have significance for the subject.[71] Indeed, as late as 2012, Professor Forsyth continued to maintain that in South Africa, "private international law is the Cinderella subject, seldom studied, little understood".[72] Arguably, the publication in 2013 of *Private International Law in Commonwealth Africa* was a turning point in the intellectual history of the subject in Africa.[73] Drawing on about 1500 cases, the book, for the first time, made accessible to the world case law from many African countries that were hitherto largely inaccessible.

There has been significant growth in scholarly work on private international law in African countries. Leaving aside numerous articles in the specialist journals on the subject, chapters in edited books and encyclopedias, and doctoral theses, several monographs have also been published.[74] This expanding academic interest bodes well for the reform of private international law in Africa.

70 *Rubin v Eurofinance SA* [2012] UKSC 46 [130].

71 Richard Frimpong Oppong "Private International Law in Africa: The Past, Present and Future" 2007 *American Journal of Comparative Law* 677-719.

72 Forsyth (2012) 46-47.

73 Chukwuma Samuel Adesina Okoli "Sowing the Seeds of a Future African Union Private International Law: A Review of *Private International Law in Commonwealth Africa*" 2014 *Journal of Private International Law* 517-533.

74 See *eg* C S A Okoli and R F Oppong *Private International Law in Nigeria* (2020); P Okoli *Promoting Foreign Judgments. Lessons in Legal Convergence from South Africa and Nigeria* (2019); Moran and Kennedy (2022); and M Rossouw *The Harmonisation of Rules on the Recognition and Enforcement of Foreign Judgments in the Southern African Customs Union* (2016).

Writing in 1981, J C Smith identified two principal ways in which academics can participate in law reform. These are through published writings, and official bodies such as national Law Reform Commissions and unofficial law reform bodies, including those formed by academics.[75] To these, one may add the potential influence of academic writings on judicial decisions. In advanced common law jurisdictions, the days when publishing in academic journals was largely for the edification of the writer and other academic readers are long past.[76] Judges now frequently rely on academic scholarship in their judgments and acknowledge them as such.[77]

However, the culture of judicial citation of academic work is yet to fully emerge in decisions from courts in African countries, except perhaps in South Africa. For example, apart from the occasional references to very old editions of what is now *Dicey, Morris and Collins on Conflict of Laws*,[78] one seldom finds citation of academic works in conflict of laws decisions from courts in African countries, other than South Africa. It is hoped that there would develop a more enlightened approach from African judges that recognises academic writings as a viable non-binding source of the common law. This will be facilitated if African judges start to "read academic articles as part of their ordinary judicial activity".[79] Scholars on private international law in African countries would do well to make their work more accessible to legal practitioners and judges to facilitate this. In addition to books and articles, short case comments and reviews would be important in this regard.

The prospect of scholars on private international law in African countries coming together as a group or association to work on projects aimed at reforming the subject in Africa is also worth considering. Such a group would be especially useful given that there is currently no official initiative to reform or harmonise private international law rules at the continental or regional levels.

Comparatively, scholarly initiatives have played a key role in legal reforms of both substantive and private international law in various parts of the world. There is a private initiative by scholars and academics in Asia that aims to create a model law called the Principles of Asian Contract Law.[80] The Asian Principles of Private International Law is the product of private international

75 J C Smith "An Academic Lawyer and Law Reform" 1981 *Legal Studies* 119.

76 See *Douez v Facebook Inc* 2017 SCC 33 (CanLII) [2017] 1 SCR 751 in which the Supreme Court of Canada cited more than twenty academic writings in a case dealing with the enforceability of a jurisdiction agreement.

77 Lord Neuberger of Abbotsbury MR "Judges and Professors – Ships Passing in the Night?" 2013 *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* 233–250.

78 See *Steak Ranch Limited v Steak Ranches International BV* 2011/HP/0183 (High Court, Zambia, 2012) in which counsel relied on a 1980, 10th edition of Dicey and Morris.

79 *First National Tricity Finance Ltd v OT Computers Ltd* [2004] EWCA Civ 653 par 43.

80 Shiyuan Han "Principles of Asian Contract Law: An Endeavour of Regional Harmonisation of Contract Law in East Asia" 2013 *Villanova Law Rev* 589.

law scholars in ten East and Southeast Asian countries that has the goal of harmonising the region's private international law rules.[81] In Europe, there are the Principles of European Contract Law, 1998 drafted by the Commission on European Contract Law ("Lando Commission"). The Lando Commission, which was established in 1982, is composed primarily of academics, many of whom are practising lawyers. They are independent and are not representatives of specific political or governmental interests. Another interesting project in this regard is the Common Core of European Private Law that aims to chart the "common core" of private law in Europe through publications on various issues in private law. There is the Organization for the Harmonisation of Business Law in the Caribbean (OHADAC).[82] Since its formation in 2010, OHADAC has already produced a model law of commercial companies.[83] There are projects for the harmonisation of private international law and the law on international commercial contracts.[84]

In Africa, there is the Research Centre for Private International Law in Emerging Countries at the University of Johannesburg. Its principal object is the drafting of the African Principles on the Law Applicable to International Commercial Contracts.[85]

Recently, the Nigerian Group on Private International Law was established. It aims to improve the law in Nigeria in matters relating to private international law; persuade the Nigerian government to accede to the Hague Conventions; liaise with other experts, groups, and research centres on private international law to nurture, guide and develop the legal mechanism and framework for Nigerian private international law; improve the links and communication between private international law experts in Africa; and be the collective voice of private international law experts for the Nigerian government, the judiciary, lawyers and other relevant stakeholders. This is a commendable initiative that, hopefully, will be actively pursued and resourced to yield results.

5 Conclusion

This paper examined the reform of private international law in African countries as a tribute to Professor Christopher Forbes Forsyth's scholarly

81 Chen Weizuo and Gerald Goldstein "The Asian Principles of Private International Law: Objectives, Contents, Structure and Selected Topics on Choice of Law" 2017 *Journal of Private International Law* 411–434; and Uematsu Mao "APPIL (Asian Principles of Private International Law) and its Perspectives Regarding International Jurisdiction" 2019 *Ritsumeikan Law Review* 35–49.

82 http://www.ohadac.com/accueil.html.

83 http://www.ohadac.com/textes/1/draft-ohadac-model-law-of-commercial-companies.html.

84 Status of the OHADAC Project's Progress http://www.ohadac.com/actualite/126/status-of-the-ohadac-project-s-progress.html.

85 J L Neels *African Principles on the Law Applicable to International Commercial Contracts* (2023).

work. The case for reform is palpable given the increased level of international business transactions with the continent. It was argued that engagement with international processes, including co-operation with the Hague Conference, is an important path to reform. While African countries' membership of the Hague Conference and ratification of its conventions have increased with time, there is still significant room for growth. This paper has argued for African countries to consider legislating based on specific provisions in some of the Hague Conventions. These should be complemented by domestic legislation and incremental judicial decisions. Happily, there are signs of activity on both fronts.

It has also been argued that academics have a crucial role in the reform of private international law in Africa. Comparative lessons from other parts of the world reveal how this can be achieved.

Arbitration, Court Adjudication or *Via Media*?

The Eruption of Hybrid Bodies for the Resolution of International Commercial Disputes – A Path for Southern Africa?

Marta Pertegás Sender*

1 Introduction

Christopher Forsyth has inspired colleagues and law students around the world, far beyond the many jurisdictions (South Africa, the United Kingdom, Hong Kong SAR or Singapore) where he deployed most of his professional activities.

In this tribute of a European civil law lawyer to our very inspiring and learned colleague, I would like to use a characteristic expression of one of his legal "homes" – the *via media* of South African conflict of laws – to analyse a new trend in transnational commercial dispute resolution. The South African conflict of laws refers to the *via media* to assess the process by which characterisation can be conducted when *lex causae* and *lex fori* differ as to the classification of prescription as a procedural or substantive issue. The *via media* approach was confirmed by the Supreme Court of Appeal in *Society of Lloyd's v Price* and was met with approval by South African commentators, including Christopher Forsyth himself.[1]

A similar *via media* or hybrid technique is noticeable in different parts of the world for the resolution of international commercial disputes. Many jurisdictions have witnessed the creation and development of special courts specifically designed to resolve international commercial disputes. Other than the common courts that serve as higher instance in court systems of

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1 See *Society of Lloyd's v Price, Society of Lloyd's v Lee* 2006 5 SA 393 (SCA) accessible at www.supremecourtofappeal.gov.za; approving comments of C F Forsyth *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012) 88–90 and further references.

different States,[2] the focus here is on specialised courts that are part of a single jurisdiction but are specifically tailored to serve the needs of international commercial litigation. A non-exhaustive list of such courts would certainly feature the pioneering Commercial Court of England and Wales, the oldest and leading commercial court attracting foreign litigants, as well as the US District Court for the Southern District of New York or the Hong Kong Court of First Instance. Interestingly, the list would also include several institutions of recent creation such as the Singapore International Commercial Court (SICC), the Dubai International Financial Centre Courts (DIFC), the China International Commercial Courts (CICC) or the international sections of Commercial Courts in certain continental European States such as France, Germany or the Netherlands.

A common trend appears to be emerging, as several jurisdictions in different regions of the world offer competitive alternatives to traditional commercial courts or arbitral tribunals specialised in international disputes. It triggers the question whether similar trends are expected or should be recommended for the Southern Africa region. In this contribution, I would like to set the scene for such questions. To this end, section 2 provides an overview of relevant judicial developments in a number of jurisdictions. Section 3 then tries to identify some of the common characteristics as well as the differences between the identified institutions, and, finally, section 4 raises questions about the need to set up a similar hybrid dispute resolution mechanism in Southern Africa. It is hoped that the recipient of this tribute, and many other experts from the region, may find the following comparative and preliminary observations to be helpful for their analysis of the policy options for the region.

2 A Brief *tour d'horizon*

The rapid developments in the international commercial dispute settlement landscape are certainly remarkable, and have generated much interest in judicial circles and beyond.[3]

2 For instance, the OHADA Court of Justice and Arbitration or the Caribbean Court of Justice.

3 See for instance, the inclusion of a panel on this subject on the agenda of the commemorative conference of 70 Years Korean Judiciary organised by the Korean Judicial Policy Research Institute, UNODC and supported by UNCITRAL on "The Future of Judiciary: A Global Perspective", in December 2018. See also the panel on "The Future of International Dispute Resolution" at a conference held in Singapore in August 2019 on the occasion of the signature of the UNICITRAL Mediation Convention or the speech of the Hon Justice John Middleton (Federal Court of Australia) on "The Rise of the International Commercial Court" (https://www.fedcourt.gov.au/digital-law-library/judges-speeches /justice-middleton/middleton-j20180921), delivered in Hong Kong in November 2018. In doctrinal writings, see *inter alia* G Saumier "Specialised National Courts and International Business Disputes" 2023 summer course delivered at the Hague Academy of International Law (forthcoming); G Rühl and M Yip "Success

2.1 Asian Trendsetters

Asia is a trendsetter with regard to recent developments in international commercial litigation. While characterised by a fragmented and diversified judicial landscape, this region has also managed to establish some of the most reputed international dispute settlement hubs in the world, including newly established courts with *sui generis* features.

2.1.1 *Singapore International Commercial Court (SICC)*

The SICC deserves a specific mention, given its relative recent creation (in early 2015), the swift process that led to its creation and its rapid consolidation in the past years.[4]

The SICC is a division of the Singapore High Court and part of the Supreme Court of Singapore. Thanks to the referral of a significant number of international cases by other Singaporean courts in its first years of existence, as well as the massive promotional efforts of the Singaporean legal community, the SICC has gained progressive relevance in the international dispute settlement landscape. A solid legal embedment in Singapore's court system, its hybrid bench with both Singaporean and "international" judges, as well as calibrated and resource-intensive campaigns to increase awareness about its services have yielded the expected results. Nowadays, the SICC stands as a "new model of litigation for international disputes" that practitioners and academic commentators have positively welcomed.[5]

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and Impact of International Commercial Courts – A First Assessment" 2022-2023 *Yearbook of Private International Law* 45, and, by the same authors as editors, *New International Commercial Courts – A Comparative Perspective* (Intersentia, 2024); W Gu and J Tam "The Global Rise of International Commercial Courts: Typology and Power Dynamics" 2022 *Chicago Journal of International Law* 443-492; Z Huo and M Yip "Comparing the International Commercial Courts of China with the Singapore International Commercial Court" 2019 *International and Comparative Law Quarterly* 903-942; M Requejo Isidro "International Commercial Courts in the Litigation Market" 2019 *MPI Luxembourg Research Paper Series* <www.mpi.lu>; and E Themeli *The Great Race of Courts – Civil Justice System Competition in the European Union* (2018 thesis Erasmus University Rotterdam, the Netherlands) available at https://repub.eur.nl > pub > The-Great-Race-of-Courts-final-version.

4 Early 2013, Chief Justice of Singapore Sundaresh Menon proposed the idea of the SICC: see S Menon "Response by Chief Justice Sundaresh Menon" (speech delivered at the Singapore Opening of Legal Year 2013, 4 January 2013) http://www.sal.org.sg/Lists/Speeches/DispForm.aspx?ID=112.

5 See M Yip "Special Reports – Singapore International Commercial Court: A New Model for Transnational Commercial Litigation" 2015 *Chinese (Taiwan) Yearbook of International Law and Affairs* 155; and more recently, A Chong and M Yip "Singapore as a Centre for International Commercial Litigation: Party Autonomy to the Fore" 2019 *Journal of Private International Law* 97-129. For an Australian perspective, see A Godwin, I Ramsay and M Webster "International Commercial Courts: The Singapore Experience" 2017 *Melbourne Journal of International Law* 219-259. From

2.1.2 *Developments in PR China*

The constitution of China's (First and Second) International Commercial Courts (CICC) in 2018 is very significant as well. As one of the world's economic superpowers, China is implementing very ambitious plans to give its judiciary a prominent place in the international legal arena. Next to traditional venues for international litigation such as Hong Kong or Shanghai, the CICC, established by the Supreme People's Court as a permanent tribunal of the Chinese judiciary, operates from two locations: Xi'an, the starting point of the ancient Silk Road, and Shenzhen, which is in the Guangdong-Hong Kong-Macao Greater Bay area and is home to, among others, tech giant Huawei. The creation of the CICC appears to respond to China's strategy to provide adequate means of resolution of disputes arising out of the Belt and Road Initiative, a State-based development strategy that involves huge amounts of projects and investments by Chinese undertakings in Asia, the Middle East, Africa and Europe.

The CICC characterises itself by offering diverse dispute resolution mechanisms to parties, combining litigation, arbitration and mediation. It appears that the courts may decide to either hear the case, or refer it to other specialised institutions, depending on the characteristics of the individual case and the parties' expectations. This diversified approach contrasts with other more rigid characterising features of the CICC. For instance, the Procedural Rules for the China International Commercial Court of the Supreme People's Court (For Trial Implementation) allow for limited flexibility as to the language of the proceedings or the role of foreign lawyers representing the parties. In addition, all CICC-appointed judges are China's Supreme Court judges, although they may rely on the (foreign) members of the Expert Committee to gain access to relevant foreign law(s).

While the English version of the CICC case database reports on less than a handful pending or completed cases, it nonetheless seems that China is willing to embrace the current trend of adjusting dispute settlement to the needs of (Chinese parties in) international commercial disputes.[6]

a comparative perspective with international arbitration, see D Ruckteschler and T Stooss "International Commercial Courts: A Superior Alternative to Arbitration?" 2019 *Journal of International Arbitration* 431-449 (the authors consider international arbitration a better alternative for international commerce at present, but see more potential for international commercial courts if the global enforceability scheme for judgments improves: see 3.4 below).

6 See N Zhao "The CICC: An Endeavour towards the Internationalisation and Modernisation of Chinese Courts" in X Kramer and J Sorabji (eds) *International Business Courts – A European and Global Perspective* (2019) 159-184; W Zhang and G Tu "Recent Efforts in China's Ambition to Become a Centre for International Commercial Litigation" 2023 *RabelsZ* 497-531.

2.1.3 *The Middle East*

Some Middle East jurisdictions have followed the trend of establishing special common law courts in mixed jurisdictions, where the civil law tradition and the Sharia coexist. Interestingly, another legal tradition, the common law, has inspired such courts, which are set up to mirror the Commercial Court of England and Wales in its organisation and practices. The rationale lies in the perceived prevalence of that court and common law schemes for the resolution of international commercial disputes.[7]

Courts such as the Qatar International Court and Dispute Resolution Centre or the Abu Dhabi Global Market Courts have ambitious plans to emulate the success of its Far East counterparts. They display certain similarities: from a fully international bench that includes seasoned judges from the common law tradition to state-of-the-art facilities with regard to the conduct of the proceedings (use of English language and court procedure regulations akin to English procedure, small claims tribunal, use of new technologies, outstanding communication and logistical facilities, etc.). It seems, from a quick review of their respective dockets, that these courts are mainly for the specific needs of disputes related to the special economic zones within the Emirates. They nonetheless succeed in their aspirations of attracting broader circles of international disputants.[8]

2.1.4 *Interest in the Pacific Region?*

Questions about the establishment of international commercial courts have travelled to other continents. In the Pacific region, some members of the Australian bench have suggested the establishment of an Australian International Commercial Court, but this proposal does not appear to have taken further institutional shape so far.[9]

7 Z Sharar and M AI Khulaifi "The Courts in Qatar Financial Centre and Dubai International Financial Centre: A Comparative Analysis" 2016 *Hong Kong Law Journal* 529.

8 The DIFC Courts have undertaken significant efforts to attract international disputants. See M Hwang "Commercial Courts or International Arbitration – Competitors or Partners?" 2015 *Arbitration International* 193-212. Compare the press release published in August 2019, according to which the DIFC Courts heard 469 cases across all divisions in the first half of 2019 (https://www.difccourts.ae/2019/08/25/difc-courts-signals-surge-in-cases-from-smes/) in pre-pandemic times and the statistics provided by the 2022 *Annual Report* (https://www.difccourts.ae/media-centre/publications/annual-reports/annual-report-2022-english).

9 The establishment of an "integrated commercial court" in Australia, which, similar to the SICC, could aim to attract both regional and "global disputants" was suggested by Chief Justice Marilyn Warren and Justice Clyde Croft in 2016 ("An International Commercial Court for Australia – Looking Beyond the New York Convention" Commercial CPD Seminar Series, 13 April 2016, available at: https://www.supremecourt.vic.gov.au/sites/default/files/assets/2017/10/b5/0475019f6/aninternationalcommercialcourtforaustralialookingbeyondthenewyorkconvention.

2.2 European Developments

The Asian developments also resounded in Europe, not only because of their potential impact on traditional hubs for international commercial litigation such as London, but also because they coincided with times of post-Brexit "regulatory competition" among European judiciaries.[10]

The landscape of court-based international commercial dispute resolution is in full evolution in Europe: while some traditional venues are adapting themselves to societal and technological developments, others are seizing the opportunity to create new courts (or sections, divisions, etc) of like characteristics. There appears to be a growing attention to the necessity of adjusting litigation services to the perceived needs of the international business community.

2.2.1 *The Traditional "Magnets" of International Commercial Litigation*

For centuries, London has maintained a privileged position in the international dispute resolution market. However, in times of post-Brexit readjustment and of multiplication of international commercial courts around the world, the stakeholders of the City's courts painstakingly follow the developments in other jurisdictions and have to deploy their best efforts to maintain London's prime position. Such efforts include regular organisational improvements of the Business and Property Courts of England & Wales (to which the Commercial Court belongs) or notable promotional and marketing work carried out by the London-based legal community to avoid losing market share. It cannot be a coincidence that, in the midst of the proliferation of new international commercial courts in the world, the Standing International Forum of Commercial Courts was created under the auspices of the Business and Property Courts of England and Wales. This is a forum by courts and for courts, which brings together the world's commercial courts to discuss topics of common interest. Courts can

pdf). For a more sceptical view, based on the quality, reputation and speed of some Australian courts and the possible inconvenience of a federal law system as applicable law: Justice Andrew Bell "An Australian International Commercial Court – Not a Bad Idea or What a Bad Idea?" paper presented at the 2019 ABA Biennial International Conference on 12 July 2019 in Singapore, available at http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2019%20Speeches/Bell_20190712.pdf.

10 G Wagner "Dispute Resolution as a Product: Competition between Civil Justice Systems" in H Eidenmüller (ed) *Regulatory Competition in Contract Law and Dispute Resolution* (2013) 347-413; and S Francq "Regulatory Competition in Civil Procedure Between EU Member States" in G Van Calster and J Falconis (eds) *European Private International Law at 50: Celebrating and Contemplating the 1968 Brussels Convention and Its Successors* (2018) 13-32. Such competition may be detrimental for the European Judicial Area, as noted by G Ruhl: see her study on behalf of the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs: G Ruhl "Building Competence in Commercial Law in the Member States" available at http://www.europarl. europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604980.

learn from each other, develop best practices and offer mutual assistance in topics of common interest such as cross-border enforcement of judgments.[11] Furthermore, the London legal community (including its judiciary) actively promotes this forum around the world. In the same vein, the Law Society of England and Wales works hard to safeguard the market share of London as an international dispute settlement hub by promoting judicial cooperation in civil and commercial matters in a broad transnational setting.[12]

On the European continent, changes are noticeable as well. Paris may have been the first jurisdiction to soften the official language requirements for judicial proceedings in commercial cases, allowing proceedings to be conducted in languages other than French. What started as a judicial practice of the Paris Commercial Court was given further shape with the introduction of an International Chamber to its Commercial Court of First Instance and Court of Appeal. In 2018, the rules applicable to proceedings brought before these courts were further modernised. It is the clear intention of the supporters of these developments to channel a significant portion of international commercial cases from London to Paris.

Other EU States are witnessing analogous developments. Several courts in Germany have traditionally attracted significant portions of international commercial disputes in sectors such as finance or intellectual property, and wish to maintain their *status quo*, or even increase their market share in a post-Brexit era. Reforms were completed to ensure more visibility and easier access of foreign litigants to German courts.[13]

2.2.2 *Some Newcomers*

In parallel, other continental jurisdictions saw this rapidly evolving judicial landscape as an opportunity to raise their profile in a specialising legal market for international commercial cases.

The Netherlands Commercial Court (the "NCC")[14] opened its doors on 1 January 2019. In line with a progressive liberalisation of language requirements in Dutch proceedings, the NCC is still unique in the Dutch judicial landscape

11 See https://www.sifocc.org/.

12 See https://www.lawsociety.org.uk/support-services/brexit-and-the-legal-sector/.

13 See, for instance, B Hess and T Boerner "Chambers for International Commercial Disputes in Germany: The State of Affairs", (2019) 1 *Erasmus Law Review* 33 - 41; M Lehmann "'Law 'Made in Germany': The Export Engine Stutters" in X Kramer and J Sorabji (eds) *International Business Courts – A European and Global Perspective* (2019) 83-106; and P Podszun and T Rohner "Die Zukunft der Kammern für Handelssachen" 2019 *Neue Juristische Wochenschrift* 131-136.

14 The NCC website reflects the embedding of this court within the judiciary of the Netherlands: https://www.rechtspraak.nl/English/NCC/Pages/default.aspx. For an analysis, see for instance S Kruisinga "Commercial Courts in the Netherlands, Belgium, France and Germany – Salient Features and Challenges" 2019 *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 277-280.

as it operates proceedings fully conducted in English leading to judgments in English. With regard to other procedural aspects, both the NCC as first instance court, as well as the Netherlands Commercial Court of Appeal (NCCA), which is to hear appeals from the NCC, remain governed by "Dutch procedure, including in particular the CCP (the Dutch Code of Civil Procedure). The applicable substantive law is determined by reference to the rules of Dutch private international law."[15]

Conversely, the proposal to launch a Brussels International Business Court (the "BIBC") was discontinued.[16] While the idea of setting up such a court in Europe's political capital resonated with the Brussels-based international legal community, it was met with scepticism by influential members of the Belgian political and judicial sector. There was perhaps no opposition to the establishment of the court *per se*, but it was noted that other more pressing needs of the Belgian court system should be prioritised, instead of investing efforts and financial resources in a new structure fit for a small number of cases.

This brief overview shows that the judicial landscape for international commercial disputes is in constant flux, in Europe and beyond. Parallel developments take place in several geographically distant locations, in spite of different institutional, legal and cultural settings. The newly established courts, as well as the traditional ones, share similar aspirations of attracting significant portions of international commercial dispute resolution. Furthermore, these courts operate in an interconnected world of international business transactions and enhanced judicial cooperation so that, as section 3 suggests, they may develop common features at the intersection of diverse legal families and court administration structures.

3 International Commercial Courts as "*Via Media*"?

There are several reasons that one can give for the proliferation of international commercial courts: they are set up because regular courts in the respective jurisdictions are not adequately equipped to deal with international commercial cases; they are an attempt to counter the predominance of international arbitration as the preferred mechanism of resolving international disputes; they are part of a broader strategy to strengthen the market share of a given jurisdiction in a particular segment of cases, etc. No matter what their particular motives may be, the emergence of such courts has certainly brought new insights about the resolution of international commercial disputes. Emerging as

15 Article 1.2.1 of the NCC Rules. See https://www.rechtspraak.nl/SiteCollectionDocuments/ncc-procesreglement-en.pdf.

16 The proposal was launched with the support of broad sectors of the Belgian and Brussels-based legal community, as well as the former federal Government, but failed to pass parliamentary scrutiny.

a *via media* between domestic courts and alternative forms of dispute resolution, they rely on a number of hybrid features, schematically set out below.

3.1 "New Style" Courts: A More Integrated Approach to International Dispute Resolution

International commercial matters may be complex and specialised, but they can still be resolved by courts. It is important for any rule-based system that court adjudication remains a viable option for litigants, even if arbitral or other alternative dispute resolution prevail as the preferred method in practice.

What is more, dispute resolution hubs gain overall attractiveness if they offer a more integrated approach to dispute resolution, where courts facilitate arbitration if parties express a preference for such resolution method or where courts encourage out-of-court mediated agreements as much as possible. Such a diversified approach does not call into question the role of courts as the focal point of an extensive range of dispute resolution methods available to international litigants. To this end, some international commercial courts offer a symbiotic function between distinct forms of dispute resolution. For instance, the DIFC reports a successful rate of out-of-court settlements in response to the court's active policy of encouraging parties to resolve disputes out of court. Similarly, the CICC encourages parties to use mediation as a first resort to solve the dispute and will hear the case only if parties are unwilling or unable to find a solution through mediation. Such examples illustrate the usefulness of blended dispute resolution structures, where arbitration, mediation, conciliation or recourse to specialised courts offer valuable alternatives, in light of the particular needs of the parties in each individual case. Novel and multi-layered dispute resolution services, with the court system as the "main player",[17] contribute to the attractiveness of a given jurisdiction for international commercial litigants.

3.2 Broad Interpretation of "International" and "Commercial" Matters

There may be variations, but there is a general understanding that the established international commercial courts have broad competences over a very comprehensive range of "international" and "commercial" matters. Guidance from the international arbitral practice – and the progressive adaptation of these notions to the current needs of international commerce – is welcome. For instance, the SICC accepts that the criterion of "internationality" can be met

17 N Andrews *The Three Paths of Justice. Court Proceedings, Arbitration and Mediation in England* (2018) 6; and S Menon "International Commercial Courts: Towards a Transnational System of Dispute Resolution" Opening Lecture for the DIFC Courts Lecture Series 2015, available at https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---difc-lecture-series-2015.pdf.

by agreement of the parties or based upon the litigants' place of business or lack of connection to Singapore.[18] Similarly, the NICC accepts a broad notion of international matters, but makes it clear that it is in no way intended to supplant existing national courts for solely domestic matters.[19]

Commerciality is broadly defined as based upon a "relationship of a commercial nature", and does not necessarily require any particular formalities, or even a contract.[20] The transnational dimension of commercial transactions, as well as the progressive detachment from physical connections, indeed require a broad understanding of the substantive scope of competence for such judicial institutions. Given their adaptability and specialisation, technology-related cases may be a particularly good fit for such courts.

3.3 Access to the Courts Through Party Autonomy

International commercial courts rely predominantly upon the willingness of parties to submit to their own jurisdiction. The consent of the parties is a commonly accepted jurisdictional factor in international commercial disputes and, as such, it is not surprising that international commercial courts refer to a choice of court agreement (prior or once the dispute has arisen) to establish their (international) jurisdiction.[21] The exercise of jurisdiction may be conditional to the *forum non conveniens* test in some (common law) jurisdictions, but not in others.

Convergent transnational standards on exclusive and non-exclusive choice of court agreements are still in their infancy, but they shall progressively emerge from the application of the 2005 Choice of Court and the 2019 Judgments Conventions of the Hague Conference on Private International Law (HCCH).[22] The former instrument entered into force ten years after its conclusion and has attracted more than thirty Contracting States to date, including all EU States, the United Kingdom and Singapore. This Convention supports a transnational understanding of an exclusive choice of court agreement by establishing

18 See Rule 1(2)(a) of Order 110 of the SICC Rules of Court.

19 See Art 1(3)(1b) of the NICC Rules of Procedure.

20 Compare for instance, Rule 1(2)(b) of Order 110 of the SICC Rules of Court with Art 1(3)(1a) of the NICC Rules of Procedure, and the clarification that the notion of "civil and commercial matters" under the Brussels I Regulation is more restricted than the one used by the NICC.

21 Art 1(3)(1d) of the NICC Rules of Procedure; and Art 5 of Law No 12 of 2004 in respect of the judicial authority at the Dubai International Financial Centre. For the CICC, see Art 2(1) of the Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court (note the monetary threshold of 300 million RMB for the submission of cases to the CICC by means of a choice of court agreement).

22 Convention of 25 June 2005 on Choice of Court Agreements and Convention of 2 July 2019 on the Recognition and Enforcement of Judgments. Their respective current status is available at https://www.hcch.net/en/instruments/conventions.

uniform rules on the formal and substantive validity of such agreements. The Convention has also dispensed with the application of the *forum non conveniens* doctrine in favour of an exclusive jurisdiction clause. It is therefore meant to contribute to a transnational understanding of adequate court selection schemes in international commercial cases. For other (non-exclusive) court selection agreements, the HCCH Convention concluded in July 2019 is indirectly relevant. By facilitating the recognition and enforcement of judgments "given by a court designated in an agreement", the Convention indirectly acknowledges the importance of the parties' choice of court, and it delineates acceptable bases of jurisdiction for recognition and enforcement among Contracting States.[23]

In addition, in the initial years of operation of some of the newly created international commercial courts, jurisdiction may be achieved via the transfer of proceedings from another court, such as the transfer from other divisions of the Amsterdam District Court to the NICC or the transfer from the Singapore High Court to the SICC.[24] Such transfers allow international commercial courts to register and handle cases immediately after their creation. It is by showcasing and marketing their first practical experiences that such courts progressively gain the trust of litigants and, in turn, the referral of cases by party submission.[25]

23 The (future) significance of the HCCH Conventions was noted by Menon (2015). See also A Reyes "Recognition and Enforcement of Interlocutory and Final Judgments of the Singapore International Commercial Court" 2015 *Journal of International and Comparative Law* 337 340 noting that "if there were an equivalent to the New York Convention applying to judgments, international commercial courts such as the SICC would come into their own as a credible alternative to arbitration (including arbitration in Singapore)".

24 See Sec 2.2 of the SICC Procedural Guide, with reference to the Supreme Court Judicature Act (Cap 322). The NCC District Court and the NCC Court of Appeal are chambers of the Amsterdam District Court and the Amsterdam Court of Appeal, respectively.

25 Interestingly, the first judgment rendered by the NCC resulted from a post-dispute agreement between the parties to litigate the case in English before the NCC. This was welcomed by observers as a sign of confidence of the international legal community in the attractiveness of the recently established court (or rather English-language division of the Amsterdam court). See G Antonopoulou and X Kramer "The Netherlands Commercial Court Holds its First Hearing!" entry blog on http://conflictoflaws.net/2019/the-netherlands-commercial-court-holds-its-first-hearing/. Similarly, the second judgment rendered by the NCC resulted from a dispute between parties that entered into an exclusive choice of court agreement for the courts of Amsterdam and, further to the dispute, complemented their choice by agreeing to proceedings conducted in English before the NCC. See https://www.rechtspraak.nl/English/NCC/Pages/judgments.aspx.

3.4 Recognition and Enforcement Abroad

The portability of judgments rendered by international commercial courts features as the most prominent factor of their success in practice.[26] The real test is whether these courts are likely to render decisions that benefit from simplified recognition and enforcement abroad. Courts based in the EU indeed benefit from the suppression of *exequatur* of the "Brussels regime", that is, the EU Regulations led by the Brussels I Regulation that ensure free circulation of judgments between EU Member States. It is a matter of debate whether, in the post-Brexit era, the Commercial Court of England and Wales (or other UK-based courts) will lose attractiveness for litigants in the European continent as the EU instruments on recognition and enforcement are no longer applicable.

On a broader scale, the uniform and liberal regime of the 2005 Choice of Court Convention is available to its Contracting States. As noted, this Convention firmly enshrines party autonomy of an exclusive choice of court as an acceptable jurisdictional ground, by obliging "not chosen" courts to suspend or dismiss proceedings (Article 6), and to recognise and enforce judgments rendered by the chosen court (Article 8). The Convention should attract additional Contracting States, including China and Australia, in the near future. As a complement, the 2019 Judgments Convention, which entered into force in 2023, should claim a prominent place in the firmament of international dispute settlement, in general, and the operation of international commercial courts, in particular. As things currently stand, the competitive advantage of other dispute resolution methods flows from the much wider scope of application of the 1958 New York Convention or the surge of the 2019 Singapore Convention, which has attracted Contracting States in all continents and more than five signatories.[27]

3.5 Procedural Accommodations Aimed at Attracting Foreign Disputants

Last but certainly not least, international commercial courts are characterised by their notable efforts of tailoring their procedures and practices to the needs of prospective users. This shows once more the emergence of a *via media* for international commercial disputes, which is court-based but benefits from a "strong influence" of arbitral practice.[28] For instance, the SICC offers relatively accommodating approaches with respect to confidentiality, proof of foreign

26 Menon (2015) 5; and Ruckteschler and Stooss (2019) 447-448.

27 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at https://www.newyorkconvention.org/english and United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation"), available at: https://uncitral.un.org/en/texts.

28 Yip (2015) 6.

law and rules of evidence. It also allows for an international bench and grants foreign lawyers relatively liberal rights of access.[29]

Costs are another essential factor for international commercial courts. In the race to attract prospective litigants, some courts advertise that equivalent judiciary standards can be provided in France, the Netherlands or Germany at a fraction of the procedural costs of their English counterparts. However, the costs of such courts within their respective judiciary remain a source of concern: such courts should not become an additional burden on the limited resources of the judiciary. Imposing higher procedural costs to ensure self-funding raises a broader concern that law-makers ought not to be more responsive to the "demands" of foreign actors than to those of their local constituents, as it would be inadequate to create a "two-class" judiciary that privileges foreign disputes (with no link to the jurisdiction) over the local.[30] This broader matter is one to be further considered as the (future) courts develop in practice.

4 The Southern Africa Perspective

The described developments in distant parts of the world trigger the question about their relevance for the region of Southern Africa. Could one envisage the establishment of a similar international commercial court in the region?

It is of course for local experts to consider this policy question in more detail. What follows are some personal reflections, based on my limited knowledge about dispute resolution in the region. For years, I was responsible for the promotion of the 2005 Choice of Court Convention as well as the HCCH project that led to the 2019 Judgments Convention. On the African continent, this task led to very informative exchanges with local officials and academics about dispute resolution for international commercial cases.

Above all, it is clear that the developments described above have not gone unnoticed in Southern Africa. There is awareness that such multiplication of international commercial courts in different parts of the world may have an impact on the dispute resolution pattern for international commercial cases connected to the region. However, other than recommending the reinforcement of the commercial divisions of courts in States where they exist,[31] I am not

29 Menon (2015) 19.

30 As noted, this is one of the reasons why the BICC project was discontinued. See J Erauw "EEX-Verordening en Internationale Contracten: Recente Ontwikkelingen en Perspectieven" 2019 *Nederlands Internationaal Privaatrecht* 318 330; and G van Calster "The Brussels International Business Court. A Carrot Sunk by Caviar" in X Kramer and J Sorabji (eds) *International Business Courts – A European and Global Perspective* (2019) 107-114. About the NICC, see P Ortolani and B van Zelst "Reservations of the Netherlands Commercial Court" available at https://www.maastrichtuniversity.nl/blog/2017/10/ reservations-over-netherlands-commercial-court.

31 For instance, in South Africa, the Commercial Court Practice Directive introduced by the Deputy Judge President of the Gauteng Division of the High Court, available at https://content.app-sources.com/s/92583153899527409/uploads/Practice_Manual_

aware that the establishment of a region-based international commercial court has been discussed.

One possible trend could be that the very prominent resort to international arbitration is revisited in favour of more diversified and integrated dispute resolution schemes. Commercial litigants in the region traditionally turn to arbitration for similar reasons than those reported in other parts of the world (that is, a better chance of having a neutral and enforceable resolution of their dispute). This motive is possibly combined with the perception that the domestic court system is incapable of meeting the demands of international commercial relations in terms of swift and specialised dispute resolution. On the other hand, there are concerns about international (investment) arbitration which are possibly rooted in the private (or confidential) nature of the arbitral process and its impact on public interest issues.[32] While such concerns may have more or less impact in the different States of the region, they can generally influence litigants in need of more transparent and open dispute resolution methods. This may in turn swing the pendulum in favour of courts with proven expertise for international commercial cases.

Another possible consequence of more competition between different international commercial courts may be that litigation is geographically spread among different regions of the world, instead of systematically resorting to the traditional 'magnets' of international litigation such as the Commercial Court of England and Wales. We may therefore witness a diversification of venues channelled by party autonomy. For instance, it is likely that contracts drafted by Chinese investors contain choice of court clauses in favour of the CICC and these parties may be willing to impose their preferences irrespective of the place where the investment project takes place (the rest of Asia, Africa or Europe). For the other contracting parties, an option may be to argue for another international commercial court, which may be similar to the CICC but is located in a neutral jurisdiction. The rising number of available courts may facilitate such negotiations. It is therefore useful to follow the fast developments in this area of international dispute resolution and take advantage of the available options to the extent possible.

Whether these developments will materialise – and whether the establishment of an international commercial court in the region will be considered – remains an exercise of crystal-ball-gazing. The reputation of a jurisdiction in terms of its attractiveness for foreign-related disputes depends on so many factors that the specific weight of an individual institution (such as an international commercial court or an arbitral institution) is relative. It is possible, as Justice Bell suggested for Australia, that no new institution needs to

Files/REVISED-COMMERCIAL-COURT-PRACTICE-DIRECTIVE-WITH-EFFECT-FROM-01-JUNE-2022--3162612.pdf.

32 E Onyema "The Role of African Courts and Judges in Arbitration" in E Onyema (ed) *Rethinking the Role of African National Courts in Arbitration* (2018) 3 7.

be set up because a number of desirable factors are already available. It is then recommendable to invest the available resources in raising the level of overall support and protection offered by a jurisdiction, and the quality of dispute resolution in general.

5 Concluding Remarks

The emergence of international commercial courts in distant parts of the world shows the ability of court systems to adapt themselves to the needs of contemporary transnational commercial dispute resolution. Such courts compete among themselves and with other dispute resolution institutions for a proportionally limited segment of disputes and employ a range of measures that are perceived to be litigant-friendly: procedural innovations, linguistic facilities, emerging concepts of integrated or hybrid dispute settlement, specialised benches, etc. They offer global legal services to international litigants and, as such, welcome litigants from all regions of the world.

To the best of my knowledge, the establishment of such a court in Southern Africa has not been considered and the purpose of my contribution was not to suggest it should. At this stage, it seems to me that it is possibly too early to determine whether another such institution is needed. It may well be the case that available resources for the judiciary would be put to a better use were they to reinforce other components of the dispute resolution processes. Such policy choices, it is submitted, should be based on the analysis of current changes to international commercial court practice and their consequences for litigants in the region.

Prospects and Options for Recovery of "Heritage Art" in the *Oeuvre* of Irma Stern

Christa Roodt*

1 Background

Irma Stern (1894–1966) was a foremost colourist with a highly individualistic modernist style. Her reputation ensures that her art achieves high prices on the secondary art market. South African by birth, Africa was where she made her home upon completion of her studies and where her artistic province lay.[1] While the Second World War was raging across Europe, Stern undertook several ventures into the heart of Africa. During her "Zanzibar period" (1936–1946), she became fascinated with the blend of Arabic, Iranian and Indian cultures on the island. Works from this period count among her best.[2]

Stern was educated in Germany and the formative influence of German Expressionism is strongly evident in her work.[3] Stern never exhibited her work in Nazi Germany.[4] After the Second World War, Germany had no recollection of her, but Germany's art historical memory was restored by an exhibition of her work in Bielefeld in 1996.[5]

Stern witnessed pivotal social and political moments in the histories of Europe and Africa, and she was uniquely placed to capitalize on them.[6] Stern's position and role in modern art in South Africa had two sides. Her association with artistic exchanges between the African and the Jewish diasporas and the social activism of the Jews against racism expressed one side.[7] The disavowal of the Cape Town art community made an outsider of her, but there was another side. She also found herself in the inner circle of the Apartheid government's system of privilege which offered her its unrelenting support. Winning favour with the conservative South African art establishment of the time meant she had to condone the Apartheid discourse on racial segregation in public. Stern

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1 N Dubow *Irma Stern* (1974) 7.

2 I Stern *Zanzibar* (1948).

3 K Schoeman *Irma Stern: The Early Years 1894–1933* (1994) 61–62.

4 M Arnold *Irma Stern: 'n Fees van Kleur* (1995) 21.

5 I Below "Between Africa and Europe" in P Cullen (ed) *Irma Stern: Expressions of a Journey* (2003) 31 34.

6 L Berger *Irma Stern and the Racial Paradox of South African Modern Art: Audacities of Color* (2020) 8.

7 Berger (2020) 3–9.

left her estate in trust for the promotion of South African art. Critical appraisal of her contribution to African art has always vacillated, but her *oeuvre* of more than 2000 works made a lasting contribution to Modern and Contemporary Art in South Africa and internationally. An attempt at "art-napping" two of Stern's works from the Pretoria Art Museum in 2012 confirms the public appeal of her work. "Two Malay Musicians" (1930) and "Fishing Boats" (1931) were taken by thieves who impersonated an art lecturer accompanied by students, but the works were saved.

States employ a variety of mechanisms and techniques to indicate that cultural objects, works of art, or certain collections qualify for legal protection in the public interest. Special legal regimes confine certain material to the national territory. Restrictions range from embargoes on the export of broad categories of cultural material and total prohibitions on listed objects, to export controls exclusively reserved for objects of truly national importance.[8] Limitations on the absolute exercise of property rights with regard to works of art require a delicate balancing act between rights of state ownership and the interference with private property rights.[9] There is no multilateral convention on export control law that harmonises the significant legal diversity in the field.[10]

Regulating the cross-border movement of cultural objects by means of export prohibitions poses fundamental challenges.[11] International civil litigation is costly and time-consuming. A foreign court would need to be convinced to recognise the protected status of a work of art, based on an administrative decision to classify an object as "protected", and to implement the mutual effect of export regulations. When a state or a branch of state brings a proprietary claim for recovery of exported material to a foreign court that needs to be convinced of the cultural significance of the object or material concerned, it is not purely a question for the domestic legal framework and the state agencies charged with implementation of that framework to decide. However important a domestic determination that confirms the heritage status of an object may be, it remains inconclusive. It is the recognition of export controls as an assertion of an ownership interest by a foreign court that would enable an object's heritage status to take effect, that would enable its recovery. Buy-back of an artwork doubles the loss suffered by the national estate. The government of New Zealand bought the famous Taranaki Panels back in 2014 at a cost of $4.5 million in

8 *Eg*, R K Paterson and M Renold "Foreign Culture: Export Controls on Material of Foreign Origin" in J A R Nafziger and R K Paterson (eds) *Handbook on the Law of Cultural Heritage and International Trade* (2014) 571. J H Merryman, A E Elsen and S K Urice *Law, Ethics and the Visual Arts* (2007) 115 classify types of export control into five groups.

9 M de Clippele and L Lambrecht "Art Law & Balances. Increased Protection of Cultural Heritage Law vs Private Ownership: Towards Clash or Balance?" 2015 *IJCP* 259.

10 K Siehr "Private International Law and the Difficult Problem to Return Illegally Exported Cultural Property" 2015 *Uniform Law Review* 503 515.

11 Siehr (2015) 513.

recognition of the meaning of the panels for Maori communities and the people of New Zealand.[12] The privately funded buy-back of ethnographic material for the benefit of the Bishop Museum in Hawaii confirms the considerable costs involved in buy-back.[13]

To determine whether prospects for an English court to recognize the "heritage status" of some of Stern's work are real, may sharpen the tools involved in an action for legal recovery in future. The combination of South African and English themes in discussion of options and prospects for recovery make for an appropriate topic by which to pay tribute to Professor Christopher Forsyth's contribution to private international law in South African and English courts.

2 The Responsibility to Protect National Cultural Heritage

The South African National Heritage Resources Act 25 of 1999 (NHRA) utilises a combination of categorisation,[14] listing in inventories[15] and classification[16] to support the definition and status of cultural objects.[17] The South African Heritage Resources Agency (SAHRA) is the administrative body charged to manage and develop, promote and conserve national heritage resources that qualify as part of the national estate.[18] The national estate comprises not only works that form part of public collections, but "the total sum of heritage resources in South Africa worthy of preservation". Only objects that are part of the national estate may be declared heritage objects.[19] SAHRA is authorized by the NHRA to provide heritage status to new or previously unrecognized objects when export is imminent. This suggests, firstly, that an object that has not been declared a heritage object can still form part of the national estate, and, secondly, that a declaration of heritage status is preceded by some decision on the cultural significance of an object. SAHRA is also empowered to consider the cultural significance of an object when an application for an export permit is made, and to control the trade in heritage objects.[20] The removal of an object that is closely

12 H Harvey "Motunui Panels Returned to Taranaki" *Taranaki Daily News* (20 March 2015).

13 S Reyburn "Masterpiece of Mistake? A Hawaii Museum's $7.5 Million Question" *NYT* (27 February 2019).

14 Categorization is based on a very general description indicating what qualifies for protected status.

15 Every item that is to be protected is listed in an enumeration approach.

16 By classification, protection is extended only when an administrative decision is taken by SAHRA, the competent authority, to that effect.

17 L V Prott and P J O'Keefe *Law and the Cultural Heritage* (1984-1989) 26-30.

18 NHRA sets standards for SAHRA. For example, a duty to keep an inventory of the national estate is imposed in sec 39 of NHRA.

19 Sec 32(1) of NHRA.

20 Secs 4 (d), 32 and 59 of NHRA.

associated with the history of South Africa from South African territory would require a permit from SAHRA.[21]

SAHRA first published a list of the types of heritage objects for which export permits would be required in 2002.[22] An auction sale of "Arab in Black" (1939),[23] one among a handful depicting Arab noblemen, illustrates how the regulations were applied. Stern had donated a work to one of the charity auctions held to raise money for the Treason Trial Defence Fund. The Fund was set up to help pay the legal costs of Nelson Mandela, and to support the families of the 156 ANC activists accused of high treason in 1958. In a letter to Freda Feldman dated 13 November 1958, Stern explained that she did not wish to continue donating to the cause.[24] She feared attracting attention from the authorities. The family who bought the work at the charity auction in question emigrated to the United Kingdom during the 1970s.[25] "Arab in Black" ended up in the modest London apartment of one of their children. A specialist in South African art at Bonhams auction house who was called out for a valuation of other items in the apartment, spotted the work.[26] The edges of the elaborate wooden frame were being used to hold photographs and letters. The date of production, 1939, and the date on which it had been removed from South Africa in the 1970s, meant the work fell short of the 50-year mark. Despite the work's direct connection with the birth of the democratic South African nation, it did not qualify for protected status, and its return to South Africa was not a realistic prospect. The painting sold for £ 842 500 at an auction sale at Bonhams in London in 2015.[27]

The new Regulations (Identified Types of Objects that are Protected, and May Not be Exported without a Permit from SAHRA) contain a revised list.[28] Regulation 3(4) re-iterates the 50-year rule by which paintings that have been in South Africa for more than 50 years and that are of notable aesthetic, cultural or historical significance, require a permit for exportation. The responsibility

21 Secs 32(1)(a), 32(19), 32(24) and 35(2) of NHRA.

22 GN 1512 *Government Gazette* 24116 of 6 December 2002; http://www.sahra.org.za/sahris/ about/about-sahra.

23 Oil on canvas 61 x 51cm.

24 C B Braude "Beyond Black and White: Rethinking Irma Stern" 2011 *Focus: Journal of the Helen Suzman Foundation* 58; M Berman *Remembering Irma, Irma Stern: A Memoir with Letters* (2003) 141 183.

25 CBC News "Used as a Bulletin Board, Irma Stern Painting Turns out to be Worth $1.5M" *CBC News* 22 July 2015, https://www.cbc.ca/radio/asithappens/as-it-happens-wednesday-edition-1.3162288/used-as-a-bulletin-board-irma-stern-painting-turns-out-to-be-worth-1-5m-1.3164043.

26 M Kennedy "South African Painting Discovered in Use as a Kitchen Noticeboard Valued at £1m" *The Guardian* (21 July 2015), https://www.theguardian.com/culture/2015/jul/21/arab-in-black-irma-stern-painting-kitchen-noticeboard-valued-1m.

27 Bonhams Auction Sale, South African Art, 9 September 2015, Lot 12.

28 GN 587 *Government Gazette* 42407 of 18 April 2019.

of the state to protect the integrity of its national cultural heritage may be incontrovertible and its duties as steward of the national estate clear in terms of the domestic legal framework, but it can be challenging to identify which objects come under the protective regime.[29] This status applies only to the major, most exceptional and rarest of works, whether privately owned or museum-owned, for which there is no comparison in public collections. Moreover, the definition stage may be deferred for objects for which there is no completed application that defines the object's status until such time as an administrative decision to grant or decline the export permit is taken. Any foreign buyer interested in acquisition of an object that could potentially qualify for protection is required to approach the SAHRA Permit Committee for a decision. A permanent permit must be denied if the object in question is (a) "of outstanding significance by reason of its close association with South African history or culture, its aesthetic qualities, or its value in the study of the arts or sciences" and (b) its loss will diminish the national heritage.[30] The very first sale of a South African heritage artwork to a foreign public institution after SAHRA had been set up, was "Arab Priest" (1945).[31] The Qatar Museums Authority was keen to have it for the Qatar Orientalist Museum, and paid £ 3 044 000, inclusive of buyer's premium, in 2011. However, the painting could not be removed.[32] The SAHRA Permit Committee refused to issue a permanent export licence.[33] While the Irma Stern Trust objected to a permanent permit, the Irma Stern Museum did not have the funds available to acquire the work. Qatar appealed, and a deadlock ensued.[34]

An applicant may require "compulsory purchase" of his or her property when a permit is refused.[35] The export bar offers a window of opportunity for buyers located in South Africa to make an offer before anyone else does, or to match the offer made from a buyer overseas, to buy out an object. If there is a fair offer to purchase forthcoming from inside South Africa, then a permit may not be issued.[36] Local cultural institutions may find it impossible to match the price offered by an overseas buyer, however.[37] If no fair offer is forthcoming from inside South Africa, SAHRA must forego compulsory purchase and issue

29 P Davies and P Myburgh "New Zealand" in J A R Nafziger and R Kirkwood Paterson (eds) *Handbook on the Law of Cultural Heritage and International Trade* (2014) 286 294.

30 Sec 32(23) of NHRA.

31 Oil on canvas 96,5 x 85cm.

32 Lot 2013 Bonhams Sale 18788. See http://www.bonhams.com/er/auction/18788/lot/203/.

33 M Beukes "South Africa" in J A R Nafziger and R K Paterson (eds) *Handbook on the Law of Cultural Heritage and International Trade* (2014) 354 375-376 gives a full account of the reasons for the refusal.

34 Sec 49 of NHRA; Beukes (2014) 376. The NHRA makes no provision for appeal against a decision taken by SAHRA itself.

35 Sec 32(25) of NHRA; Beukes (2014) 345, 368 and 370.

36 SAHRA decides on the fairness: Sec 32(25)-(31) of NHRA.

37 C Brown and B Grosvenor "Is it Time to Reform Art Export in the UK?" *Apollo* (29 March 2016).

a permit. An agreement was reached concerning "Arab Priest" at state level in early 2012, subject to a temporary permit restriction of 20 years.[38] This compromise allowed the work to leave South Africa without diminishment of the national estate.[39] The work shuttles between Qatar and South Africa every 5 years.[40] Prospective foreign buyers of works in the Stern *oeuvre* may be left without certainty over whether the artwork in question will be allowed to be taken abroad for some time.

Stern's "Black Lilies" meets the 50-year rule, but the painting remains in a private collection today.[41] The owner of "Black Lilies" (1941) approached Bonhams on 28 February 2013 to export and sell it, but the SAHRA Permit Committee turned down the permit application.[42] The justifications for the refusal included that black lilies were indigenous to Southern Africa; the work displayed fine formal as well as "startling" aesthetic qualities; and its exportation would constitute a loss to the national estate.[43] Another application for an export permit was going to be made in 2017, but the record now simply states that the work was sold for R2 273 600, including buyer's premium and VAT.[44]

3 Public Policy and Public Law in the Context of International Civil Proceedings

The prospect of a profitable sale on the international art market may attract private collectors to Stern's art. Insurance and maintenance of valuable artworks and cultural property can be difficult to keep up due to escalation in the price. It is conceivable that an owner or a smuggler might be tempted to by-pass customs ports of entry as is required by law.[45] Furthermore, a work acquired or held privately for its aesthetic or financial value may be of significance to the South African nation for its heritage value.[46] Public money is not readily forthcoming to incorporate art works of national importance into museum

38 Reg 24(2) of GN R548 *Government Gazette* 21239 of 2 June 2000 provides that permits for the temporary export of objects may be issued for a maximum period of two years and are renewable.

39 J Kuper "Currency of Culture" *Mail and Guardian* (20 January 2012).

40 Beukes (2014) 377.

41 https://www.the-athenaeum.org/art/list.php?m=a&s=tu&aid=5042.

42 Oil on canvas 69 x 64cm, signed and dated "Irma Stern / 1941" (lower left); further signed, titled and inscribed "Irma Stern Black Lilies, 75G / The Firs Chapel Road, Rosebank Cape Town" (verso).

43 https://www.sahra.org.za/sahris/sites/default/files/otherrefsdecisions/Black%20Lilies%20by%20Irma %20Stern.pdf.

44 Lot 595. See the sales catalogue compiled by Strauss and Co "Important South African and International Art, Decorative Arts and Jewellery on 16 October 2017", https://www.straussart.co.za/auctions/lot/16-oct-2017/595.

45 Sec 32(20) of NHRA.

46 http://www.sahra.org.za/sahris/about/heritage-objects.

collections, however. The question of the recognition of export controls could present itself once the definition of that work as "heritage art" is complete, and it is "art-napped" from a public collection while funds are being raised to retain it. It is also conceivable that an artwork that qualifies for legal protection based on its heritage value could enter the international art market with fraudulent export papers;[47] or could surface in a private exhibition in London.[48] If a museum piece that qualifies for protected status were to be unlawfully removed to be sold at an auction in England, the state or cultural institutions in South Africa may apply to an English court to recognize that status. What is the likelihood that an English court would halt the sale pending the outcome or order return? Two English cases grapple with the appropriate legal yardstick for recognition and application, in England, of cultural heritage status and protection under foreign public law. Both cases are concerned with the application and exclusion of foreign public law in English private international law.

The approach the court at first instance adopted in *Attorney-General of New Zealand v Ortiz*[49] in 1982 to the recognition of "protected" status in foreign export controls in the law of New Zealand, was compelling. Five elaborately carved Maori store house panels known as the "Taranaki Panels" (dated to between 1750 and 1820) were offered for sale by auction in London. They were buried in a swamp on the North Island of New Zealand, where a Maori tribesman found them in 1972. Lance Entwistle, a London dealer, bought them and exported them without obtaining permission from the authorities as required by the New Zealand Historic Articles Act of 1962. By virtue of this law, Entwistle was the legal owner while the panels were on New Zealand soil, but they were forfeited to the State when they left state territory. As soon as Entwistle arrived in New York, he contacted George Ortiz, a collector of African and Oceanic works. Ortiz bought the carved panels in 1973 and kept them in Switzerland until circumstances forced him to put up part of his collection for auction in 1978. When the Attorney-General of New Zealand learnt that Sotheby's London was about to auction the panels off, he claimed the panels' return.[50] The court at first instance ruled that forfeiture occurs automatically upon illegal export, and that the 1962 statute – which had the purpose to preserve historic objects as the property of the people of New Zealand and did not constitute penal or revenue

47 The Kingdom of Spain succeeded to obtain a declaratory order that Goya's "La Marquesa de Santa Cruz" had left Spain without an export permit in the Chancery Division in *Kingdom of Spain v Christie, Manson & Woods Ltd* [1986] 1 WLR 1120. This prevented its continued circulation on the international art market.

48 There was no official record of "The Bridegroom Cometh" by Sir William Blake Richmond having left South Africa when it turned up at a private exhibition in London in 1991. See P Naidoo "'Missing' Art: Foreign Affairs Steps In" *Sunday Tribune* (18 August 1991).

49 *Attorney-General of New Zealand v Ortiz* [1982] 3 All ER 432 (QBD and CA); [1983] 2 All ER 93 (HL).

50 Siehr (2015) 504.

law – qualified for enforcement in England.[51] Staughton J declared: "If the test is one of public policy … there is in my judgment every reason why the English courts should enforce s 12 of the Historic Articles Act 1962 …."[52] Despite the coherent analysis of the court at first instance, it was reversed by the Court of Appeal. Forfeiture was considered to occur upon seizure only, and "public law" was considered a category that was precluded in civil proceedings. Lord Denning classed an export prohibition accompanied by automatic forfeiture upon export as a "public law" which the country that is requested to enforce, will not.[53] The House of Lords upheld the decision of the Court of Appeal on crucial points – that the Panels were not automatically forfeit when they were removed, and that, since there was no seizure, ownership and the right of possession did not vest in the state – and denied New Zealand's restitution claim.[54] A ruling on the scope of the "public laws" category was not considered necessary, and questions regarding the scope of the exclusionary rule in English law remained unsettled for more than 25 years. The Taranaki Panels spent 40 years abroad as a direct result of the finding concerning forfeiture and the uncertain scope of the notion of non-enforcement of foreign public law.

Twenty-four years after the removal of the Taranaki Panels, New Zealand enacted legislative amendments to prevent a repeat of the *Ortiz* case. The Protected Objects Amendment Act 2006 (the "POA") paraphrased and incorporated into its domestic law key clauses of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. The POA bans the export of protected objects without a licence[55] and vests title in the Crown.[56] Trade in Maori artefacts is confined to registered collectors and to those who were in possession of these objects before the commencement of the POA, with sales to parties outside of New Zealand prohibited.[57]

The issues left unsettled in *Ortiz* featured again when an English court was called upon to rule on the unlawful sale of 18 carved chlorite jars, bowls and cups which Iran dated to between 3000 and 2000 BC in *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd*.[58] Iran averred that the antiquities had been excavated and unlawfully exported from cemeteries in the Jiroft region in 2001 and that they were national cultural heritage to which it held title. Barakat Galleries, a Bond Street art dealer, maintained it had acquired good title under

51 *Attorney-General of New Zealand v Ortiz* [1982] 1 QB 447-450.
52 *Attorney-General of New Zealand v Ortiz* [1982] 1 QB 451.
53 *Attorney-General of New Zealand v Ortiz* [1982] 3 All ER 459.
54 *Attorney-General of New Zealand v Ortiz* [1983] 2 All ER 93 100.
55 § 5 and § 7 of POA.
56 § 11 of POA.
57 § 15 of POA.
58 *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2007] EWHC 705 (QB).

the laws of France, Germany and also Switzerland, where it had purchased the chlorite. The court at first instance held that Iran could not establish a proprietary right – be it title or a right to immediate possession – based purely on the Iranian ownership declaration in the 1979 Legal Bill Regarding Prevention of Unauthorised Excavations and Diggings; actual possession of the antiquities was required. Furthermore, it considered that the 1979 law contained penalties for illegal export, rendering it a penal law that could not be enforced in an English court.[59] When the Court of Appeal overturned the ruling in 2009, it noted that the court *a quo* appeared to have been unaware that the UK had ratified the 1970 UNESCO Convention.[60] Iran's claim for recovery was classified as a patrimonial claim of a private law nature (*ie*, based on title to antiquities that form part of its national heritage under a vesting law), as opposed to a claim based on compulsory acquisition from private owners (*ie*, a claim to enforce a public law or assert sovereign rights).[61] The claim was allowed to proceed and an injunction was granted to prevent the sale of the antiquities. The scope of the exclusionary rule was tightened, excluding from its purview claims based on state ownership provisions. The ruling was that Iran was an owner and not an accidental finder, had extensive *personal rights* to the chlorite antiquities, and that the objects had to be returned. The recognition of Iran's title or its possessory right was not considered to depend on actual possession. Referring to Staughton J's conclusion in *Ortiz*, the court declared that it would be contrary to public policy to shut out a claim to recover national heritage.[62] While the court did not formulate a position on export controls, it qualified the rule-based approach to the non-enforceable category of public law for claims involving cultural material covered by state ownership laws.

4 Giving Direction for the Future

English legal practice draws foreign public law (*eg*, penal and revenue law) together in the non-application category.[63] English courts will be familiar with classifications based on criteria resembling the Waverley criteria, but the exclusionary rule is likely to prevail where export controls applicable to heritage art were concerned. English commentaries also tend to leave the broad scope of the exclusionary rule unquestioned.[64] The 2009 *Barakat* ruling by the Court of Appeal steers the analysis towards public policy. This resonates with Staughton J's visionary ruling in *Ortiz* in 1982. Leading English commentators interpret the *Ortiz* precedent with greater circumspection post-*Barakat*, acknowledging that

59 *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* (n 58) §§ [81], [89], [90].

60 *Republic of Iran v The Barakat Galleries Ltd* [2009] 1 QB 22 (CA) § [8].

61 *Republic of Iran v The Barakat Galleries Ltd* (n 60) §§ [111] and [149].

62 *Republic of Iran v The Barakat Galleries Ltd* (n 60) §§ [151]-[154].

63 A V Dicey and J H C Morris *The Conflict of Laws* (1980) Rule 3.

64 *Eg*, J Ulph and I Smith *The Illicit Trade in Art and Antiquities : International Recovery and Criminal and Civil Liability* (2012) § 6.12, § 6.32 and § 6.33.

English courts will not enforce a claim based on foreign public law "if the claim involves the exercise or assertion of a sovereign right, unless it is contrary to public policy for the claim to be shut out".[65] This cautionary approach coincides with the guidance found in Forsyth's analysis of the exclusionary rule for foreign penal and revenue law in South African private international law.[66] He considers the justifications by which Anglo-American courts routinely refuse to recognize or enforce foreign penal and revenue law when they entertain claims from foreign governments based on judgments for taxes or income of a foreign sovereign or for penalties and penal awards of damages exacted by the state that fall foul of public policy. These justifications, applied to commercial dealing, are the exercise of sovereignty, the territorial operation of foreign public laws, and local public policy. Forsyth bases his critical perspective on the understanding that the non-enforcement of foreign law could equally go against public policy; not just its application.[67] This insight is crucial where a foreign provision concerning cultural heritage protection claims application, when it belongs to the applicable law and there is no impediment to its application such as that it contradicts forum public policy.[68] Positive reasons of policy are to be found in the UNESCO Conventions why claims for the recovery of cultural objects based on public law should not be excluded from civil litigation if their application does not encroach on any recognisable interest of the forum.[69]

5 Conclusion

The exclusionary rule of English law in respect of foreign public law creates risks for claims for the return of a work that enjoys protected status in South African law. There is no precedent that recognizes and applies an administrative decision that grants heritage art status, or of a classification that confers protected status on cultural heritage. If a private owner or the Irma Stern Museum were to be deprived of a painting with heritage status, there would be no scope for pursuing the enforcement of South African law in an English court, but such scope exists, in principle, in the event of works that have been removed from public museums. While the dogmatic underpinnings of the non-application rule in common law legal systems are open to adjustment, the judicial casuistry of the English legal system will likely allow the exclusionary rule to prevail in commercial cases in England.

The conclusions which Forsyth reached for commercial dealing retain their validity for domestic rules on the transfer and protection of cultural heritage

65 A V Dicey, J H C Morris and L A Collins *The Conflict of Laws* (2012) 5R-019 to 5R-042.

66 C F Forsyth *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012) 123-24.

67 Forsyth (2012) 124-25.

68 A Jakubowski "Return of Illicitly Trafficked Cultural Objects Pursuant to Private International Law: Current Developments" in A F Vrdoljak and F Francioni (eds) *EUI Working Paper on The Illicit Traffic of Cultural Objects in the Mediterranean* (2009) 137 145.

69 H Kronke "Capital Markets and Conflict of Laws" 2000 *Recueil des Cours* 245 288.

and the limits they impose on commercial trade. The paucity of precedent on the recognition of "heritage status" adds weight to the direction he provided. It is a measure of the quality of Forsyth's scholarship that the water-tight explanation he provides in relation to the exclusionary principle in South African private international law keeps the justifications for the rule firmly in view. His exemplary scholarly reasoning nudges conflicts scholars in the direction of balanced development of common law doctrine absent a test case reaching the English courts. It provides guidance to any English court that may be asked to recognize the heritage status of protected art by South African standards while the UK remains unsupportive of the 1995 UNIDROIT Convention.

Forum Selection Clauses and the Waning Legacy of *The Eleftheria*

Geneviève Saumier*

1 Introduction

In the first edition of his landmark treatise on private international law in South Africa, Christopher Forsyth described *The Eleftheria*[1] as "the leading English case" on the exercise of judicial discretion in the enforcement of forum selection clauses.[2] As that edition was published in 1981, it is not surprising that a 1969 decision, even one from a first instance court,[3] be referred to in those terms. What might be less expected, however, is the presence of the identical statement more than thirty years later, in the last published edition of Forsyth's text in 2012.[4] Indeed, by that time, several English appellate cases,[5] including the 2001 House of Lords' *Donohue v Armco*,[6] had been decided. The latter is described by Adrian Briggs as having "overtaken" earlier precedents,[7] and *The Eleftheria* has since been relegated largely to footnotes in English law.[8] In a detailed report on UK forum selection law for the 2018 Congress of the International Academy of Comparative Law, *The Eleftheria* is not even mentioned.[9] Admittedly, the English common law on forum selection clauses was for decades limited to cases falling

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1 [1969] 2 2 All ER 641.

2 C F Forsyth *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the Supreme Court* (1981) 165. As explained in that text, jurisdictional issues are not considered to be part of private international law in South Africa but are included in the book to provide a more complete picture of international litigation.

3 The judgment is by Brandon J (as he then was) sitting in the Hight Court, Probate, Divorce and Admiralty Division.

4 C F Forsyth *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (2012) 218.

5 For example, *The El Amria* [1981] 2 Lloyd's Rep 119 (CA); and *The Sennar (No 2)* [1985] 1 WLR 490 (CA).

6 *Donohue v Armco Inc* [2001] UKHL 64. Forsyth does not mention any of these cases in the 2012 edition of his book.

7 A Briggs *Civil Jurisdiction and Judgments* (2015) 451.

8 See for example A Briggs *Agreements on Jurisdiction and Choice of Law* (2008), mentioned only once at footnote 54 to par 6.26; and R Fentiman *International Commercial Litigation* (2015) mentioned only twice: at footnote 405 to para. 2.223; and at footnote 407 to par 2.224.

9 See L Merrett and J Carruthers "United Kingdom: Giving Effect to Optional Choice of Court Agreements—Interpretation, Operation and Enforcement" in M Keyes (ed) *Optional Choice of Court Agreements in Private International Law* (2020) 443.

outside the ambit of the Brussels Regulations and remains limited, since 2015, to cases not subject to the 2005 Hague Choice of Court Convention.[10]

Outside of England, however, the legacy of *The Eleftheria* has endured and has not been limited to South Africa. Indeed, courts and commentators in Canada, Australia and Singapore, for example, have continued to refer primarily to *The Eleftheria* and to quote its lengthy main passage when restating the applicable test for stays in forum selection cases.[11] Of these jurisdictions, only Singapore has ratified the 2005 Hague Convention on Choice of Court Agreements.[12] The Convention's rules will replace the common law, leaving no room for the discretionary model made famous by *The Eleftheria*, at least when clauses designate courts in contracting parties, which of course includes the UK.[13]

Given this rapidly evolving landscape, it seems an opportune moment to canvass the legacy of *The Eleftheria*, that "leading English case", as Christopher Forsyth called it in his work. This contribution to the *Festschrift* will undertake this historical voyage, with a particular emphasis on Canadian common law.

2 *The Eleftheria* in Canadian Common Law Courts

Canadian courts have become very receptive to the enforcement of forum selection clauses, particularly in commercial litigation.[14] Party autonomy has long been considered an important policy worthy of judicial support, whether for jurisdictional or choice of law purposes.[15] While this view is legislatively enshrined in Quebec,[16] the Canadian common law provinces continue to rely on

10 Originally because of the accession of the EU to that Convention. However, the Convention continues to apply in the UK post-Brexit as the result of a renewed accession by the UK effective 1 January 2021. See https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=eif. Contracting Parties to the Convention are currently the EU (including Denmark), the UK, Mexico, Montenegro, Singapore and Ukraine.

11 See references below in notes 37–61.

12 Choice of Court Agreements Act 2016, Act No 14 of 2016 (entered into force 1 October 2016). The Australian parliament's Joint Standing Committee on Treaties recommended accession in 2016, but this has not yet occurred.

13 See, for example, *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257, where the court confirmed that the Convention excluded the common law discretion.

14 Although an article published in 1982 noted that there were relatively few cases: G B Robertson "Jurisdiction Clauses and the Canadian Conflict of Laws" 1982 *Alberta Law Review* 296 298.

15 See C Walsh "The Uses and Abuses of Party Autonomy in International Contracts" 2010 *UNB Law Journal* 12.

16 This position, established in the 1991 reform of the Civil Code of Quebec, was a reversal of the previous law that rejected forum selection clauses as against public policy. See Walsh (2010) 12.

case law to define the judicial treatment of contractual jurisdiction clauses.[17] And in so doing, courts initially turned to English sources, most prominently to *The Eleftheria*. Despite seeking guidance from this English case, Canadian common law courts do not appear to have followed further developments in the English courts or from other commonwealth countries that also originally followed English law. As a result, the Canadian common law on forum selection clauses has remained relatively underdeveloped and tends to exhibit methodological inconsistencies that could benefit from a fresh look at other common law jurisdictions.[18]

The first reported Canadian common law case referring to *The Eleftheria* is from the Saskatchewan Court of Queen's Bench in 1972, namely *E K Motors Ltd v Volkswagen Canada Ltd*.[19] The case concerned a distribution agreement that contained a clause subjecting the contract to the laws of Ontario and to "the exclusive jurisdiction of her Courts". In considering the defendant's request for a stay, the trial judge first noted that clauses that sought to oust the jurisdiction of the court were not against public policy.[20] Such clauses were not, however, "absolutely binding" and courts retained a discretion to refuse to enforce them through a stay of proceedings. An article in the *Canadian Bar Review* was cited in support,[21] followed by a lengthy direct quote from Justice Brandon's summary statement of the law in *The Eleftheria*:[22]

> The principles established by the authorities can, I think, be summarised as follows: (I) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its

17 A partial exception exists in the three provinces that have adopted the Court Jurisdiction and Proceedings Transfer Act which deals only with prorogation, that is, clauses that designate the forum seized of the action. See for example, for British Columbia, SBC 2003, c 28, sec 3(c). As per the Supreme Court of Canada in *Douez v Facebook Inc* (2017) SCC 33, where the court is seized in derogation of a forum selection clause, the CJPTA does not apply, leaving the assessment of a stay request to be determined according to the common law. For discussion, see G Saumier "Has the CJPTA readied Canada for the Hague Choice of Court Convention?" 2018 *Osgoode Hall Law Journal* 141. A revised version of that statute was proposed by the Uniform Law Conference of Canada in 2021 that includes a specific provision on exclusive forum selection clauses, but it retains the common law discretion.

18 See, generally, G Saumier "Choice of Court Agreement in Common Law Canada" in M Keyes (ed) *Optional Choice of Court Agreements in Private International Law* (2020) 137.

19 1972 CanLII 775 (SK QB). All Canadian cases are available online at www.canlii.org.

20 *The Eleftheria* (n 1) par 6.

21 Z Cowen and M Da Costa "The Contractual Forum, A Comparative Study" 1965 *Can Bar Rev* 453. This article examined the 1963 draft Hague Convention on the Choice of Court that was eventually adopted in 1965 but never came into force.

22 *E K Motors Ltd v Volkswagen Canada Ltd* (n 19) par 7.

> jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (II) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (III) The burden of proving such strong cause is on the plaintiffs. (IV) In exercising its discretion, the court should take into account all the circumstances of the particular case. (V) In particular, but without prejudice to (IV), the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would — (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

Applying these factors, the trial judge refused the stay, finding that "the balance of convenience is strongly in favour of the plaintiff".[23] On appeal, the Court again quoted the passage from *The Eleftheria* but concluded that the clause successfully ousted the jurisdiction of the court and, interestingly, that given the express and clear terms of the clause, "the doctrine of convenience has no application".[24]

That decision was subsequently invoked in other provinces by defendants claiming that an exclusive jurisdiction clause *entitled* them to a stay. Courts outside Saskatchewan were not favourable to that view, preferring to follow the English approach that preserved the court's discretion in all cases. A British Columbia court began the trend, referring to both *The Eleftheria* and the earlier English Court of Appeal decision in *The Fehmarn* to support the view that parties could not, by consent alone, oust the jurisdiction of the court.[25] The same conclusion was shared by several other provincial appellate courts[26] and eventually by the Supreme Court of Canada in its landmark 2003 judgment in *Z I Pompey Industrie v ECU-Line N V*.[27]

23 *E K Motors Ltd v Volkswagen Canada Ltd* (n 19) par 12.

24 *E K Motors Ltd v Volkswagen Canada Ltd* 1972 CanLII 802 (SK CA) par 14.

25 *G & E Auto Brokers Ltd v Toyota Canada Inc* 1980 CanLII 483 (BC SC).

26 See for Alberta: *Volkswagen Canada Inc v Auto Haus Frohlich Ltd* 1985 ABCA 223; PEI: *Knolloffice Inc v Oulton Agencies Inc* 1988 CanLII 1366 (PE SCAD); and New-Brunswick: *A/S Nyborg Plast v Groupe Qualité Lamèque/Lameque Quality Group Ltd* 2001 NBCA 86.

27 2003 SCC 27 par 19 and 39.

That case concerned a forum selection clause designating the "courts in Antwerp and no other Courts" in a bill of lading.[28] The Supreme Court began its analysis of the defendant's request for a stay by quoting the paragraph from *The Eleftheria* extracted above. The Court's reliance on the "strong cause" test as expressed in *The Eleftheria* is unequivocal and is the only reference to a foreign case in the judgment.[29] Without referring to any subsequent English cases on the issue, the Supreme Court of Canada explicitly endorsed the view that a forum selection clause was not to be treated merely as one element in a *forum non conveniens* analysis, quoting an English academic commentator, Edwin Peel, on that point.[30]

Despite this statement by the Supreme Court distinguishing the two tests, the list of factors from *The Eleftheria* replicates in large measure the criteria applicable under the generic *forum non conveniens* doctrine, a point underscored by the Ontario Court of Appeal seven years later:

> Thus, even though the literal wording of the test in *The "Eleftheria"* may imply a conventional *forum non conveniens* analysis, Pompey makes clear that such an analysis is not to be used. Rather, the forum selection clause pervades the analysis and must be given full weight in the consideration of other factors. It is not enough for the plaintiff to establish a "strong" case that Ontario is the more convenient forum. The plaintiff must show "strong cause" that the case is exceptional and the forum selection clause should not be enforced.[31]

Again, the Ontario appellate court referred only to *The Eleftheria* and to the Peel article to support this statement. Yet it went much further in reformulating the "strong cause" test in the following manner:

> A forum selection clause in a commercial contract should be given effect. The factors that may justify departure from that general principle are few. The few factors that might be considered include the plaintiff was induced to agree to the clause by fraud or improper inducement or the contract is otherwise unenforceable, the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim, the claim or

28 The Marine Liability Act SC 2001, c 6, sec 46 provides that claims relating to goods carried by water can be started in Canada despite a forum selection clause designating a foreign court where certain connections to Canada are established. This section was not in force at the relevant time and therefore not applicable to the case: *Z I Pompey Industrie v ECU-Line N V* (n 27) par 37.

29 In discussing the test at par 21 and then in applying it to the facts of the case, at par 39-40.

30 E Peel "Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws" 1998 *LMCLQ* 182 190 cited at par 21 of the judgment.

31 *Expedition Helicopters Inc v Honeywell Inc* 2010 ONCA 351 par 11.

> the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause, the plaintiff can no longer expect a fair trial in the selected forum due to subsequent events that could not have been reasonably anticipated, or enforcing the clause in the particular case would frustrate some clear public policy. Apart from circumstances such as these, a forum selection clause in a commercial contract should be enforced.[32]

This list of factors is strikingly different from the one in *The Eleftheria* that was endorsed and applied by the Supreme Court of Canada in *Z I Pompey*. The Supreme Court of Canada has since had two opportunities to consider this stricter test propounded by the Ontario Court of Appeal but did not do so.[33] Instead, it has stuck to *The Eleftheria* and its own decision in *Z I Pompey* to restate the broader set of factors, despite the significant overlap with the generic *forum non conveniens* test that it arguably had sought to distinguish in relation to forum selection clauses.

And yet a stricter approach arguably finds support in English jurisprudence since *The Eleftheria*. Most notably, in *Donohue v Armco Inc*,[34] in 2001, the House of Lords expressed support for exclusive forum selection clauses in much stronger language than the traditional list of factors from *The Eleftheria*. That decision is described by a leading English commentator as "a new dawn": "[T]he court leans in favour of a stay unless exceptional reasons dictate otherwise; and the management of multipartite litigation may be the only real exception."[35] In other words, most of the factors in *The Eleftheria* list that overlap with *forum non conveniens* factors have faded over time. Even with regard to optional clauses, a long line of English cases considers that factors going to the relative "convenience" of the alternative fora should not carry much weight in the stay assessment if they were foreseeable at the time of contracting.[36] Indeed, once the parties have agreed in advance that litigation can or should proceed in a designated forum, it stands to reason that this forum is considered appropriate, barring exceptional changes in circumstances. Thus, without claiming that the exercise of judicial discretion regarding forum selection clauses before English courts is entirely predictable, the framework there has moved far beyond *The*

32 *Expedition Helicopters Inc v Honeywell Inc* (n 31) par 24.

33 See *Momentous.ca Corp v Canadian American Association of Professional Baseball Ltd* 2012 SCC 9 and *Douez v Facebook Inc* (n 17). Interestingly, the Ontario Court of Appeal seems no longer to see the difference in these two approaches, referring to *Z I Pompey* and *Expedition Helicopters* as if they are equivalent: see most recently *Quickie Convenience Stores Corp v Parkland Fuel Corporation* 2020 ONCA 453 par 30–33.

34 *Donohue v Armco Inc* [2001] UKHL 64.

35 Briggs (2015) par 4.52.

36 See, for example, *Highland Crusader Offshore Partners LP v Deutsche Bank AG* [2009] EWCA Civ 725.

Eleftheria in ways that could usefully be considered by Canadian common law courts and the lawyers appearing before them.

The fact that Canadian courts, including the Supreme Court of Canada, continue to refer to and even quote *The Eleftheria* as if it were the last word on forum selection clauses in English law might be merely slightly awkward, showing a lack of familiarity or interest in the development of English law on the subject. But such lack of familiarity or interest may also be detrimental to the development of Canadian common law and, as a result, contribute to increased unpredictability – and thus legal risk – surrounding forum selection clauses for parties involved in litigation before Canadian courts.

Before turning to areas that could benefit from looking beyond *The Eleftheria* in existing Canadian common law jurisprudence, it is interesting to take a quick look at how that seminal English judgment has endured in four other common law jurisdictions: South Africa, Nigeria, Singapore and Australia.

3 *The Eleftheria* in Other Common Law Jurisdictions

3.1 South Africa

As noted in the introduction, *The Eleftheria* is presented by Forsyth as "the leading English case" on forum selection clauses from the first to the fifth edition of his treatise on private international law in South Africa.[37] This is confirmed by case law, including the 2012 Supreme Court of Appeal of South Africa decision in *Foize Africa v Foize Beheer*.[38] In its reasons, the court quoted directly from *The Eleftheria* to state the factors going to the exercise of judicial discretion in relation to a request for a stay based on a forum selection clause, referring to these factors as "relevant". [39] It indicated that this list is not closed and that other factors include: the need for the party seeking to avoid the clause to make a "very strong case" for the stay; the need to avoid multiple proceedings particularly where the action involves a plurality of parties not all of which are bound by the clause; and a consideration of the potentially "astronomical" costs of litigation in England when compared to South Africa.[40] Beyond that, the law governing forum selection clauses is not particularly developed in South Africa, at least in so far as distinguishing between exclusive and optional clauses, on

37 [1969] 1 Lloyd's Rep 237 [1970].

38 *Foize Africa (Pty) Ltd v Foize Beheer BV* (752/2011) [2012] ZASCA 123; 2013 3 SA 91 (SCA). The case involved a dispute settlement clause that contained both an exclusive forum selection clause in favour of the Netherlands and an ICC arbitration clause. Even though South Africa is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, its courts continue to apply the "strong cause" test to both forum selection and arbitration clauses.

39 *Foize Africa (Pty) Ltd v Foize Beheer BV* (n 38) par 27.

40 *Foize Africa (Pty) Ltd v Foize Beheer BV* (n 38) par 28.

the availability of damages for breach of the clause or on the availability of anti-suit injunctions to enforce forum selection clauses.[41]

3.2 Nigeria

References to *The Eleftheria* in Nigerian decisions on enforcement of forum selection clauses have been commonplace, although the appeal to the English precedent has only been successful in rejecting a stay where the claim was statute-barred in the foreign chosen forum.[42] Some decisions do not, however, mention the English case, focussing instead on a strict contractual approach to the enforcement of jurisdiction clauses rather than to the traditional "strong cause" test that parallels *forum non conveniens*.[43]

On other issues, Nigerian law remains underdeveloped, similarly to South Africa and Canada. For example, courts do not appear to distinguish between exclusive and optional choice of court agreements,[44] nor have they yet used their power to grant anti-suit injunctions or award damages for breach of a forum selection clause.[45]

41 See E Schoeman "South Africa – Time for Reform" in M Keyes (ed) *Optional Choice of Court Agreements in Private International Law* (2020) 347. In *East Asian Consortium BV v MTN Group Ltd* (2013/44462) [2023] 1 All SA 632 (GJ), the potentially optional nature of the clause was not raised or considered. It is worth noting that an anti-suit injunction in relation to judicial proceedings in Zambia was granted to support arbitration seated in South Africa in *Vedanta Resources Holdings Limited v ZCCM Investment Holdings PLC* (2019/23462) [2019] ZAGPJHC 250.

42 See for example *BUPA Insurance v Chakraverti* (2021) LPELR-55940 and *Sonnar (Nigeria) Ltd v Partenreedri M S Norwind* (1987) 9–11 SC 121 and, where this did not avail, *Nika Fishing Co Ltd v Lavina Corp* (2008) 1 All NLR 422 (SC). See, generally, C Okoli and R Oppong *Private International Law in Nigeria* (2020) 109–113. For a discussion of the *BUPA* case, see C Okoli "The Nigerian Court of Appeal Declines to Enforce an Exclusive English Choice of Court Agreement" (27 November 2021) https://conflictoflaws.net/2021/the-nigerian-court-of-appeal-declines-to-enforce-an-exclusive-english-choice-of-court-agreement/.

43 See *Kashamu v UBN Plc* (2020) 15 NWLR (Pt 1746) 90; and *Damac Star Properties LLC v Profitel Limited* (2020) LPELR-50699(CA). For a comment on these decisions, see C Okoli "Analysis of Choice of Court Agreements in Nigeria in the Year 2020" 2021 *Nederlands Internationaal Privaatrecht* 292. Okoli also reports an anomalous decision (*ABU v VTLS* (2020) LPELR-52142 (CA)) that held a forum selection clause to be invalid as an attempt to oust the jurisdiction of Nigerian courts, a view inconsistent with prevailing jurisprudence.

44 Okoli and Oppong (2020) 108.

45 Okoli and Oppong (2020) 125–26.

3.3 Australia

Australian courts also continue to refer to the "strong cause" test as articulated in *The Eleftheria*[46] but only in relation to exclusive forum selection clauses in international cases.[47] Indeed, stays in the presence of optional forum selection clauses are instead considered under the *forum non conveniens* doctrine.[48] But Australian courts have taken note of *Donohue v Armco Inc* and will typically send parties to the foreign court designated in an exclusive forum selection clause barring public policy objections[49] or third party interests, largely without considering factors going to convenience.[50]

The law governing exclusive choice of court agreements is also more developed in Australia than in Canada. As noted, there is a clear difference of treatment between exclusive and optional clauses.[51] In addition, the availability of anti-suit injunctions as a remedy for proceedings undertaken in violation of an exclusive forum selection clause is established in Australia, following on English precedents to that effect.[52] Finally, while there appears to be openness to the availability of damages for breach of an exclusive clause, no court has awarded them yet.[53]

46 See, for example, *Akai Pty Ltd v The People's Insurance Company Ltd* (1996) 188 CLR 418 428-429 and *Global Partners Fund Limited v Babcock & Brown Ltd* [2010] NSWCA 196 par 85. Admittedly, references to *The Eleftheria* are typically indirect, that is, as part of a direct quote from an earlier case, often *Akai Pty.* See, for example, *Carnival plc v Karpik (The Ruby Princess)* [2022] FCAFC 149 par 179. See, generally, B Marshall "Australia: Inconsistencies in the Treatment of Optional Choice of Court Agreements" in M Keyes (ed) *Optional Choice of Court Agreements in Private International Law* (2020) 51.

47 There is a special regime for interstate litigation and for trans-Tasman litigation (see Trans-Tasman Proceedings Act (2010)).

48 The doctrine operates distinctly in Australia, requiring that the party seeking the stay shows that the Australian court seized is "clearly not appropriate", as opposed to showing that the foreign court is "clearly more appropriate" as the doctrine is applied in English and Canadian common law.

49 For a recent decision refusing a stay for public policy reasons: *Epic Games Inc v Apple Inc* [2021] FCAFC 122 (leave to appeal refused).

50 See Marshall (2020) sec 11; and see also, for example, the detailed discussion of *Donohue v Armco* in *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* [2019] NSWCA 61**.**

51 Although Marshall argues that the jurisprudence relating to the latter is not necessarily coherent or consistent.

52 See, for example, *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724, citing *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyds Rep 87 (EWCA).

53 See A Dinelli "The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: The Law of Contract Meets Private International Law" 2015 *Melbourne University Law Review* 1023.

3.4 Singapore

The Singapore Court of Appeal recently reviewed the common law governing stays in relation to forum selection clauses. In the 2018 *Vinmar* decision, it began its consideration of the issue with the following statement: "The general principles governing the grant of a stay to give effect to an exclusive jurisdiction clause are derived from the celebrated case of *The Eleftheria* …. In *Amerco Timbers*, we adopted the overarching 'strong cause' test and endorsed the *Eleftheria* factors as part of our law …." [54]

In applying those factors, however, the Court reiterated that "factors which render proceedings in Singapore more convenient than proceedings in the agreed forum are of limited weight if they were foreseeable at the time when the parties made the jurisdiction agreement".[55] While the court did not refer to English judgments to support this point, earlier decisions have done so.[56]

The decision in *Vinmar* is significant for a different reason – it put to rest an interpretation of one of *The Eleftheria* factors in a few English cases that had migrated to Singapore.[57] The factor referred to is "whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages".[58] If the plaintiff could show there was no viable defence to its claim, then it followed either that there was "no dispute" between the parties or that the defendant did not genuinely desire a trial in the other jurisdiction, and a stay should be refused. Citing the rejection of this view in later English judgments,[59] as well as other developments in its own jurisprudence and local doctrine, the Singapore court concluded expressly that the merits of the defence are irrelevant when deciding whether to stay proceedings because of an exclusive forum selection clause.[60]

54 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] SGCA 65 par 71 (citations omitted). The same point is repeated at par 112.

55 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* (n 54) par 72 and par 112.

56 See for example *Golden Shore Transportation Pte Ltd v UCO Bank* [2003] SGCA 43 par 36–38.

57 The main Singapore cases were *The Jian He* [1999] 3 SLR(R) 432; and *The Hung Vuong-2* [2000] 2 SLR(R) 11. The Court notes that this interpretation was also followed in Hong Kong (*Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* (n 54) par 95).

58 *The Vishva Prabha* [1979] 2 Lloyd's Rep 286; *The Atlantic Song* [1983] 2 Lloyd's Rep 394; and *The Frank Pais* [1986] 1 Lloyd's Rep 529.

59 Most explicitly in *Euromark Ltd v Smash Enterprises Pty Ltd* [2013] EWHC 1627 (QB). See also Fentiman (2015) par 2.230.

60 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* (n 54) 113. The Court did not reject the factor from *The Eleftheria* altogether, instead holding that it should be read to apply to situations of abuse of process by the defendant (par 129–132). For further discussion on this point see A Chong and M Yip *Singapore Private International Law: Commercial Issues and Practice* (2022) 104–106.

On other issues, the Singapore courts are willing to grant anti-suit injunctions where a foreign court has been seized contrary to a choice of court agreement, and resort to English cases for the criteria.[61] They have not, as of yet, considered whether damages would constitute an available remedy in similar circumstances.

4 How Canadian Common Law Could Benefit from Looking Beyond *The Eleftheria*

Canadian common law on forum selection clauses could benefit from looking beyond *The Eleftheria*, whether at developments in English law or in other common law jurisdictions, as illustrated in the following three examples.

First, a choice of law question may arise regarding the law applicable to a forum selection clause.[62] Where the contract is governed by foreign law (whether expressly or not), this normally includes questions of interpretation. This may determine whether the clause is exclusive or not, whether the claim is covered by the clause, how to resolve conflicting clauses, etc. While academic commentary in Canada supports the English law holding that interpretation is governed by the *lex contractus*, no decided case can be cited in support.[63] In fact, the choice of law issue seems to go unnoticed by courts (and counsel) in Canada who simply resort to general common law principles of contract interpretation. Where the result under the applicable foreign *lex contractus* would be different, counsel might refer the court to the 2013 English decision in *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd*, where the English High Court stated:[64]

> The governing law of a jurisdiction agreement is, like any other contractual provision, to be determined by the parties' express choice if they have made one, and in general the parties' intention will be taken to be that it is to be governed by the law applicable to the contract of which it forms part.

More specifically, on construction of the clause, the Federal Court of Australia noted that "[w]hether this jurisdiction clause is 'exclusive' needs

61 Most recently reiterated in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] SGCA 10 par 68.

62 The effect of the clause on the jurisdiction of the court seized is clearly a matter of procedure governed by the *lex fori*.

63 See R F Oppong and S K C Gibbs "Damages for Breach and Interpretation of Jurisdiction Agreements in Common Law Canada" 2017 *Canadian Bar Review* 383 400-01. Robertson claimed that one case did so but a careful reading of it does not support this conclusion (Robertson (1982) 298 citing *Carveth v Railway Asbestos Packing Co* (1913) 9 DLR 631 (Ont SC)).

64 [2013] EWHC 1328 (Comm) par 15-16.

to be determined according to the proper law of the contract".[65] There is also authority for that point in South Africa[66] and in Singapore.[67]

The second example concerns damages for breach of a forum selection clause. As discussed previously, it is well established in Canadian law that breach of a jurisdictional agreement may give rise to a stay of proceedings. Whether damages may also be available remains uncharted territory despite academic invitations to explore it.[68] English precedents here again could provide guidance on this point. Based on the premise that an exclusive forum selection clause involves a promise not to sue elsewhere, English courts have held that damages for breach of that promise are available in principle,[69] although they typically award them only for breach of a clause designating the English courts. While there is an Australian *obiter* to the same effect,[70] the issue does not appear to have been addressed in Nigeria, Singapore or South Africa.[71]

Finally, the third example involves forum selection clauses that can be described as optional as opposed to exclusive. Optional clauses include the designation of a specific jurisdiction for the resolution of disputes but do not specify that this is to the exclusion of any other jurisdiction. Common language to that effect provides that parties will "submit" or "attorn" to the jurisdiction of the courts of a particular state. Although the precise nature of a given clause is a matter of construction (arguably to be assessed according to the *lex causae* and not the *lex fori*, as discussed above), an optional clause might deserve treatment distinct from that afforded an exclusive clause. Canadian common law courts have not addressed this difference in a consistent and coherent manner, creating uncertainty both regarding the process and the outcome.

A number of Canadian common law courts have stated that an optional forum selection clause should be treated as one element within a *forum non conveniens* analysis – whether the clause designates that court or a foreign

65 *Faxtech Pty Ltd v ITL Optronics Ltd* [2011] FCA 1320 par 5, although the court did not follow the foreign law expert on the point.

66 See Schoeman (2020) citing *MV Spartan-Runner v Jotun-Henry Clark Ltd* 1991 3 SA 803 (N) and *Blanchard, Krasner & French v Evans* 2002 4 SA 144 (T) 9.

67 See A Chong "Singapore: A Mix of Traditional and New Rules" in M Keyes (ed) *Optional Choice of Court Agreements in Private International Law* (2020) 325, citing *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* [1996] SGHC 285 [62] fn 6.

68 See Oppong and Gibbs (2017) 61.

69 See also *Union Discount Co Ltd v Zoller* [2002] 1 WLR 1517 (CA) and Fentiman (2015) par 2.249. According to the UK Supreme Court, damages are even available within the European Union: see *Starlight Shipping Company v Allianz Marine & Aviation (The Alexandros T*) [2013] UKSC 70.

70 *Commonwealth Bank of Australia v White [No 2 of 2004]* [2004] VSC 268 at 5. See also Dinelli (2015) 1023.

71 See Schoeman (2020) and Chong (2020).

court.[72] Other courts have instead applied the "strong cause" test, drawing on *The Eleftheria* and *Z I Pompey*, without explaining why this test should apply to optional clauses or without addressing the nature of the clause.[73] Others combine both approaches, even where the clause is understood to be exclusive, which only increases confusion.[74]

On this issue, guidance from English judgments may not necessarily be of assistance. Indeed, there is no single line of authority on point. Several cases consider that where England is designated, whether optionally or exclusively, this forecloses any argument that England is *forum non conveniens* and a stay will only be granted where there is strong cause to do so.[75] Other judgments seek to maintain some distinction between exclusive and optional clauses although the impact on outcomes is not necessarily predictable.[76] But Canadian common law courts could look to these English cases to refine their application of the *forum non conveniens* doctrine in relation to optional forum selection clauses, in particular, to acknowledge that elements of that doctrine going to the convenience of the parties should exclude any factors that were foreseeable at the time of contracting. This is quite clear in the English case law, as well as in Singapore,[77] is justified in principle, and would be a sensible addition to the Canadian common law on this point.

72 See for example *Sugar v Megawheels Technologies Inc* 2006 CanLII 37880 par 28; and *Silveira v FY International Auditing & Consulting Corp* 2015 ONSC 338.

73 See, for example, *Meta4Hand Inc v Research In Motion Ltd* 2017 ABQB 23; and *2Source Manufacturing Inc v United Technologies Corporation* 2017 ONSC 4409.

74 See for example, *Forbes Energy Group Inc v Parsian Energy Rad Gas* 2018 ONSC 5103, where the court assessed the clause designating a foreign court first under the "strong cause" test and then, subsequently, having found the absence of strong cause, under the *forum non conveniens* test, before granting a stay. In *Corrosion Service Company Limited v Hydrosphere Construction Inc* 2018 ONSC 4434, with respect to an agreement designating the forum, the court held first that there was no strong cause not to enforce but then sent the parties to Québec, on the basis that it was the more appropriate forum under a *forum non conveniens* analysis. In *3289444 Nova Scotia Limited v R W Armstrong & Associates Inc*, the trial court, deciding prior to *Douez v Facebook* (n 17), gave a rather clear judgment distinguishing between exclusive and optional clauses and applying the *forum non conveniens* analysis to the latter under the CJPTA (2016 NSSC 330); on appeal, after *Douez v Facebook* (n 17), though upholding the lower court's stay order, the decision proceeds on a much more confusing appraisal of the applicable rules (2018 NSCA 26).

75 See Merrett and Carruthers (2020) citing for example *Antec International Ltd v Biosafety USA Inc* [2006] EWHC 47 (Comm).

76 See Merrett and Carruthers (2020) citing for example *Highland Crusader Offshore Partners LP v Deutsche Bank AG* [2009] EWCA Civ 725.

77 Recently stated in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] SGCA 65 par 72 citing *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR(R) 6 38 and *The Hyundai Fortune* [2004] 4 SLR(R) 548 30.

Canadian courts could also extend this reasoning to factors in the "strong cause" test applicable to exclusive forum selection clauses drawn from *The Eleftheria*. Indeed, that list includes elements going to the convenience of the parties, many of which should be held to have been considered at the time of concluding the jurisdictional agreement and therefore not open to reassessment at the time of litigation absent unforeseen changes. And while the Ontario Court of Appeal in *Expedition Helicopters* did implicitly pursue this approach,[78] the Supreme Court has not followed suit. In the three cases dealing with an exclusive forum selection clause, the highest court either expressly described it as including a consideration of convenience to the parties or did not touch on the point.[79]

Decisions from Singapore could also be of interest in developing a more sophisticated approach to optional clauses. Courts in Singapore have indeed grappled with whether it is open to a defendant to argue that proceedings in the designated court can be stayed on *forum non conveniens* grounds given that its selection presupposes that it met the parties' requirements at the time of contracting.[80] On the other hand, since *forum non conveniens* is only an evaluation of the *relative* merits of two otherwise competent courts, a stay on that ground does not impugn the appropriateness of the designated forum. While the Singapore jurisprudence is not definitive on this point, it raises relevant issues and invites parties to respond to them in presenting their case for or against a stay. Engaging in this type of analysis imposes greater rigour in judicial reasoning and should eventually lead to a more cogent and predictable body of law.

5 Conclusion

The legacy of *The Eleftheria* has been an enduring one. For many common law jurists outside of England, especially practicing lawyers and judges, it remains the "leading case" on forum selection clauses. English law has moved on since 1969 and developed a more sophisticated regime through new landmark decisions. It has even expressly abandoned the ever-narrowing judicial discretion for commercial cases falling within the purview of the 2005 Hague Convention on Choice of Court Agreements. Singapore has followed English common law developments in some measure and stands to move on as it has also joined the treaty. And although Canada is yet to take steps towards accession, two provinces have already adopted implementing legislation in

78 See discussion above in text around notes 32–33.

79 *Douez v Facebook* (n 17) par 73–75; *Momentous.ca Corp v Canadian American Association of Professional Baseball Ltd* (n 33), noting at par 6 that the defendant did not raise the issue of convenience; and *Z I Pompey Industrie v ECU-Line N.V* (n 27) par 31 and 40.

80 See, for example, *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519 and *Abdul Rashid bin Abdul Manaf v Hii Yii Ann* [2014] 4 SLR 1042. See also Chong and Yip (2022) 106–108.

anticipation of ratification.[81] There is, however, no indication that Australia, Nigeria or South Africa are moving towards accession. References to *The Eleftheria* are thus not immediately headed for extinction. But the decision should no longer be considered "the leading English case" on forum selection clauses in any jurisdiction. That ship has long since sailed.

81 See for Ontario, International Choice of Court Agreements Convention Act, SO 2017, c 2, sch 4; and for Saskatchewan, The Choice of Court Agreements (Hague Convention Implementation) Act, SS 2018, c C-10.2.

Online Defamation in the Conflict of Laws

*Sierd J Schaafsma**

1 Introduction

This essay is in honour of Professor Forsyth of the University of Cambridge, whose publications, including his standard work on South African private international law, have had considerable effect on the development of this area of law in South Africa.[1] One of the areas involved is the international tort. This essay deals with the conflict-of-law rules in relation to tort focusing on online defamation in a commercial context, comparing *inter alia* British, South African and Dutch private international law. It examines the question whether the international *Entscheidungsharmonie*, which is one of the main objectives of Von Savigny, is achieved in this respect.[2]

2 Von Savigny: *lex fori*

Back in the 19th century, Von Savigny himself considered tort law to be "irregular law", falling beyond the scope of the conflict-of-law system that he had developed. In his view, tort law has a scope that is unmistakably territorially limited, whereas "normal" private law rules, for example contract law rules, are territorially unlimited as a matter of principle. Rules on tort law, however, have a strictly positive and compulsory nature, according to Von Savigny ("von streng positive, zwingender Natur"). As Forsyth noted, Von Savigny viewed delictual claims as being akin to criminal prosecutions and strongly linked to the public policy of the forum.[3] Therefore, in Von Savigny's own view, his conflict-of-law system does not apply to tort. Here, according to Von Savigny, the court has to apply its own law, the *lex fori*: "Bei solchen Gesetzen wird der Richter das einheimische Recht ausschliessender anzuwenden haben …, das fremde Recht dagegen unangewendet lassen müssen …."[4] It seems that, as regards tort, Von Savigny had so-called "formal territoriality" in mind: this means that the court has to apply the *lex fori* in any event, regardless of other factors such as the

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1 C F Forsyth *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (2012).

2 International *Entscheidungsharmonie* ("decisional harmony") is the ideal of a uniform conflict-of-law result irrespective of the forum where the dispute is litigated.

3 Forsyth (2012) 352.

4 F C von Savigny *System des heutigen r*ömischen Rechts Band VIII (1849) 32.

place where the delict was committed.[5] Consequences of this position are that the applicable-law question is in fact absorbed into the jurisdiction question and that it is possible that the claimant will be able to choose the applicable law by selecting a competent forum. Von Savigny acknowledged this consequence but apparently he did not worry too much about this problem.[6]

However, Von Savigny's *lex fori* approach is quite problematic, as the following example may illustrate. MediaGroup is an international media enterprise in EU member state A with registered offices in that country. Costume, a company with registered offices in EU member state B, produces and sells clothing in various member states in the European Union, mainly in country C. Journalists of MediaGroup publish an article on child labour in Costume's clothing factories in Asia. The article is published in English on the .com website of MediaGroup, which is accessible worldwide. According to Costume, the publication is defamatory. Costume starts proceedings against MediaGroup, claiming damages on the basis of tort (defamation). The question arises as to which law applies in Von Savigny's view.

Assessing jurisdiction on the basis of the Brussels I *bis* Regulation, several courts in the European Union are competent to hear Costume's claim.[7]

In the first place, the courts of country A are competent as *forum rei* on the basis of Article 4 Brussels I *bis*. Following Von Savigny's approach, this court should apply the laws of country A as *lex fori*.

In addition, article 7(2) Brussels I *bis* – the *forum delicti* – also provides for jurisdiction. According to the European Court of Justice in its *eDate* decision, this provision attributes jurisdiction to hear claims for damages in online defamation cases to (i) the court of the centre of interests of the victim, which corresponds in general to his habitual residence, (ii) the courts of the places of the damage (*locus damni*), and (iii) the courts of the place of the act (*locus actus*).[8]

5 S J Schaafsma *Intellectual Property in the Conflict of Laws: the Hidden Conflict-of-Law Rule in the Principle of National Treatment* (2022) 203-204 (par. 487).

6 Von Savigny (1849) 280: "dass in solchen Fällen sehr häufig eine bedeutende Macht in die Hände des Klägers gelegt wird, indem dieser oft die Wahl zwischen mehreren Gerichten hat, also dadurch bestimmen kann, welches unter mehreren örtlichen Rechten zur Anwendung kommen soll". Von Savigny, however, seems to downplay the problem: "die Gefahr für den Beklagten [wird] vermindert durch die sehr beschränkende Bedingungen, an welche jeder Gerichtsstand der Obligation gebunden ist".

7 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("Brussels I *bis*") *OJ EU* 2012, L 351/1 (*OJ EU* 2014, L 163/1).

8 ECJ 25 October 2011, C-509/09 and C-161/10, ECLI:EU:C:2011:685; [2011] ECR I-10269; IER 2012/19 (*eDate v X and Martinez v MGN*); ECJ 21 December 2021, C-251/20, ECLI:EU:C:2021:1036 (*Gtflix*).

Hence, in relation to (i), in the MediaGroup case, it seems that the courts of country C are competent to hear the entire claim, as they are the courts of "the place where the alleged victim has his centre of interests". For a legal person which carries out the main part of its activities in a different country from the one in which its registered office is located, the former country is the place of its centre of interests, as was decided by the European Court of Justice in the *Bolagsupplysningen* decision.[9] Costume is mainly active in country C, so it is submitted that its centre of interests is situated in that country. According to Von Savigny these courts should apply the laws of country C, the *lex fori*.

As regards (ii), the victim may also bring his action before the courts of each country in the territory of which the defamatory content is online or has been accessible. Those courts have jurisdiction only in respect of the damage caused in its national territory (the so-called "mosaic approach"). This means that the courts of countries B, D, E etc have jurisdiction, although this jurisdiction is territorially limited. According to Von Savigny, these courts should apply their own laws as *lex fori*.

Finally, as regards (iii), the courts of country A are competent to hear the entire claim as the courts of the *locus actus*, which is defined by the European Court of Justice as the courts of the State "of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all of the harm caused by the defamation".[10] This jurisdiction coincides with the *forum rei*. According to Von Savigny these courts should apply the laws of country A as *lex fori*.

All in all, the courts of five different countries have jurisdiction in respect of this claim.[11] They are alternatively competent, which means that the claimant (the victim, Costume) may choose where he brings the action. Now, following the *lex fori* approach of Von Savigny would mean that the claimant may choose the applicable law from a range of five legal systems by selecting the forum. The example makes it clear that this approach cannot be accepted. It makes the applicable-law question unpredictable, favours the claimant to the detriment of the defendant and invites forum-shopping.[12] It is therefore no surprise that the

9 ECJ 17 October 2017, C-194/16, ECLI:EU:C:2017:766 (*Bolagsupplysningen*).

10 ECJ 7 March 1995, C-68/93, ECLI:EU:C:1995:61, [1995] ECR I-415 (*Shevill v Presse Alliance*); ECJ 25 October 2011, C-509/09 and C-161/10, ECLI:EU:C:2011:685, [2011] ECR I-10269 (*eDate v X and Martinez v MGN*).

11 Some are competent to hear the entire claim (the courts in countries A and C), and some have territorially limited jurisdiction (the courts in countries B, D and E).

12 *Cf* J Kiggundu "Choice of Law in Delict, the Rise and Rise of the *lex loci delicti commissi*" 2006 *South African Mercantile Law Journal* 97 99. It should be mentioned that there is also a forum-shopping incentive for the tortfeasor, who may want to try to bring an action for a negative declaration seeking to establish the absence of liability in tort *before* the victim brings his claim for damages, thus creating a *lis pendens* blockade; such a "pre-emptive strike" is possible (see ECJ 25 October 2012, C-133/11, ECLI:EU:C:2012:664 (*Folien Fischer v Ritrama*), although it seems not allowed to use

lex fori approach that Von Savigny proposed for torts did not find acceptance. In the 19th century it had some success for a while in Germany and it was embraced in the United Kingdom by the Privy Council in the *The Halley* case,[13] but it was abandoned in the end.

3 Common-law Approach

In the United Kingdom, the "pure" *lex fori* rule of the *The Halley* case was abandoned two years later in the famous case of *Phillips v Eyre*.[14] The court introduced the so-called double actionability rule. Under this rule, in order to bring an action in tort, two requirements must be satisfied. In the first place, the alleged conduct must "be of such a character that it would have been actionable if it had been committed" in the local jurisdiction. Hence, it must be actionable as a tort under the *lex fori*. If done in the forum state, the act would be a tort under the *lex fori*. Secondly, "the act must not have been justifiable by the law of the place where it was done": it must be non-justifiable under the *lex loci delicti*. These two requirements taken together amount to a cumulative application of the *lex fori* and the *lex loci delicti*: in respect of an act done in a foreign country, actionability as a tort is required under both the law of the forum and the *lex loci delicti*. If this double actionability requirement is satisfied, the *lex fori* will be applied to the extent that is congruent with the rights available under the *lex loci delicti*.[15] It is submitted that, in general, this rule works in favour of the defendant and to the prejudice of the claimant.[16]

Subsequently the double actionability rule evolved. It was mitigated in *Boys v Chaplin*[17] and in *Red Sea Insurance*.[18] These cases introduced "a flexible exception" to the rule. In the first place, in *Boys v Chaplin*, the exception was introduced that if the *lex fori* has a much closer connection with the case, this law applies, displacing the *lex loci delicti*. Secondly, *Red Sea Insurance* introduced the mirror image of this exception: the same applies *vice versa*. The evolution of the double actionability rule ended in the United Kingdom with the 1995 Private International Law (Miscellaneous Provisions) Act, which abolished the rule in Section 10. The Act provides for the *lex loci delicti* rule as the general conflict of law rule for torts in Section 11, with a proper law of the tort exception in Section 12. However, pursuant to Section 13, the double actionability rule remains intact

option (i), see the *eDate* decision at 48). Following Von Savigny's approach, this pre-emptive strike enables the tortfeasor to select the applicable law.

13 *Liverpool, Brazil and River Plate Steam Navigation Company Ltd v Benham ("The Halley")* (1868) LR 2 PC 193. *Cf* D I Fisher *Defamation via Satellite, a European Law Perspective* (1998) 142.

14 *Phillips v Eyre* (1870) LR 6 QB 1.

15 *Cf* Dicey, Morris and Collins *The Conflict of Laws* (2022) 2344.

16 *Cf Burchell v Anglin* 2010 3 SA 48 (ECG) par 101 and 113; Forsyth (2012) 359.

17 *Boys v Chaplin* [1971] AC 356. See also J R Crawford "The 'Proper' Law of a Delict (A Comment on *Boys v Chaplin*)" 1968 *South African Law Journal* 314-319.

18 *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190.

for defamation claims.[19] It seems that the main purpose of this provision is to "preserve the barrier of the *lex fori* so as, at least as a general rule, to prevent foreign liabilities in defamation and related claims being enforceable in the English courts unless the events giving rise to those liabilities give rise to an actionable claim in English domestic law".[20]

Therefore, in the United Kingdom the double actionability rule still applies to defamation. The arrival of the Rome II Regulation, which applied as from 11 January 2009, did not change this position, as the Regulation excludes "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation" from its material scope in Article 1(2)(g).[21] It should be added that, as from 2014, the double actionability rule was accompanied in the United Kingdom by a jurisdiction rule in Section 9 of the Defamation Act 2013 that removes the jurisdiction of English courts to hear cases in which the English part of the publication was only a fragment of an international publication with its centre of gravity elsewhere – this is an attempt to discourage so-called "libel tourism" to English courts.[22]

Applying the double actionability rule in the defamation context, the question arises as to where the place of commission of the act must be situated. It appears that this is the place of publication. This immediately raises the question where the place of publication is in the internet context. It seems to be accepted that this is the place where the defamatory publication is downloaded, at least if the victim suffers damage to his reputation in that country.[23]

4 South African Private International Law

In several common-law jurisdictions the double actionability rule has been abolished, also as regards defamation, for example in Canada, Australia and New Zealand.[24] The position under South African private international law was

19 Section 13(2) provides for a definition of a defamation claim.

20 Dicey, Morris and Collins (2022) 2339.

21 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) *OJ EU* 2007, L 199/40. After Brexit, at the end of the UK-EU transition period on 31 December 2020, the Rome II Regulation stopped applying to the United Kingdom (see also article 66 of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community). However, the Regulation is, in a lightly amended form, adopted as so-called "retained EU law", see A Briggs *Private International Law in English Courts* (2023) 521.

22 A Briggs *Private International Law in English Courts* (2023) 604-606.

23 Dicey, Morris and Collins (2022) 2348-2349

24 Canada: *Tolofson v Jensen* [1994] 3 SCR 1022; Australia: *Pfeiffer v Rogerson* [2000] HCA 36, 203 CLR 503; New Zealand: Private International Law (Choice of Law in Tort) Act 2017, Section 10. In Singapore the double actionability rule has not been abolished (*cf IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6, [2018] SGHC 123). See also

unclear for a long time.[25] A few cases dealt with the delictual conflict-of-law problem, but not satisfactorily.[26] In 2010, however, the Eastern Cape High Court in Grahamstown (Crouse AJ) rendered judgment in what became for some time South Africa's leading case: *Burchell v Anglin*, a cross-border defamation case.[27]

Simplified, the facts of the case were the following. The claimant operated a game reserve and a hunting safari business with related activities in South Africa, generating most of his clients from a booking agent in Nebraska, United States of America. The defendant, a former business associate of the claimant, was a businessman residing in Texas, United States of America, with interests in South Africa. The claimant alleged that the defendant defamed him to the booking agent in Nebraska by sending two letters to this agent in which it was said that the claimant was guilty of criminal activities, notoriously abusive of his own employees and unethical in his hunting practices, and did not pay his bills. As a result, the number of safari bookings decreased dramatically, causing him damage and loss of profit. Accordingly, he instituted *inter alia* an action for general damages and loss of profit.

Deciding on the conflict-of-law question, Crouse AJ started by citing the implicit invitation of Forsyth, who observed that "the general consensus amongst writers is that the question is *res nova* in South Africa, or at any rate, sufficiently open to enable the judge first [seized] with the question to decide on practically any of the various approaches to the problem or to adopt any particular rule".[28] After scrutinising English and American private international law, the court decided not to follow the double actionability rule, as this rule is no longer the best test available. This step was welcomed by Forsyth.[29] Subsequently, Crouse AJ developed a conflict-of-law rule for delicts, at least

A Chong and M Yip *Singapore Private International Law. Commercial Issues and Practice* (2023) 319-356, and 347-351 (defamation).

25 E Kahn "Delict in Conflict of Laws" 1950 *South African Law Journal* 66-69; S J du Plessis "Die Suid-Afrikaanse Internasionale Deliktereg" in J A Coetzee (ed) *Gedenkbundel H L Swanepoel* (1976) 119-139; A B Edwards "Choice of Law in Delict: Rules or Approach" 1979 *South African Law Journal* 48-80; Kiggundu (2006); Forsyth (2012) 350; J L Neels and E A Fredericks "Liability Arising From Traffic Accidents Involving Self-driving Cars in Private International Law" 2024 *Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law* 510.

26 See *Mckay v Phillips* (1830) 1 Menz 455; *Rogaly v General Imports (Pty) Ltd* 1948 1 SA 1216 (C); *Minister of Transport, Transkei v Abdul* 1995 1 SA 366 (N); see F E Marx "At Last a South African Proper Law of Delict" 2011 *Obiter* 224.

27 *Burchell v Anglin* 2010 3 SA 48 (ECG). See *eg* Marx (2011) 224-232; Forsyth (2012) 351 *et seq*; J L Neels and E A Fredericks "The Various Roles of Public Policy in Private International Law: Exclusion, Inclusion and Reform on the Basis of Constitutional Values" in C Hugo and T M J Möllers (eds) *Legality and Limitation of Powers: Values, Principles and Regulations in Civil Law, Criminal Law, and Public Law* (2019) 311-320.

28 Par 95.

29 Forsyth (2012) 364.

for defamation, under South African law.[30] Here, as Forsyth points out, her reasoning becomes unclear.[31] First, she decided that the *lex loci delicti* was the law of Nebraska, as the relevant letter from the defendant to the booking agent was (posted in Florida and) sent to his office in Nebraska and read there by his employees. Then, however, Crouse AJ continued:

> Internationally, a balancing test is used to determine the jurisdiction with the most significant relationship to the parties and the delict, and then the law of that jurisdiction is applied. I will follow this route. Having decided that the *lex loci* of the delict is Nebraska, I must now decide whether this is indeed the jurisdiction with the most significant relationship to the parties and the delict. In order to come to this decision, I will endeavour to establish whether our law or Nebraskan law will weigh more heavily on the balancing scale.[32]

In the summary of the judgment, Crouse AJ concluded that she "decided that the *lex loci* was only to be used as a factor in a balancing test to decide which jurisdiction would have the most real or significant relationship with the defamation and the parties".[33] In the present case she found this was Nebraskan law.

In his book on South African private international law, Forsyth raises the question whether the court adopted the *lex loci delicti* rule as a general rule with an exception for another legal system with which there is a more significant relationship, or whether the court was in direct search of the most significantly related legal system (*ie* the proper law of the tort).[34] It is submitted, as he also observes, that although the court's reasoning starts with the *lex loci delicti* rule, the court finally seems to embrace the proper law of the tort approach.[35] Forsyth rightly argues that the first approach is preferable: the *lex loci delicti* rule as the general rule, with an exception for another legal system with which there is a more significant relationship.[36]

This approach was endorsed by the South Gauteng High Court in Johannesburg (Wepener J) in *East Asian Consortium BV v MTN Group Ltd,* which

30 Marx (2011) 231 submits that the *ratio decidendi* relates only to defamation, and that the court missed a golden opportunity to formulate a general conflict-of-law rule for the law of delict.

31 Forsyth (2012) 351 and 364.

32 Par 122.

33 Par 128.

34 Forsyth (2012) 364.

35 Forsyth (2012) 351.

36 Forsyth (2012) 364. See also *Apleni v African Process Solutions (Pty) Ltd* (15211/17) [2018] ZAWCHC 160 (27 November 2018), citing Forsyth with approval at 54–56.

was a delict case, but not about defamation.[37] The court preferred the approach proposed by Forsyth for the reasons offered by the author: as to the general rule, in most cases the *lex loci delicti commissi* conflict-of-law rule will be clear, certain and appropriate; the rule is in accord with the reasonable expectations of most parties; the rule is in accord with Roman-Dutch authority; the rule has been adopted in both Canada and Australia; and there have been clear legislative moves in the United Kingdom and in Europe in support of the rule. The court also considered – following Forsyth – that the acceptance of the rule would ensure broad uniformity with many other influential jurisdictions across the world, including important trading partners. This is a clear understanding of the importance of international *Entscheidungsharmonie*.

The decision of the South Gauteng High Court in respect of the applicable law was confirmed in 2025 by the Supreme Court of Appeal in *East Asian Consortium BV v MTN Group Ltd*.[38] The court agreed with Forsyth that the *lex loci delicti* should be the conflict-of-law rule of general application in respect of delict, with the exception that the *lex loci delicti* may be replaced in favour of the law of the country with a "manifestly closer, significant relationship to the occurrence and the parties".[39] The displacement of the rule requires a manifestly closer connection. According to the court, this ensures that the *lex loci delicti* rule "is not supplanted, unless there is a clear showing that the law of another jurisdiction is plainly more appropriate".[40]

This Supreme Court decision is now South Africa's leading case. In principle, this approach (*ie* the *lex loci delicti* rule, with the exception of a manifestly closer connected law) must be applied to all types of delict[41] and, as such, *Burchell*[42] (*ie* the proper law of the tort) is no longer to be followed.[43]

The court also considered transnational delicts, defining "transnational" as the situation in which "the conduct or events constituting the delict do not take place in one country". The court held that in such case the *lex loci delicti* is the law of the country in which the greater part of the conduct or events making up the elements of the delict took place (the "plurality approach").[44] It seems that the court addressed the situation in which the delict is based on multiple, subsequent *acts* in different countries, thus solving the problem as to where the *locus actus* is to be situated in that constellation (*ie* in the country in which

37 *East Asian Consortium BV v MTN Group Limited* (2013/44462) [2022] ZAGPJHC 969; [2023] 1 All SA 632 (GJ); 2023 (3) SA 77 (GJ) (30 November 2022), citing Forsyth with approval at 16.

38 [2025] ZASCA 50, par 99-111 and 113. *Cf Acting Prime Minister [Eswatini] v Swaziland News (Pty) Ltd* [2024] 4 All SA 714 (ML) par 47 and 51.

39 par 102.

40 par 102.

41 par 104 and 107.

42 (n 27).

43 par 101 and 102.

44 par 103 and 107.

the greater part of the acts took place).[45] The court seems to have developed a general approach for the determination of the *lex loci delicti* in the case of a transnational delict. This appears to include transnational defamation,[46] although further clarification could be helpful as to how this approach is to be applied in such cases. It should be noted that, also in defamation cases, the *lex loci delicti*, as determined according this approach, may be replaced by the law of the country with a manifestly closer relationship.

5 Dutch Private International Law

As mentioned above, there is no European law rule in this respect: the Rome II Regulation excludes defamation from its material scope. This is due to lack of agreement: several proposals were on the table during the legislation process in Brussels, but none of them reached the finishing line.[47] First, in its draft proposal in 2002, the European Commission had proposed that the law of the victim's habitual residence be applied to defamation. This solution, however, met with extensive criticism.[48] In a further draft in 2003, the Commission proposed to apply to defamation the Regulation's general rule (*lex loci damni*),[49] together with the *Shevill* approach.[50] It was added that this rule must be disapplied in favour of the *lex fori* if it is incompatible with the public policy of the forum in relation to the freedom of the press.[51] This proposal was rejected too. Subsequently, the European Parliament's alternative also failed.[52] It proposed to apply, as a general rule for defamation, the law of the country in which the most significant element or elements of the loss or damage occur, with the presumption that this is the country to which the publication or broadcasting service is principally directed; if this is not apparent, this is the country in which the editorial control is exercised.[53]

45 In the European Union, the Rome II Regulation solves the problem of transnational delicts (understood as: *locus actus* and *locus damni* are situated in different countries) by application of the *lex loci damni* (Art 4(1) Rome II), see 5.

46 *Cf* par 103, in which the court took into account the delict of defamation (*Burchell*).

47 See also P Mankowski in U Magnus and P Mankowski (eds) *Rome II Regulation* (2019) 115–124.

48 COM/2003/427 final, par 33.

49 Hence, the law of the place where the direct damage is sustained (with two exceptions: if the parties reside in the same country or if the dispute is more closely connected with another country).

50 ECJ 7 March 1995, C-68/93, ECLI:EU:C:1995:61, [1995] ECR I-415 (*Shevill v Presse Alliance*).

51 In addition, a provision was proposed about the right of reply and equivalent measures, these issues being governed by the law of the country in which the broadcaster or publisher is established.

52 6_TA(2005)0284, p 11–12.

53 In addition, it was proposed that "[t]he law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast

The matter appeared to be too controversial. In essence it was not possible to find an acceptable balance in the underlying area of tension, *ie* the friction between freedom of speech, on the one hand, and the protection of privacy, on the other. The solution was to exclude the matter from the Regulation's scope. A proposal to exclude defamation only partially failed.[54] Finally, article 1(2)(g) provided for the complete exclusion of "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation". Further study was required, and the European Commission was instructed to undertake this.[55]

The exclusion of defamation by Rome II means that these topics are left to the national conflict-of-law rules of the member states of the European Union. The Dutch legislator took the view that its national conflict-of-law rules in respect of torts should follow the Rome II Regulation in order to achieve coherence. Thus, it prescribed in 2012 the analogous application of Rome II on torts falling outside the Regulation's scope. Section 159 of Book 10 of the Dutch Civil Code (DCC) says that obligations falling outside the scope of application of the Rome II Regulation, and that may be regarded as having arisen from tort (a tortious act), are governed by the provisions of the Rome II Regulation.[56] As a consequence, the general conflict-of-law rules in Rome II apply in the Netherlands analogously to defamation, *ie* the *lex loci damni*,[57] unless there is a common habitual residence,[58] the tort is manifestly more closely connected with another country,[59] or there is a choice of law by the parties.[60] This may be seen as a remarkable approach because, as mentioned above, application of the general conflict-of-law rules of Rome II in respect of defamation was rejected during the Rome II legislation process. It seems that the Dutch legislator did not

shall be the law of the country in which the publisher or broadcaster has its habitual residence".

54 In 2006 the Commission proposed to exclude defamation partially (as far as press offences are involved) (COM/2006/83 final).

55 See Art 30(2). Accordingly, a comparative report was presented in February 2009: JLS/2007/C4/028, Final Report. See also the resolution of European Parliament in 2012 (P7_TA(2012)0200; *OJ EU* 2013, C 261 E/17). In 2025, the European Commission presented a report to the European Parliament, the Council and the European and Social Committee on the application of the Rome II Regulation (COM/2025/20 final). The Commission concluded that there seems to be a critical mass of arguments to consider an amendment to Rome II that includes non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, within the scope of the Regulation (par. 3.1) and stated that further in-depth analysis of the issue is required (par 4).

56 With an exception for obligations resulting from the exercise of Dutch public power: they are governed by Dutch law.

57 *Cf* Art 4(1) Rome II.

58 *Cf* Art 4(2) Rome II.

59 *Cf* Art 4(3) Rome II.

60 *Cf* Art 14 Rome II.

reflect on the consequences of analogous application of Rome II in respect of defamation.

The problem arose a few years later in the *Dahabshiil* case. A person domiciled in the Netherlands published articles in English on the internet about Dahabshiil, an organisation based in London. Arguing that these articles were defamatory, Dahabshiil instituted an action before the Dutch court against the author, claiming *inter alia* rectification and an injunction. On appeal, the conflict-of-law problem came into the spotlight. Applying article 4(1) Rome II analogously on the basis of the aforementioned section 10:159 DCC, the Court of Appeal was in search of the *locus damni*. The court held that the interpretation given by the European Court of Justice to article 7(2) Brussels I *bis*, in particular the abovementioned *eDate* decision,[61] should be extrapolated in the context of article 4(1) Rome II. Therefore, according to the court, the applicable law is *in casu* the law of the country where the victim has its centre of interests. The court situated Dahabshiil's centre of interests in London, as it had its seat in London and was supervised by financial authorities there. This led the court to the conclusion that English law is applicable.[62] In cassation appeal, the Supreme Court approved this judgment, emphasising the importance of a consistent interpretation of Rome II and Brussel I *bis*.[63]

Hence, under Dutch private international law, defamation is apparently governed by the law of the country where the alleged victim has his centre of interests, which corresponds in general to his habitual residence.[64] In addition, three exceptions apply to this rule.[65]

This approach, however, raises some questions. A consistent interpretation is indeed important, especially as to the scope of these Regulations and the notions used therein, but it is submitted that jurisdiction rules and conflict-of-law rules have different underlying policy considerations.[66] The *eDate* criteria were designed in and for the jurisdiction context, where the friction between freedom of speech and protection of privacy is not so pressing as it is in the applicable-law context. The legislative history of Rome II illustrates the difficulties in striking the right balance in the latter context. Extrapolating *eDate* to the applicable-law context seems to ignore this.[67]

61 (n 8).

62 Court of Appeal 's-Hertogenbosch, 23 July 2013, ECLI:NL:GHSHE:2013:3348, at 4.11.2 (*Dahabshiil*).

63 Supreme Court 3 June 2016, ECLI:NL:HR:2016:1054 (*Dahabshiil*).

64 This approach comes close to the draft proposal of the European Commission, see above.

65 *Cf* Articles 4(2), 4(3) and 14 Rome II.

66 *Cf* ECJ 16 January 2014, C-45/13, ECLI:EU:C:2014:7 (*Kainz*), at 20.

67 It also seems somewhat forced to try to achieve a consistent interpretation with a Regulation that does not intend to be applicable in this respect. In addition, it should be noted that for rectification claims (the main claims in the *Dahabshiil* case) special conflict-of-law rules were proposed during the Rome II legislative process.

In addition, where the *Dahabshiil* decision relies heavily on a consistent interpretation of Rome II, Brussels I *bis* and the *eDate* decision, the question arises whether the claimant, like in *eDate*, may choose between the centre-of-interests approach or the mosaic approach. That would be a unilateral choice of law. It is not clear from the *Dahabshiil* decision whether this would be allowed.

Finally, it should be observed that under the Brussels I *bis* regime the defamation centre of interests is always in a member state of the European Union (the Regulation distributing jurisdiction *within* the European Union), whereas under the Rome II-*Dahabshiil* regime this centre of interests can be anywhere, also in a country outside the European Union.[68] Here, the friction between freedom of speech and protection of privacy may become even more severe.[69] Suppose a Dutch journalist publishes an article on an international website that is critical about the president of, for instance, country X, a country with quite strict defamation laws and less affinity with the freedom of the press. The *Dahabshiil* rule may entail that the Dutch court, hearing a defamation case initiated by the president of country X against the journalist, must apply the laws of country X. This includes questions such as whether publication of the article is unlawful or not in the light of the freedom of speech, whether damages should be awarded, whether prohibitory injunctions or a rectification should be ordered, etc.[70] The only safeguard is the *ultimum remedium* of the public policy exception, which is rarely used by Dutch courts.[71] These observations as to the *Dahabshiil* decision justify the question whether the Dutch conflict-of-law approach to defamation is an appropriate one, but it should be mentioned that the *main* cause of the problem is the analogous application of Rome II ordered by the Dutch legislator.

6 Conclusion

Online defamation is treated differently in the conflict-of-laws in the three legal systems examined. Under British private international law, the old double actionability rule still applies, amounting to a cumulative application of the *lex fori* and the *lex loci delicti,* which seems to be the law of the country where the publication is downloaded, at least if the victim suffers damage to his reputation in that country. In South Africa, the general rule today is the application of the

68 Article 3 Rome II: "Any law specified by this Regulation shall be applied whether or not it is the law of a Member State." Section 10:159 DCC does not limit this universal application.

69 Within the European Union, the Charter of Fundamental Rights of the European Union (*cf* Articles 7 and 11) and the European Convention on Human Rights (*cf* Articles 8 and 10) apply.

70 *Cf* L Strikwerda and S J Schaafsma *Inleiding tot het Nederlandse Internationaal Privaatrecht* (2026) 362.

71 Section 10:6 DCC and Art 26 Rome II. Another solution would be the analogous application of Art 4(3) if the tort is manifestly more closely connected with another country.

lex loci delicti with an exception for another legal system with which there is a manifestly closer relationship. Finally, under Dutch private international law an analogous application of the general conflict-of-law rules of the Rome II Regulation is prescribed, which, as a general rule, leads to the application of the law of the country of the centre of interests of the victim as *lex loci damni*. The comparison teaches us that Von Savigny's ideal of the international *Entscheidungsharmonie* has clearly not yet been achieved here. As the Rome II legislative process makes clear, the underlying friction between freedom of speech and protection of privacy seems to complicate this.

The Spiliada in South Africa

Sailing into the Future

Elsabe Schoeman*

1 Introduction

In his book *Private International Law*, Professor Christopher F Forsyth concludes his discussion of *forum (non) conveniens* with a question: "But the question now is: is applying a test similar to this one the future of the South African law of jurisdiction?"[1]

The question follows on an extract from *The Spiliada*, where Lord Goff set out the basic principles governing *forum (non) conveniens*.[2] In this contribution, I shall chart the course of *The Spiliada* through South African case law to establish the current state of the doctrine of *forum (non) conveniens* in South African law, and to reflect on its future role in cross-border jurisdiction.

2 Distinguishing between *Forum Conveniens* and *Forum Non Conveniens*

In *The Spiliada*, Lord Goff distinguished clearly between the two different jurisdictional contexts in which the doctrine of *forum (non) conveniens* finds application. The first is in the context of establishing jurisdiction where a plaintiff wishes to serve proceedings abroad on a foreign defendant in order to establish jurisdiction in the plaintiff's home jurisdiction. This is known as "service out" cases and one of the requirements in these cases is that the plaintiff's home forum must be *forum conveniens*.

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1 C F Forsyth *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012) 188. For South African writings on *forum (non) conveniens*, see for example: J Taitz "Jurisdiction and *forum non conveniens* – A New Approach?" 1980 *Journal of Contemporary Roman Dutch Law* 187-195; E Spiro "*Forum non conveniens*" 1980 *Comparative and International Law Journal of Southern Africa* 333-339; J Taitz "Jurisdiction and *forum non conveniens*: A Reply" 1981 *Journal of Contemporary Roman Dutch Law* 372-379; C Schulze "*Forum non conveniens* in Comparative Private International Law" 2001 *South African Law Journal* 812-830; and S Eiselen "Goodbye Arrest *ad fundandam*, Hello *forum non conveniens*?" 2008 *Journal of South African Law* 794-800.

2 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL) (*The Spiliada*) 476C-478E.

The other context is where the defendant challenges the already existing jurisdiction of a forum on the basis that there is another (foreign) competent court that is clearly more appropriate to hear the matter. This scenario typically arises when the plaintiff serves proceedings on a foreign defendant while the foreign defendant is present in the plaintiff's home jurisdiction. Although *forum non conveniens* is used to describe this scenario, it is not the appropriateness of the forum already seized that is being challenged in the sense that it is inappropriate[3] – the focus is on another competent court being clearly more appropriate.

2.1 *Forum Conveniens*

In some Anglo-common law jurisdictions, such as England and Wales, a plaintiff may require the permission of the court to serve a foreign defendant abroad in certain instances, known as "serving abroad with leave" or "service out". This takes the form of an *ex parte* application and the starting point for the plaintiff is to prove that its claim falls within a certain designated category ("jurisdictional gateway"), which allows it to serve abroad with leave.[4] In New Zealand, however, falling within one of those jurisdictional gateways allows a plaintiff to serve a foreign defendant *without leave* – leave of the court is only required for claims that do not fall within a designated jurisdictional gateway.[5]

Be that as it may, in all instances, whether applying for leave to serve abroad or whether responding to a protest by the foreign defendant (having been served abroad), the burden of proof is on the plaintiff to prove, amongst other things,[6] that its home forum is *forum conveniens*. In this context *forum conveniens* applies to the establishment of jurisdiction – in other words, whether jurisdiction *exists*.

2.2 *Forum Non Conveniens*

Forum non conveniens arises as a defence to jurisdiction already established, in other words, jurisdiction *exists*. In this case, the burden of proof is on the defendant to prove that there is another competent (foreign) forum that is distinctly more appropriate to hear the matter. Therefore, the current forum

3 But see Australia, which is the exception to the rule, where the defendant must prove that the forum selected by the plaintiff is clearly inappropriate: *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

4 r 6.37 of Civil Procedure Rules. See further, P Torremans (ed) *Cheshire, North and Fawcett: Private International Law* (2017) 334*ff*. Note that this only applies to r 6.36 cases (see Part 6 Practice Direction B par 3.1) under the traditional English jurisdictional regime (that is, not covered by the Brussels/Lugano regime): see Torremans (2017) 189.

5 rr 6.27-6.29 of High Court Rules.

6 For example, a good arguable case that one of the jurisdictional gateways is satisfied and that there is a serious issue to be tried on the merits: *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 453*ff*.

should stay proceedings and not *exercise* its jurisdiction. Should the defendant be successful in persuading the court that there is another competent and clearly more appropriate forum available, the burden of proof shifts to the plaintiff to prove why a stay should not be granted on the ground that it will not receive justice in the other forum. Lord Goff's exposition of the principles relating to *forum non conveniens* has become the quintessential authority on the topic.[7]

2.3 The Significance of Distinguishing Between *Forum Conveniens* and *Forum Non Conveniens*

Lord Goff, while pointing out that both manifestations of the doctrine focused on the appropriateness of the forum (*forum conveniens*) or fora (*forum non conveniens*), drew attention to a few significant differences.[8] Most important for present purposes are the burden of proof and the purpose of the enquiry: in the case of *forum conveniens*, the onus is on the plaintiff and it is used to establish jurisdiction (*existence* of jurisdiction),[9] while in the case of *forum non conveniens* the onus is on the defendant (in the first stage) and it is used to challenge the *exercise* of jurisdiction, while conceding that jurisdiction *exists*. The burden of proof shifts to the plaintiff in the second stage, should it argue for the refusal of a stay based on considerations of justice.[10]

With this distinction in mind, a review of South African cases, in which *The Spiliada* was invoked as authority, will be conducted. Each of these cases illustrates a particular aspect of the *forum (non) conveniens* enquiry.

3 *The Spiliada* in South Africa

3.1 *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris*[11]

This was an admiralty case, concerning the arrest of a ship in Port Elizabeth harbour in order to provide security for proceedings contemplated elsewhere in the world – in a foreign court or courts – under section 5(3)(a) of the Admiralty Jurisdiction Regulation Act.[12] The arrested ship was an "associated ship"[13] of

7 Despite *The Spiliada* being a *forum conveniens* ("service with leave" or "service out") case, and not a *forum non conveniens* case.

8 *The Spiliada* (n 2) 480G–481E.

9 Justice considerations may also play a role in regard to *forum conveniens*, for example, should the plaintiff argue that it would not receive a fair trial abroad: Torremans (2017) 372.

10 *The Spiliada* (n 2) 478C–E. See A Arzandeh "Should the *Spiliada* Test be Revised?" 2014 *Journal of Private International Law* 89 108–109 who prefers the two-stage approach.

11 1989 3 SA 820 (A).

12 105 of 1983.

13 sec 3(6) and (7) of the Admiralty Jurisdiction Regulation Act 105 of 1983.

another vessel that had perished in a fire in Aiden harbour in South Yemen.[14] Causes of action in contract and delict were contemplated and the bill of lading contained an exclusive jurisdiction clause in favour of the Tokyo District Court in Japan.[15] The applicants (appellants on appeal) secured an order for security in respect of foreign courts, but the parties were unable to reach agreement on exactly which foreign courts were to be included for purposes of security. The reason for this was that the applicants wanted to include the courts of South Yemen, while the respondent (owner of the ship) was vehemently opposed to that, relying on the exclusive jurisdiction clause in favour of the Japanese court. In subsequent proceedings, this disagreement had to be resolved and the issue turned on the respondent's argument that it would not receive justice in a South Yemeni court.[16]

It was in this context that *The Spiliada* was cited (only once) to indicate that the burden of proof rested on the party alleging that it would not obtain justice in a foreign court to persuade the court that that was indeed the case. Botha JA stated that:[17]

> In this regard the onus of proof is a heavy one. In England it is well settled that a litigant who asserts that he may not obtain justice in a foreign jurisdiction is required to prove and establish his assertion objectively by means of positive and cogent evidence .... We consider that our Courts will apply the same approach.

The respondent relied on a number of factors to prove that it would not get a fair trial in the courts of South Yemen: the Marxist nature of the South Yemeni government; recent fighting leading to the temporary evacuation of foreigners; the "public interest factor" which would benefit the Yemeni Insurance Company (a public sector company through which the appellants were acting collectively); and the poor standard of the judiciary since judicial appointments tended to be political.[18] However, these allegations were not adequately substantiated and were refuted by the expert evidence of a South Yemeni lawyer. Botha JA

14 The ship was released upon adequate provision of security by the respondent (owner of the ship).

15 *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* (n 11) 827E.

16 This followed on the appellants having discharged the onus of proving that the South Yemeni courts had jurisdiction to hear the matter and the respondent not having discharged the onus of proving that those courts would decline to exercise their jurisdiction in favour of the appellants, whether on the ground of the exclusive jurisdiction clause or any other ground: *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* (n 11) 843H–J.

17 *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* (n 11) 833E–F.

18 *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* (n 11) 844H–845A.

concluded that the respondent had not succeeded in proving that it would not receive a fair trial in South Yemen.

This case dealt with a typical *Spiliada* stage two enquiry, focusing on considerations of justice in regard to the foreign forum that had been identified as clearly more appropriate to hear the matter during the first stage of the *forum non conveniens* enquiry.

3.2 *Dias Compania Naviera SA v MV AL Kaziemah*[19]

This was also an admiralty case, concerning a dispute about the ownership of a vessel, anchored in Durban harbour. The applicant alleged that it was the owner of the ship and that it was wrongfully denied possession thereof.[20] Bristowe J decided that a claim for ownership and possession of a vessel could be enforced through an action *in rem*[21] and therefore the court had jurisdiction to hear the matter.[22]

Once jurisdiction had been established (jurisdiction therefore *existed*) the respondents argued *forum non conveniens* in favour of a trial in a Greek court, relying on *The Spiliada* as authority.[23] After considering the very substantial connections with Greece, most notably that Greek law would be the *lex causae* and that the ship was still registered in Greece (at least according to the applicant), as well as several related proceedings pending in Greece,[24] Bristowe J nevertheless refused to stay the proceedings. According to him, whether Greek law was argued by lawyers in a Greek court or whether it was presented as foreign law in a South African court, there would not be any significant difference in relation to costs. He regarded the presence of the vessel in Durban harbour as being of "overriding importance":[25] the *forum rei sitae* had jurisdiction to determine possession of movable property and therefore the

19 [1994] 3 All SA 4 (D). Note, however, that judgment was given on 25 September 1989.

20 The ship had been mortgaged to Chase Manhattan Bank, which had purported to sell and transfer it to the third respondent which, in turn, had sold, or purported to sell, it to the second respondent and, separately, to the fourth respondent: *Dias Compania Naviera SA v MV AL Kaziemah* (n 19) 5.

21 *Dias Compania Naviera SA v MV AL Kaziemah* (n 19) 8.

22 *Dias Compania Naviera SA v MV AL Kaziemah* (n 19) 9.

23 Sec 7(1)*(a)* of the Admiralty Jurisdiction Regulation Act 105 of 1983 provides as follows: "A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that any other court in the Republic or any other court or any arbitrator, tribunal or body elsewhere will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court or by such arbitrator, tribunal or body."

24 *Dias Compania Naviera SA v MV AL Kaziemah* (n 19) 12.

25 *Dias Compania Naviera SA v MV AL Kaziemah* (n 19) 12.

court had jurisdiction "as of right".[26] In addition, where the property was under arrest (as was the ship in this case) a decision in favour of the applicant was guaranteed effectiveness. This was a huge advantage in comparison to other possible jurisdictional venues, especially since the ship had not been back to Greece for some time and there was little prospect of it returning to Greece in the foreseeable future.[27]

This case dealt exclusively with a *Spiliada* stage one *forum non conveniens* enquiry. The jurisdiction of the South African court existed, and the respondents argued for a stay of proceedings on the basis that there was another competent, distinctly more appropriate forum (in Greece) to hear the matter.

3.3 *Great River Shipping Inc v Sunnyface Marine Ltd*[28]

This was yet another admiralty case where the applicant argued for a stay of proceedings under section 7(1)(a) of the Admiralty Jurisdiction Regulation Act.[29] The respondent had (twice) secured the arrest of a ship in Saldanha Bay for the purposes of pursuing an *in rem* action. One of the issues to be decided was whether the South African court should decline jurisdiction in favour of a court in the People's Republic of China (PRC).[30]

Recognising and applying the authority of *The Spiliada*, Berman J said it could not be disputed that a competent court in the PRC would be a "more natural appropriate forum"[31] for the matter: the dispute concerned the validity of the arrest of a vessel in Quingdao in the PRC and its subsequent sale and transfer in the PRC (purportedly in accordance with Chinese law and proceedings in a Chinese court); the witnesses would be almost exclusively Chinese and their evidence would be in their language; witnesses could not be compelled to attend proceedings in South Africa; costs to bring witnesses to South Africa would be exorbitant; it would not be fair if some witnesses came and others not; the applicable law in the dispute would be Chinese law and this required expert evidence by Chinese lawyers; there would be difficulties relating to differing translations of Chinese documents; it was a coincidence that the vessel was found in a South African port; and no person in South Africa had any interest in the proceedings.[32]

In response to the applicant having discharged the onus of showing that a competent court in the PRC would be distinctly more appropriate to hear the matter, the respondent set out to prove that it would not obtain justice in a

26 *Dias Compania Naviera SA v MV AL Kaziemah* (n 19) 12. See also *The Spiliada* (n 2) 474B.
27 *Dias Compania Naviera SA v MV AL Kaziemah* (n 19) 12.
28 1992 4 SA 313 (C).
29 105 of 1983.
30 *Great River Shipping Inc v Sunnyface Marine Ltd* (n 28) 316C–D.
31 *Great River Shipping Inc v Sunnyface Marine Ltd* (n 28) 318F.
32 *Great River Shipping Inc v Sunnyface Marine Ltd* (n 28) 318F–319C.

PRC court.[33] The respondent addressed two points in this regard: the inability to obtain legal representation and concern about the impartiality of a particular court, the Quingdao Maritime Court. Several expert witnesses produced different opinions on these matters, but in the end Berman J decided that the respondent had not discharged the onus (which was a heavy one)[34] of proving that it would not get a fair trial in the PRC: the respondent was not restricted to the Quingdao Maritime Court and the PRC had a sophisticated civil procedure system, allowing for appeals, judicial review, etcetera.[35] Furthermore, Berman J did not regard the availability of legal representation as a problem.[36]

This case concerned both stages of the *Spiliada forum non conveniens* enquiry. However, the conclusion of Berman J that the respondent had "failed to discharge the onus of showing the existence of special circumstances which warrant a finding that a Court in the PRC is not a more appropriate forum to entertain the action"[37] seems to conflate the two stages. The first stage deals with the appropriateness of the other available forum, based on factors such as significant connections to that jurisdiction, costs, applicable law and the like, while the second stage concerns justice factors, which could result in a refusal to stay proceedings even though the other forum is clearly more appropriate.

3.4 *M T Tigr Bouygues Offshore SA v Owners of The M T Tigr*[38]

This is also an admiralty case but the facts and focus were slightly different. This case was concerned with the application of the *Spiliada* doctrine of *forum non conveniens* where two sets of proceedings were pending in different jurisdictions – South Africa and England.[39]

The South African proceedings concerned an *in personam* claim[40] for damages by the owner of a barge (the plaintiff) against the owner of a tug (the defendant) pursuant to the tug having "lost" the barge with the result that the barge ran aground off the coast of Cape Town. Proceedings were also brought in England, in terms of an exclusive jurisdiction clause in favour of the High Court

33 Although the respondent's claims in a South African court were secured by the arrest of the vessel, actual repossession was highly unlikely – if security was provided by the applicant, the vessel would be released, and the respondent might not be able to retrieve it again. According to Berman J (320E–F), "too much weight should not be afforded any 'legitimate personal or juridical advantage' which Sunnyface may forfeit if the arrest is set aside (see *The Spiliada* at 10) – it is, however, a factor not to be left out of consideration".

34 *Great River Shipping Inc v Sunnyface Marine Ltd* (n 28) 321H.

35 *Great River Shipping Inc v Sunnyface Marine Ltd* (n 28) 321C–H.

36 *Great River Shipping Inc v Sunnyface Marine Ltd* (n 28) 322A–B.

37 *Great River Shipping Inc v Sunnyface Marine Ltd* (n 28) 322C.

38 1998 4 SA 740 (C).

39 Between different parties, so it was not an instance of *lis alibi pendens*.

40 The tug had not been "arrested"; it had been attached *ad confirmandam jurisdictionem*.

of Justice in London, between the owner of the barge and the company that had chartered the tug from its owner, under a towing ("Towcon") contract.

The defendant pleaded *forum non conveniens* in the South African court under section 7(1)(a) of the Admiralty Jurisdiction Regulation Act.[41] The focus of the enquiry was on the natural forum and in this regard the South African connections were conclusive: the incident happened in South African waters with most of the evidence being sourced from witnesses in South Africa; the plaintiff had also sued Portnet (with the owner of the tug and the company to which the tug had been chartered having been joined as joint wrongdoers) and Portnet was not amenable to the jurisdiction of the English court; and it was probable that the plaintiff's two South African actions would be consolidated.[42] As far as multiplicity of proceedings was concerned, King DJP pointed out that the continuation of both sets of proceedings in South Africa and England would result in "an unavoidable[43] fragmentation with the concomitant possibility of inconsistent decisions".[44]

King DJP also addressed the relevance of a "'[j]uridical advantage' and forum shopping".[45] The limitation of liability regime applied by the South African court would be more favourable to the plaintiff than the regime applied by the English court. According to King DJP,[46]

> [l]egitimate juridical advantage is not necessarily a decisive factor but here, where Bouygues [the plaintiff] would be correspondingly disadvantaged if it sued in England, and it is inevitable that one or other party will necessarily be advantaged at the expense of the other, the advantage should, in my view, accrue to Bouygues as *dominus litis* who sues here as of right .... Bouygues' action here is first in point of time and it is common cause that the action instituted by Bouygues in England is intended to avoid the consequences of a time-bar.

In the final analysis, the only connection in favour of the English court was the exclusive jurisdiction clause, contained in the towing contract to which the defendant was not a party. In any event, the alleged misrepresentation regarding the towing capacity of the tug (the main issue in the English proceedings) did not occur in England – it emanated from the Netherlands and was received by the plaintiff in France, where the subsequent towing contract was concluded.

41 105 of 1983.

42 *M T Tigr Bouygues Offshore SA v Owners of The M T Tigr* (n 38) 742D-743D.

43 Due to the exclusive jurisdiction clause in the towing contract: *M T Tigr Bouygues Offshore SA v Owners of The M T Tigr* (n 38) 743F-G.

44 *M T Tigr Bouygues Offshore SA v Owners of The M T Tigr* (n 38) 743E.

45 *M T Tigr Bouygues Offshore SA v Owners of The M T Tigr* (n 38) 743I-744H.

46 *M T Tigr Bouygues Offshore SA v Owners of The M T Tigr* (n 38) 744F-H.

According to King DJP, the South African court was the natural and clearly appropriate forum.[47]

This case was predominantly about the first stage of the *forum non conveniens* enquiry. However, it also highlights the significance of a juridical advantage, which falls under the second stage of the *Spiliada* enquiry,[48] and illustrates the importance of context: the plaintiff was able to secure this advantage because the exclusive jurisdiction clause did not apply to the defendant.

3.5 *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC*[49]

This was not an admiralty case. It concerned an agency agreement and both sides[50] had commenced proceedings in different jurisdictions – first in Israel and thereafter in South Africa. The defendant in the South African proceedings (the plaintiff in the Israeli proceedings) argued for a stay of the South African proceedings on the basis of *lis alibi pendens*.

The respondents (plaintiffs in the South African proceedings) opposed a stay of proceedings on three grounds: (1) it would be prohibitively expensive for them to litigate in Israel; (2) one of the respondents had been lured to Israel under a false pretext in order to be served for purposes of establishing jurisdiction and, therefore, the Israeli action was not *bona fide*; and (3) the Cape Town court was the more natural forum.

Wallis JA rejected the first ground, pointing out that the respondents did not have to bring a counterclaim in the Israeli court – the South African proceedings would simply be stayed pending the outcome of the Israeli proceedings. Thereafter, the respondents could decide whether to pursue the matter further in the South African court, with the added advantage of being able to plead *res judicata* in regard to issues already having been decided by the Israeli court.[51]

Wallis JA also rejected the second ground. The way in which jurisdiction was established did not amount to an abuse of process according to the Israeli courts – the matter had gone on appeal and further leave to appeal to the

47 *M T Tigr Bouygues Offshore SA v Owners of The M T Tigr* (n 38) 745D.

48 Torremans (2017) 400.

49 2013 4 All SA 509 (SCA).

50 There was some confusion about the identity of the parties to each set of proceedings, but in the end Wallis JA, after dealing in detail with Roman-Dutch (Johannes Voet) and contemporary authorities, decided that the two sets of proceedings concerned the same parties and that at least one of the issues was common to both disputes. Therefore, it was to be regarded as an instance of *lis alibi pendens* and the stay was granted: *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC* (n 49) par 43-44.

51 *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC* (n 49) par 37.

Supreme Court of Appeal was denied. There was no reason to disagree with the conclusions reached by the Israeli higher courts.[52]

Regarding the third contention, the respondents argued that the bulk of the evidence was in South Africa, since the agency agreement was to be performed in South Africa, and reports, detailing events that occurred in South Africa, had to be drafted in South Africa. With reference to *The Spiliada*, Wallis JA emphasised that this defence, being in the nature of *forum non conveniens*, had to be substantiated by evidence and the agreed statement of facts contained no facts to support it.[53]

This case raises the interesting point of interaction between *forum non conveniens* and *lis alibi pendens*. English common law does not have a separate *lis alibi pendens* rule – instead, it is considered part of the *forum non conveniens* enquiry under the consideration of "multiplicity of proceedings".[54] As evidenced in the case under discussion, South African law has a well-defined *lis alibi pendens* doctrine. The synergies of *forum non conveniens* and *lis alibi pendens* in South African law need to be explored further on the private international level.

3.6 *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*[55]

This was another non-admiralty case involving two plaintiffs (one South African and the other one Nigerian)[56] and six defendants. In the final analysis, the dispute turned on the jurisdiction of the South African court over the third defendant, a Nigerian company, which was the only non-South African defendant.[57] The Nigerian defendant had been served in South Africa, it being alleged that it had consented to its South African attorneys accepting service on its behalf.[58] While the Nigerian company had not been involved directly in the conclusion of the disputed "Super Dealer Agreement", the second defendant's

52 *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC* (n 49) par 38.

53 *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC* (n 49) par 39. It also seemed as if most of the evidence would be rendered in Hebrew: *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC* (n 49) par 40.

54 Torremans (2017) 407-408; Lord Collins of Mapesbury and J Harris (gen eds) *Dicey, Morris and Collins on the Conflict of Laws* (2022) vol 1 622-623 (par 12-050 and 12-051).

55 2014 3 SA 265 (GP).

56 This plaintiff, Multi-Links, was previously (during the time that most events concerning the dispute occurred) a subsidiary of the other plaintiff, Telkom SA: *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* (n 55) par 2.

57 The Nigerian company (APSN) was a subsidiary of the first (South African) defendant through the first defendant's 72% shareholding in the second (South African) defendant, which in turn held 51% shares in the Nigerian company.

58 *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* (n 55) par 2. However, there were not sufficient facts to conclusively prove submission to jurisdiction on the basis of *domicilium citandi et executandi* at that stage: *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* (n 55) par 21.

rights and obligations under the agreement had been assigned to the Nigerian company through cession.[59]

The court had to address the issue whether jurisdiction in respect of a foreign defendant could be established without attachment to found or confirm jurisdiction. The following factors, indicating the "appropriateness and convenience"[60] of the court, were advanced in support of the court assuming jurisdiction over the Nigerian defendant: it concluded the agreement as an *incola* of the court;[61] it agreed to arbitration in South Africa; it nominated a *domicilium citandi et executandi* within the area of the court's jurisdiction; it agreed that South African law would govern the agreement and any dispute pursuant thereto; it invoked the arbitration clause without qualification; it extended the terms of reference of the arbitration agreement to include determination of the special plea; it was controlled by the first and second defendants, who were domiciled within the jurisdictional area of the court; it was cited as co-defendant with another defendant, domiciled and ordinarily resident in the jurisdictional area of the court; the factual events on which the plaintiffs relied had occurred within the court's jurisdiction, involving all the defendants in the action; the defendants were sued jointly and severally, and any judgment in favour of the plaintiffs could be executed effectively in South Africa.[62] Fabricius J concluded:[63]

> [I]t seems to me that one must determine the forum most suitable for the ends of justice, and because pursuit of the litigation in that forum is most likely to secure those ends. The appropriate or natural forum is that with which the action has the most real and substantial connection. In that context then, the court would look to all the connecting factors, including all background facts, convenience, experts, the law governing the relevant transaction or action, the place where the parties reside or carry on business, etc.

59 In fact, the Nigerian company was established for this purpose and clause 32 of the agreement specifically provided for this: *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* (n 55) par 3.

60 *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* (n 55) par 15.

61 However, the Nigerian company was not involved in the conclusion of the agreement, it having been assigned the rights and obligations of the second (South African) defendant under and in terms of the agreement. According to Fabricius J, that was "not important, inasmuch as these negotiations were expressly conducted on its behalf as a company 'to be formed'": *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* (n 55) par 15.

62 *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* (n 55) par 15.

63 *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* (n 55) par 23.

It was clear that the Nigerian company was a necessary party to the litigation. It had a "direct and substantial interest" in the issues to be determined.[64] In addition, *causa continentia* was advanced by the applicants and Fabricius J agreed that[65]

> [w]here one court has jurisdiction over a part of a cause, considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause. In the present case it is common cause that no other court has jurisdiction over all the defendants. The *causae* upon which Telkom and Multi-Links' cases are founded largely occurred in this court's area of jurisdiction [and] involved parties that are resident therein, and the facts giving rise to the action are intertwined.

However, the principle of *causa continentia* only operated within the South African context where another South African court already had jurisdiction.[66] Fabricius J decided that the Nigerian defendant was not entitled to an order declaring that the court did not have jurisdiction, but that the trial court would make the final decision regarding jurisdiction.[67]

Fabricius J made extensive reference to *The Spiliada*. However, the case was not a conventional *forum non conveniens* case, like the admiralty cases or *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC*.[68] It did not concern the appropriateness of two different fora – the focus was squarely on the South African court as the appropriate forum.

3.7 *Bid Industrial Holdings (Pty) Ltd v Strang (Minister of Justice and Constitutional Development, Third Party)*[69]

This case was referred to at length in the previous case, *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*.[70] Although *Bid Industrial Holdings* did not mention *The Spiliada* at all, it set in motion reform of the establishment of jurisdiction over a foreign defendant served in South Africa. The case concerned the arrest of two Australian defendants in order to found or confirm jurisdiction in the Johannesburg High Court. In a landmark judgment,

64 *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* (n 55) par 20.

65 *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* (n 55) par 21.

66 *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* (n 55) par 22. However, Fabricius J goes on to say that "where the *continentia* rule is concerned, there are again strong factual indications which would support the argument that the court will assume jurisdiction over APSN [the Nigerian defendant] in the trial": *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* (n 55) par 23.

67 *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* (n 55) par 23.

68 2013 4 All SA 509 (SCA).

69 2008 3 SA 355 (SCA).

70 2014 3 SA 265 (GP).

the practice of arrest of a foreign defendant was ruled to be unconstitutional and the Supreme Court of Appeal determined as follows:[71]

> For all these reasons the common-law rule that arrest is mandatory to found or confirm jurisdiction cannot pass the limitations test set by s 36(1). It is contrary to the spirit, purport and objects of the Bill of Rights. The common law must be, and is hereby, developed by abolition of the rule and the adoption in its stead, where attachment is not possible, of the practice according to which a South African High Court will have jurisdiction if the summons is served on the defendant while in South Africa and there is sufficient connection between the suit and the area of jurisdiction of the court concerned so that disposal of the case by that court is appropriate and convenient.

4 Current Position in South Africa

From the discussion of the case law above, it is clear that the admiralty cases exhibit a conventional *forum non conveniens* doctrine, based on *The Spiliada*. According to Berman J, section 7(1)(a) of the Admiralty Jurisdiction Regulation Act[72] is "the *forum non conveniens* principle expressed in statutory form".[73] In these cases, there are two courts in different countries and jurisdiction has already been established in at least one of those fora – jurisdiction *exists*. This was also the case in *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC*[74] where two sets of proceedings were actually pending in two different jurisdictions. The onus is on the defendant in the first stage of the *Spiliada* enquiry to establish that the other forum (which has jurisdiction) is clearly more appropriate to hear the matter, with the plaintiff being able to argue against a stay on the basis of justice considerations in the second stage of the enquiry. *Forum non conveniens* is about the *exercise* of jurisdiction – should the forum seized exercise its jurisdiction or grant a stay of proceedings?

The situation in *Bid Industrial Holdings (Pty) Ltd v Strang (Minister of Justice and Constitutional Development, Third Party)*[75] and *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*[76] was different. These cases concerned the appropriateness of a single forum, a South African court. This is an instance of *forum conveniens*, similar to the Anglo-common law "service out" cases referred to earlier.[77] But there is an important difference: whereas the "service out"

71 *Bid Industrial Holdings (Pty) Ltd v Strang (Minister of Justice and Constitutional Development, Third Party*) (n 69) par 59 (own emphasis).

72 105 of 1983.

73 *Great River Shipping Inc v Sunnyface Marine Ltd* 1992 4 SA 313 (C) 316D-F.

74 [2013] 4 All SA 509 (SCA).

75 2008 3 SA 355 (SCA).

76 2014 3 SA 265 (GP).

77 See par 2.1 above.

cases concern the service of proceedings on a foreign defendant *abroad*, both *Bid Industrial Holdings* and *Multi-Links* concerned the service of proceedings on foreign defendants while in South Africa. In Anglo-common law countries, a foreign defendant can be served with proceedings while in the plaintiff's home jurisdiction and *service alone* suffices to establish jurisdiction.[78] The foreign defendant then has the option of arguing *forum non conveniens*.

It seems as if the courts in *Multi-links* and *Bid Industrial Holdings* advanced a slightly different version of *forum conveniens*: in order to establish jurisdiction in a South African forum, a foreign defendant may be *served while in South Africa*, *provided* that "there is sufficient connection between the suit and the area of jurisdiction of the court concerned so that disposal of the case by that court is appropriate and convenient".[79] Importantly, the onus of proving the appropriateness of the court should be on the plaintiff.[80] *Forum conveniens* is about establishing jurisdiction – does jurisdiction *exist*? Once jurisdiction has been established, the defendant can argue *forum non conveniens*:[81]

> And if the plaintiff decides in favour of suing here it is open to the defendant to contest, among other things, whether the South African court is the *forum conveniens* and whether there are sufficient links between the suit and this country to render litigation appropriate here rather than in the court of the defendant's domicile.

5 Conclusion

Both *forum conveniens* and *forum non conveniens* are now present in South African law. While *forum non conveniens* follows the conventional *Spiliada* model, the context within which *forum conveniens* operates is slightly different. The interpretation and application of both *forum conveniens* and *forum non conveniens* are informed by *The Spiliada*, despite the fact that the case was not referred to in *Bid Industrial Holdings (Pty) Ltd v Strang (Minister of Justice and Constitutional Development, Third Party)*.[82]

So, returning to Professor Forsyth's question posed in the introduction of this contribution: *The Spiliada* is alive and well in South African case law. The importance and value of "appropriateness" of forum in cross-border litigation should not be underestimated. It is a powerful tool in ensuring conflicts justice. Yes, indeed, applying a doctrine similar to *The Spiliada* in regard to both *forum conveniens* and *forum non conveniens* may well be the future of the

78 Torremans (2017) 190.

79 *Bid Industrial Holdings (Pty) Ltd v Strang (Minister of Justice and Constitutional Development, Third Party)* (n 69) par 59.

80 Justice considerations may also come into the equation: see Torremans (2017) 372.

81 *Bid Industrial Holdings (Pty) Ltd v Strang (Minister of Justice and Constitutional Development, Third Party)* (n 69) par 55.

82 2008 3 SA 355 (SCA).

South African law of cross-border jurisdiction, provided that the similarities, in terms of finding the appropriate forum and ensuring a fair trial, as well as the differences, in regard to burden of proof and purpose, of *forum conveniens* and *forum non conveniens* are acknowledged and appreciated.

The New South African International Arbitration Act

Signalling the End of the Road for the Protection of Businesses Act?

*Marlene Wethmar-Lemmer**

1 Introduction

In addition to studying from Prof Forsyth's internationally known treatise on South African private international law,[1] I have had the privilege of attending several of Professor Forsyth's papers at international conferences and seminars over the years. On several occasions, he criticised section 1 of the Protection of Businesses Act 99 of 1978 (hereinafter PBA)[2] due to the adverse effects it may have on the recognition and enforcement of, otherwise legitimate, foreign judgments in South Africa.[3] In this contribution, therefore, I would like to commend Prof Forsyth for his continued criticism of Act 99 of 1978 and celebrate the fact that its possible adverse effect on the recognition and enforcement of foreign arbitral awards in South Africa has been eliminated by newly enacted international arbitration legislation in South Africa.

The long-awaited International Arbitration Act (hereinafter the IAA) was promulgated in 2017 and came into force on 1 January 2018.[4] It has been hailed as an important legal development designed to facilitate dispute resolution in international commercial matters and is expected to enhance South Africa's participation in international commerce. For the first time, a set of governing rules tailored to all facets of international arbitration is now in force in South Africa. Schedule 1 of the IAA incorporates the UNCITRAL Model Law on

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1 C F Forsyth *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012).

2 Sec 1 of the Act requires permission of the Minister of Economic Affairs for the recognition and enforcement of, *inter alia*, judgments, orders and arbitration awards given or issued outside the Republic. This provision will be analysed under section 4 of this contribution.

3 See Forsyth (2012) 466-468.

4 For a general commentary on the IAA, see P A A Ramsden *The Law of Arbitration. South African and International Arbitration* (2018).

International Commercial Arbitration.[5] The incorporation of the Model Law into the IAA creates a procedural governing framework for parties wishing to elect South African law as the *lex arbitri* of their dispute.

South Africa acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the so-called New York Convention)[6] in 1976[7] and enacted the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977[8] to comply with its international law obligations as Member State of the New York Convention. However, the IAA repealed the 1977 Act in its entirety and the New York Convention is now incorporated into the IAA in Schedule 3.[9] The 1977 Act contained a legislative oversight in that it did not specifically provide for the recognition and enforcement of the arbitration agreement itself.[10] Furthermore, the wording of section 2 of the 1977 Act created the impression that courts had a wide discretion to refuse recognition and enforcement of foreign arbitral awards, through use of the word "may".[11]

Of utmost importance for this discussion is the fact that Schedule 4 of the IAA amended section 1 of the PBA by deleting the terms "arbitration award/ awards" where these occurred in this section.[12] No longer, therefore, will the recognition and enforcement of a foreign arbitral award in South Africa be

5 UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments adopted in 2006) (see www.uncitral.un.org).

6 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) 330 (1959) *UNTS* 38.

7 See the status table of the New York Convention, available electronically at www.uncitral.un.org. As the status table also indicates, South Africa did not make any of the permitted reservations when acceding to the New York Convention.

8 See E Kahn "Conflict of Laws" 1977 *Annual Survey of South African Law* 564–578 for an analysis of the 1977 Act. From a private international law perspective, *Laconian Maritime Enterprises v Agromar Lineas* 1986 3 SA 509 (D) constitutes an important case decided on the 1977 Act and it deals with classification as well. See C F Forsyth "Enforcement of Arbitral Awards, Choice of Law in Contract, Characterisation and a New Attitude to Private International Law" 1987 *South African Law Journal* 4–16 for a discussion of the salient points of the judgment.

9 See www.uncitral.un.org for the text of the Convention.

10 D W Butler and E Finsen *Arbitration in South Africa – Law and Practice* (1983) 311–312; South African Law Commission *Project 94 Arbitration: An International Arbitration Act for South Africa – Report* (1998) 143; and M Wethmar-Lemmer and E Schoeman "The International Arbitration Act 15 of 2017: Impetus for Developments on the Cross-border Commercial Front" 2019 *Journal of South African Law (TSAR)* 127–137.

11 *SALC Project 94 Report* (1998) 146. Sec 2(1) of the 1977 Act provided that "any foreign arbitral award *may* [own emphasis], subject to the provisions of sections 3 and 4, be made an order of court by any court".

12 In this regard, sec 20 of the IAA needs to be taken into account. It sets out the transitional provisions relating to the repealed and amended legislation.

threatened by obsolete legislation that required ministerial approval for the enforcement of judgments and awards relating to broad categories of contracts.[13]

2 Recognition and Enforcement of Foreign Arbitral Awards under the International Arbitration Act 15 of 2017

2.1 General

Chapter 3 of the IAA (sections 14–19) deals with the recognition and enforcement of foreign arbitral awards and agreements. Section 14 provides definitions of important terms. According to this provision, "foreign arbitral award" refers to an award made in the territory of a State other than the Republic of South Africa. An arbitral award is deemed to be made at its juridical seat.[14] Therefore, an international arbitral award has its seat in a territory other than South Africa. The juridical seat of arbitration is determined in accordance with the relevant provisions of the Model Law.[15] Parties may agree on the seat of arbitration. In the absence of such agreement, it will be determined by the arbitral tribunal by having regard to all the circumstances of the case – including the convenience of the parties.[16]

As already mentioned, the new IAA expressly provides that an arbitration agreement and a foreign arbitral award *must*[17] be recognised and enforced in South Africa as required by the New York Convention and subject to the requirements as set out in chapter 3 of the Act.[18] Article II of the Convention sets out the requirements for recognition and enforcement of an arbitration agreement. In essence, article II requires a forum in a Contracting State to recognise a written arbitration agreement[19] that meets certain conditions and to enforce this agreement by referring the parties to arbitration.[20] Four basic recognition requirements may be distilled from this sub-article. Firstly, there must be an agreement in writing to refer disputes to arbitration. Secondly, there

13 See sec 1 of the PBA. This will further be analysed under section 4 of this contribution.

14 Art 31(3) of the UNCITRAL Model Law. The juridical seat may be different from the physical place (geographic location) of the arbitration. For instance, for reasons of convenience, parties may elect to hold the arbitration in Cape Town, but elect London as its juridical seat: Art 20(2) of the Model Law.

15 According to sec 15 of the IAA, the seat of arbitration is to be determined with reference to Art 20(1) and 31(3) of the Model Law.

16 Art 20(1) of the Model Law.

17 Own emphasis added.

18 Sec 16(1) of the IAA.

19 Art II (1).

20 UNCITRAL *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York 1958) (2016) 39, available at www.uncitral.un.org.

must be an existing dispute. Thirdly, there must be a defined legal relationship (contractual or non-contractual) and, fourthly, the matter must be arbitrable.[21]

2.2 Requirements for Recognition and Enforcement of a Foreign Award

Article III of the New York Convention mandates that Contracting States recognise arbitral awards as binding and enforce them (in terms of the rules of procedure of the jurisdiction where enforcement is sought) if they comply with the conditions as stipulated in the Convention. In this regard, section 17 of the IAA (in conformity with art IV of the Convention) requires that a party seeking recognition and enforcement of a foreign arbitral award must produce either the original award and arbitration agreement, duly authenticated, or a certified copy thereof.[22]

2.3 Grounds for Refusal of Recognition and Enforcement of a Foreign Award

Section 18 of the IAA (based on article V of the New York Convention) contains an exhaustive list of grounds on which recognition and enforcement of a foreign award may be refused. Section 18(1)(a)(i) provides that the court may refuse recognition and enforcement of a foreign arbitral award if it (the court) finds that the subject matter which the dispute relates to may not be settled by means of arbitration in terms of South African law. Though the application of the Arbitration Act 42 of 1965 is now limited to purely domestic arbitration,[23] section 4(2) of the IAA makes the arbitrability criteria of the 1965 Act applicable to the recognition and enforcement of foreign arbitral awards and agreements. In this regard, the 1965 Act provides that no matrimonial cause or matter related thereto and no status matter may be referred to arbitration.[24] Section 18(1)(a)(ii) of the IAA permits a court to refuse recognition and enforcement of a foreign award found to be contrary to South African public policy.[25] In addition to these two grounds, section 18(1)(b) lists six grounds that a party against whom the award is invoked may raise and prove to convince the court to decline recognition and enforcement. These defences to recognition and enforcement include: that a party to the arbitration agreement lacked contractual capacity;

21 D Di Pietro and M Platte *Enforcement of International Arbitration Awards. The New York Convention of 1958* (2001) 66. See section 3 below for a discussion of the arbitrability requirement under the New York Convention.

22 Sec 17(a). If the award was not rendered in one of the official languages of the Republic, then sec 17(b) requires that a sworn translation, duly authenticated, must be submitted. However, this provision also empowers the court to accept other documentary evidence regarding the existence of the foreign arbitral award and agreement.

23 Sec 4(1) of the IAA provides that the Arbitration Act 42 of 1965 is not applicable to an arbitration agreement, arbitral award or reference to arbitration covered by the IAA.

24 Sec 2.

25 Sec 18(1)(a) of the IAA corresponds to Art V(2) of the New York Convention.

that the arbitration agreement is invalid in terms of its applicable law; that the party did not receive the required notice regarding the appointment of the arbitrator or of the proceedings and was not able to present his case; that the award deals with a dispute beyond the terms of reference to arbitration; that there were procedural irregularities in the arbitration procedure, and, finally, that the award is not yet binding on the parties or has been set aside or suspended.[26]

It warrants mentioning that the UNCITRAL Model Law also contains provisions on recognition and enforcement of foreign arbitral awards and that these provisions were included in the version of the Model Law incorporated into the IAA in Schedule 1.[27] These provisions do not conflict with the recognition and enforcement regime of the New York Convention:[28] Article 36(3) of the Model Law provides more detail only in respect of what should be included under the public policy exclusion. It provides that, without limiting the general public policy ground for refusal of recognition and enforcement,[29] it is declared that the recognition and enforcement of an arbitral award is contrary to public policy if:

> (a) a breach of the arbitral tribunal's duty to act fairly occurred in connection with the making of the award which has caused or will cause substantial injustice to the party resisting recognition or enforcement; or
>
> (b) the making of the award was induced or effected by fraud or corruption.

It seems, therefore, that the UNCITRAL Model Law complements the recognition and enforcement regime as governed by the New York Convention.

3 The Arbitrability Question and the Public Policy Exception under the New York Convention

Despite the relative clarity of the provisions of article V(2) of the New York Convention, the public policy and arbitrability exceptions to the recognition and enforcement of foreign arbitral awards have generated quite some controversy and scholarly commentary.

It has been pointed out that non-arbitrability, the validity of the arbitration clause and the public policy exception under the New York

26 These grounds are based on Art V (1) of the New York Convention.

27 See Art 35 and 36 of the Model Law, available at www.uncitral.un.org.

28 See R H Christie "Arbitration: Party Autonomy or Curial Intervention II: International Commercial Arbitrations" 1994 *South African Law Journal* 360–372 on the relationship between the provisions of the New York Convention and the Model Law.

29 The public policy exception is provided for in Art 36(1)(b)(ii) of the Model Law.

Convention are often conflated.[30] From a conflict of laws perspective, the law applicable to the determination of arbitrability is important and still contentious. In terms of the New York Convention, arbitrability needs to be determined in two distinct instances – when an arbitration agreement has to be recognised under article II (1); and when a court is called upon to rule on arbitrability as a ground for refusal of recognition and enforcement of a foreign arbitral award in terms of article V(2). Article V(2) unequivocally assigns the inquiry into arbitrability to the *lex fori*, and section 18(1)(a)(i) of the IAA refers to the law of the Republic as being applicable. However, article II(1) requires only that an arbitral agreement "concerning a subject matter capable of settlement by arbitration" be recognised, without assigning this determination to a specific *lex causae*. Several commentators have supported the application of the *lex fori* to this determination as well, since it provides a simple, clear and uniform approach to the issue of arbitrability under the Convention.[31] This approach is further supported by the UNCITRAL Secretariat Guide, which provides that the phrase "capable of settlement by arbitration" under articles II(1) and V(2)(a) should be understood in the same manner.[32] On the other hand, some commentators support the notion that the *lex arbitri* should be applied to the determination of objective arbitrability.[33] Thirdly, case law authority may be found in support of determining arbitrability under article II(1) in line with the conflicts rule contained in article V(1)(a) of the Convention – the law to which the parties have subjected the arbitration agreement, or, failing any choice in this regard, the law of the country where the award was made.[34] The phrase "where the award was made" in this context is interpreted as a reference to the seat of arbitration. As mentioned above,[35] in South Africa, express recognition of the arbitration agreement was only recently enacted by article 16 of the IAA – the 1977 Act contained no comparable provision, nor does the 1965 Arbitration Act. It therefore remains to be seen to which legal system our courts will subject arbitrability of the agreement. However, it seems highly unlikely that a South African forum would recognise a foreign arbitral agreement, the subject matter of which is not capable of being settled by means of arbitration in terms of the *lex fori*. Therefore, the application of the *lex fori* to the determination of arbitrability in all instances under the New York Convention is supported.

30 H Arfazadeh "Arbitrability under the New York Convention: The *Lex Fori* Revisited" 2001 *Arbitration International* 73 74.

31 Arfazadeh (2001) 74 and references in n 6; B Hanotiau "What Law Governs the Issue of Arbitrability?" 1996 *Arbitration International* 391–403; and A J Van den Berg *The New York Convention of 1958. Towards a Uniform Judicial Interpretation* (1981) 152.

32 UNCITRAL Secretariat Guide (2016) 227.

33 Di Pietro and Platte (2001) 66.

34 UNCITRAL Secretariat Guide (2016) 49 citing *Misr Insurance Company v Alexandra Shipping Agencies Company* Court of Cassation, Egypt, 23 December 1991.

35 Refer to the Introduction above.

The determination of the arbitrability of the subject matter needs to be distinguished from the ascertainment of the validity of the arbitration agreement under the New York Convention regime. In respect of the latter, article V(1)(a) provides that validity is to be determined in accordance with the law chosen by the parties, or, in the absence of a choice, in terms of the *lex arbitri*. Where arbitrability under a recognition and enforcement setting is assigned to the chosen proper law or *lex arbitri*, it is being confused with the validity of the agreement.

The arbitrability and public policy exceptions inevitably become entwined in that the justification for declaring some types of disputes non-arbitrable will often be grounded in a State's public policy.[36]

The interpretation of the public policy exception under the New York Convention has also been a matter of much controversy. Despite the very successful harmonisation brought about by the New York Convention,[37] this defence still provides Contracting States with a wide discretion to refuse recognition and enforcement of arbitral awards.[38] The UNCITRAL Secretariat Guide also confirms that a Contracting State is not required to uphold the public policy of another State – the reference here is to the public policy of the country where recognition and enforcement is sought.[39] Despite the fact that the reference here is to the public policy of the enforcing State, it does not refer to domestic public policy – the latter refers to "fundamental notions of morality and justice determined by a national government to apply to purely domestic disputes".[40] What is referred to here is international or, from a private international law perspective, external public policy.[41] International public policy refers to the fundamental notions of morality and justice determined by a national government to apply to disputes that have an international element.[42] Often it is stated that this notion should be referred to as "transnational public policy" of the enforcing state. In other words, this notion refers to "standards,

36 M A Buchanan "Public Policy and International Commercial Arbitration" 1988 *American Business Law Journal* 511–531.

37 See in general, M Mustill "Arbitration: History and Background" 1989 *Journal of International Arbitration* 43.

38 J D Fry "*Désordre* Public International under the New York Convention: Wither Truly International Public Policy" 2009 *Chinese Journal of International Law* 81–134.

39 UNCITRAL Secretariat Guide (2016) 245.

40 Fry (2009) 86.

41 See J L Neels "External Public Policy, the Incidental Question Properly So-called and the Recognition of Foreign Divorce Orders" 2010 *Journal of South African Law* (*TSAR*) 671–688; J L Neels "Geoorloofdheid van 'n Kontrak en Openbare Beleid in die Internasionale Privaatreg" 1991 *Journal of South African Law (TSAR)* 694–701; and A Mills "The Dimensions of Public Policy in Private International Law" 2008 *Journal of Private International Law* 201–236.

42 Fry (2009) 86.

principles or accepted norms of conduct that represent universal consensus in the community of states".[43]

A complicating factor, however, is the fact that public policy is not defined under the New York Convention or in any other international instrument.[44] It has been noted that too broad an interpretation of the public policy exception has the potential of severely undermining the harmonisation efforts of the Convention.[45] However, an analysis of the interpretation of the public policy defence in several New York Convention Member States has led to the conclusion that it is mostly afforded a narrow interpretation.[46]

We now turn to a brief discussion of the Protection of Businesses Act – classified by Forsyth as a statutory expression of public policy.[47]

4 Section 1 of the Protection of Businesses Act and the Recognition and Enforcement of Foreign Arbitral Awards

As mentioned at the outset of this contribution, the IAA has repealed the Protection of Businesses Act's application in the context of international arbitration. The 1998 Law Commission Report on International Arbitration specifically referred to Forsyth's criticism of the PBA[48] and recommended its repeal.[49]

The purpose statement of the PBA already bodes ill for South Africa's proper compliance with its obligations as a Member State of the New York Convention, not to mention foreign investor confidence and international trade relations. It states that the PBA endeavours "to restrict enforcement in the Republic of certain foreign judgments, … arbitration awards …, to prohibit the furnishing of information relating to businesses in compliance with foreign orders, directions or letters of request and to provide for matters connected therewith".[50]

Subsection 1(1)(a) of the PBA requires the permission of the Minister of Finance[51] to enforce, *inter alia*, any judgment or arbitral award emanating from outside South Africa in connection with any civil proceedings and arising from any act or transaction contemplated in subsection 1(3). Subsection 1(3) describes any "act or transaction" in the context of subsection 1(1)(a) as "an act or transaction which took place at any time, whether before or after the commencement of this Act, and is connected with the mining, production,

43 Buchanan (1988) 529.
44 Fry (2009) 92.
45 Fry (2009) 94.
46 See for example, Fry (2009) 94.
47 Forsyth (2012) 464, specifically referring to secs 1A, 1B and 1D of the PBA.
48 *SALC Project 94 Report* (1998) 152–153.
49 *SALC Project 94 Report* (1998) 154.
50 See the preamble to the Protection of Businesses Act.
51 The PBA still refers to the Minister of Economic Affairs.

importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic". Forsyth commented that, since most foreign judgments deal with "ownership of … any matter or material", a literal reading of the PBA would require ministerial approval for almost all judgments.[52] Even though the provisions of the PBA were restrictively interpreted as evidenced by the *dicta* referred to in the *Fattouche* case,[53] the fact remains that, before the enactment of the IAA, a party wishing to enforce a foreign arbitral award had to consider whether ministerial permission may be required.[54] Forsyth points out that the Minister does not readily grant permission for such recognition and enforcement.[55] Only one reported case seems available in which the Minister granted permission for recognition and enforcement of a foreign arbitral award.[56]

The case of *Fattouche v Khumalo*[57] was decided a couple of years before the final enactment of the IAA and most of the important arguments against the PBA were underlined in this judgment. The applicant sought recognition and enforcement of a foreign arbitral award in terms of the 1977 Recognition and Enforcement of Foreign Arbitral Awards Act.[58] The dispute concerned a written sale of shares agreement. The judgment referred to the well-known *dictum* from *Jones v Krok*[59] that outlines the requirements for recognition and enforcement of a foreign judgment.[60] The *Jones v Krok* case confirmed that the enforcement of a foreign judgment is also subject to compliance with the requirements of the PBA, and the judge in the *Fattouche* case stated that these requirements are *mutatis mutandis* applicable to foreign arbitral awards.[61] The salient provisions of the PBA were discussed in the *Fattouche* case[62] and it was reiterated that the words "connected with" in section 1(3) are open to a very wide interpretation.[63]

52 Forsyth (2012) 466. Though not the focus of this contribution, it warrants mentioning that secs 1A, 1B and 1D of the PBA require ministerial permission for the enforcement of judgments relating to the payment of multiple or punitive damages. These provisions were enacted to protect South African businesses "from the far-reaching tentacles of American anti-trust legislation": Forsyth (2012) 466. See, also, the SALC *Project 94 Report* (1998) 152.

53 *Fattouche v Khumalo* [2014] ZAGPJHC 102.

54 Forsyth (2012) 467.

55 Forsyth (2012) 467.

56 Forsyth (2012) 467 n 374 refers to *Seton Co v Silveroak Industries Ltd* 2000 2 SA 215 (T). Hugely problematic in this case is the fact that the Minister required submissions from both parties concerning the merits of the case before rendering a decision.

57 [2014] ZAGPJHC 102.

58 *Fattouche v Khumalo* (n 53) par 1-6.

59 1995 1 SA 677 (A).

60 *Fattouche v Khumalo* (n 53) par 17.

61 *Fattouche v Khumalo* (n 53) par 19.

62 *Fattouche v Khumalo* (n 53) par 21-23.

63 *Fattouche v Khumalo* (n 53) par 22.

The reference to "matter and material" in section 1(3) was once again elucidated in light of the *Tradex Ocean Transportation*[64] and *Chinatex Oriental Trading Co*[65] cases. It was confirmed that section 1(3) of the PBA refers to raw materials and substances, and not to the manufactured thing.[66] The *Fattouche* case also referred to *Richman v Ben-Tovim*,[67] which supported the restrictive interpretation of the PBA.[68] In the latter case, it was found that section 1(3) of the PBA does not apply to a claim for money due for professional services rendered.[69] The *Fattouche* case dealt with a transaction involving the sale of shares in a mining company, not raw materials.[70] The court held that the PBA is not applicable to the recognition and enforcement of the award, since the sale of shares cannot be classified as raw matter or material.[71] The court also considered whether section 1(1) and 1(3) was potentially unconstitutional.[72] The judge pointed out that a broad interpretation of section 1 of the PBA would have the effect of requiring ministerial approval for virtually every transaction.[73] It was argued on behalf of the applicant that the requirement of ministerial approval in the PBA is contrary to the intention of the New York Convention.[74] The *dictum* in the *Fattouche* case referred to Forsyth's criticisms of the PBA.[75] The judge also identified three constitutional provisions that may render the application of the PBA in respect of the enforcement of foreign arbitral awards unconstitutional.[76]

64 *Tradex Ocean Transportation SA v MV Silvergate (Astyanax)* 1994 4 SA 119 (D).

65 *Chinatex Oriental Trading Co v Erskine* 1998 4 SA 1087 (C).

66 *Tradex Ocean Transportation SA v MV Silvergate (Astyanax)* (n 64) 120J–121C and *Chinatex Oriental Trading Co v Erskine* (n 65) 1095I–1096C.

67 2007 2 SA 283 (SCA).

68 *Fattouche v Khumalo* (n 53) par 25.

69 *Richman v Ben-Tovim* (n 67) par 11.

70 *Fattouche v Khumalo* (n 53) par 28.

71 *Fattouche v Khumalo* (n 53) par 29.

72 *Fattouche v Khumalo* (n 53) par 36.

73 *Fattouche v Khumalo* (n 53) par 38.

74 *Fattouche v Khumalo* (n 53) par 40.

75 *Fattouche v Khumalo* (n 53) par 41.

76 *Fattouche v Khumalo* (n 53) par 45. The court referred to sec 165 (1)–(4) of the Constitution, which confirms that the judicial authority of the Republic is vested in the courts; that the courts are independent and subject only to the Constitution and the law which they must apply impartially and without favour, fear or prejudice; that no person or organ of state may interfere with the functioning of the courts and that organs of state must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. In addition, the court cited sec 34 of the Constitution that confirms that everyone has the right to have a dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. Finally, the court referred to secs 231(5) and 233, which confirm that the Republic is bound by its international agreements entered into before the Constitution took effect and that legislation must be interpreted in a manner consistent with international law.

It was also reiterated that the main aim of the New York Convention was to ensure that foreign arbitral awards would not be discriminated against.[77] Counsel for the applicant argued that the enactment of the PBA breached South Africa's international law obligations insofar as it discriminates against foreign arbitral awards that are indeed arbitrable and are not against public policy.[78] The respondent contended that the PBA does not prohibit recognition and enforcement of foreign arbitral awards, it only introduced "additional procedural requirements".[79] However, the court found on the facts and enforced the award.[80] A final point of interest is the fact that the court specifically recognised the growing importance of international arbitration as a means of effectively settling international commercial disputes.[81]

The true nature of the ministerial approval requirement remains unclear. If indeed regarded as an additional procedural requirement, then the PBA breached article III of the New York Convention. This provision prohibits the imposition of more onerous conditions on recognition and enforcement of a foreign arbitral award than those required to enforce a domestic award. Fortunately, however, Schedule 4 of the IAA repealed the PBA's application in respect of foreign arbitral awards and agreements.

5 Conclusion

In 1994, the late Prof Christie indicated that "a businessman would be ill advised to sign an international contract containing an arbitration clause that specified South Africa as the place of arbitration".[82] He therefore advocated for the adoption of the UNCITRAL Model Law. After years of preparatory work,[83] the international arbitration landscape changed drastically with the adoption of the International Arbitration Act in 2017. International merchants should now be able to choose South Africa as the seat of international commercial arbitration proceedings with confidence. Both South African and foreign merchants should be confident that they could choose arbitration as the dispute settlement regime and be able to apply for recognition and enforcement of the award in South Africa if the requirements under the New York Convention are complied with.

It is hoped that a constitutional challenge to the remaining provisions of the PBA will soon lead to its being repealed in its entirety and that its potential harmful effects on the recognition and enforcement of foreign judgments would thereby also be something of the past. Thank you to Prof Forsyth for his role in the slow demise of this archaic piece of legislation.

77 *Fattouche v Khumalo* (n 53) par 48.
78 *Fattouche v Khumalo* (n 53) par 51.
79 *Fattouche v Khumalo* (n 53) para 54 and 56.
80 *Fattouche v Khumalo* (n 53) par 59.
81 *Fattouche v Khumalo* (n 53) par 47.
82 Christie (1994) 360–372.
83 See *SALC Project 94 Report* (1998).

Part IV

In Memoriam Professor Christian Schulze

Jan L Neels*
Eesa A Fredericks**

Professor Christian (HCAW) Schulze intended to contribute to this volume; sadly, instead, an *in memoriam* is now included.[1] Professor Christopher Forsyth indicated that he would be touched by the inclusion of such a tribute. He wrote to the private international law community in South Africa and elsewhere, when informed of Christian's passing:

> I share the sorrow of others at the passing of Christian Schulze. He was a perceptive and thoughtful conflicts scholar. His contribution will be missed. But I will miss too the personal time we spent together, most recently two years ago in Leiden for the defence of Eesa's LLD thesis.[2] Our little world of PrIL has been struck a blow. My thoughts are with his family at this trying time.[3]

Christian indeed saw Eesa's defence, in the *Academiegebouw*, Rapenburg 73, Leiden, as one of the highlights of his academic career. Christian and Christopher were members of the *promotiecommissie*.[4] Christian appeared in full UNISA academic regalia and Christopher in the ceremonial Cambridge attire. They particularly enjoyed the customary doctoral dinner, held at *India Way*, Vrouwenkerkkoorstraat 7, Leiden. (Participants were cautioned not to confuse the Vrouwenkerkkoorstraat with the Vrouwenkerksteeg and the Vrouwensteeg, which all proceed from Haarlemmerstraat.)

Hans Christian Albrecht Wilhelm Schulze was born on 31 May 1956 in Klein Bülten/Peine, Germany. He attended the Bodenstedtschule Peine, the Kreisgymnasium Groß Ilsede, and the Gymnasium Uetze, Hannover. He studied at the Eberhard-Karls-University of Tübingen and the Georg-August-University of Göttingen, passing the first state examination in law in 1980.

* Professor of Private International Law, University of Johannesburg.

** Associate Professor of Private International Law, University of Johannesburg.

1 Information was *inter alia* obtained from Ms Precious Vilakazi and an official UNISA *curriculum vitae*, which we obtained via Prof Marlene Wethmar-Lemmer. Dr Jonas Baumann reviewed the German terminology.

2 Eesa A Fredericks *Contractual Capacity in Private International Law* (2016).

3 Email dated 21 February 2019, on file with the author.

4 The defence took place at 11h15 (read: 11h30) on Thursday 30 June 2016. The third member of the *promotiecommissie* was Prof E Koops of the University of Leiden. Supervisors (*promotoren*) were Professor Sierd J Schaafsma of the University of Leiden (see his contribution elsewhere in this volume) and Professor Jan L Neels of the University of Johannesburg.

From 1981 to 1984, Christian was a research assistant at the *Kirchenrechtliches Institut der Evangelischen Kirche in Deutschland* at the University of Göttingen, undertaking research on constitutional and ecclesiastical law and acting as editorial assistant for the publication of an ecclesiastical law journal. In 1983, Christian was awarded the degree *Doctor Juris* by the Georg-August-University of Göttingen, based on a doctoral thesis with the (translated) title *The Tortfeasor's Liability for Idiosyncrasies of his Victim under the German and English Law of Delict*. For this purpose, he also undertook research at Oxford University in the United Kingdom. He passed the second state examination in law in 1986, after practical legal training as from 1983. Christian was admitted by the Regional Court of Hamburg to practise as a *Rechtsanwalt*, also in 1986. From 1986 to 1989, he practised as such in the law firm of Dr E W Heinsius in Hamburg, specialising in the law of contract, commercial law, company law, tax law, the law of civil procedure and litigation.

Upon moving to South Africa, Christian worked as a professional assistant at Webber Wentzel attorneys in Johannesburg, specialising in advice to German and South African corporate clients on commercial law matters and the drafting of commercial contracts (1989–1990). In 1990 he was appointed senior researcher at the Institute of Foreign and Comparative Law at UNISA and in 1997 as chief researcher. In this capacity he wrote more than 800 expert legal opinions on private international law and foreign law, and provided expert evidence on foreign law in various division of the High Court of South Africa. In 1998 he was promoted to associate professor and in 2003 to professor of law and research director. From 2008, he was professor of law in the Department of Public, Constitutional and International Law and the Centre for Foreign and Comparative Law at UNISA. Christian was admitted as a sworn translator for German/English and English/German for the High Court of South Africa in 1995.

At UNISA, Christian was involved with teaching LLB and LLM modules in comparative law, the conflict of laws, international commercial law, international economic law and development law. He acted as supervisor for various LLM and LLD studies. Christian acted as external assessor for the University of Namibia and the University of Stellenbosch. He also lectured in and acted as external examiner for various modules in the LLM programme in International Commercial Law at the University of Johannesburg (including the assessment of many dissertations).

Christian's academic research was focused on private international law, in particular the law of international civil procedure; he also wrote substantially on free trade zones and off-shore transactions. From 2006 to 2015, he acted as rapporteur for the section on the conflict of laws in the *Annual Survey of South African Law*. He wrote three books and many articles, most of which (hopefully all) are listed in the bibliography below. The list is included in this volume to ensure that these publications are not forgotten by the academic community. Two of his books won the Hiddingh-Currie award for academic excellence. In 2006, Christian was awarded the chancellor's prize for research at UNISA.

In 2011, Christian was appointed as one of the editors of the *Annual Survey of South African Law* and, in 2012, as one of the editors of the *Comparative and International Law Journal of Southern Africa*. For many years, he has been a member and the chair of the management committee of the UNISA legal aid clinic. Christian was an active police reservist in the South African Police Service with the rank of constable and stationed in Norwood.

Christian attended, and contributed to, almost all conferences and seminars arranged by the Research Centre for Private International Law in Emerging Countries at the University of Johannesburg. He was always more than willing to participate in reviews, functions, interviews, lunches and reports, and played an important role in the establishment of a distinguished professorate in international commercial law at UJ.

Christian married Ms Thulisile Precious Vilakazi on 29 January 2019 and adopted Melokuhle Vilakazi, who was eight years old at the time. Christian was diagnosed with cancer in 2017. He passed away on 19 February 2019. A memorial service was held on 25 February 2019 in the Z K Matthews Hall at UNISA, and a funeral service on 26 February 2019 at the St Luke Anglican Church in Orchards. Christian's mother, Maria Gertrude Bahlsen, whom he often visited in Germany, died on 23 August 2019, aged 85.

Christian Schulze was an excellent author on private international law and a great friend. The conflicts community in South Africa and beyond will never be the same again.

Publications by Prof Christian (HCAW) Schulze[5]

Books

Schulze, HCAW *International Tax-free Trade Zones & Free Ports* (Butterworths) (1997).

Schulze, HCAW *On Jurisdiction and the Recognition and Enforcement of Foreign Money Judgments* (UNISA Press) (2005) (Hiddingh-Currie Award for Academic Excellence in 2006).

Church, Joan; Schulze, HCAW; and Strydom, Hennie *Human Rights from a Comparative and International Perspective* (UNISA Press) (2007) (Hiddingh-Currie Award for Academic Excellence in 2008).

Chapters in Books

Schulze, HCAW "Conflict of Laws" in J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta) (2015) 631-668.

5 Compiled by Dr Solomon Okorley and Ms Alysha Wolfaardt.

Articles

Schulze, HCAW "Notes on Judicial Review of Administrative Action in the Federal Republic of Germany" 1992 *SA Publiekreg/Public Law* 290.

Schulze, HCAW "Legal Aspects of Offshore Transactions" 1994 *Comparative and International Law Journal of Southern Africa* 27.

Schulze, HCAW "Private International Law and Jurisdictional Problems Relating to Offshore Joint Venture Agreements" 1995 *Comparative and International Law Journal of Southern Africa* 383.

Schulze, HCAW "*Partnerschaftgesellschaft*: The New German Form of Company and Business Association" 1996 *Comparative and International Law Journal of Southern Africa* 141.

Schulze, HCAW "The Examination of Witnesses Abroad: A Comparative Study of the German and English Law of Criminal Procedure" 1996 *South African Journal of Criminal Justice* 34.

Schulze, HCAW "The Legal Implications of the Establishment of Free Trade Zones in South Africa" 1998 *Comparative and International Law Journal of Southern Africa* 1.

Schulze, HCAW "The Free-trade-zone Programs of Namibia and Mauritius and the Latest Developments in Europe: Lessons for South Africa" 1999 *Comparative and International Law Journal of Southern Africa* 169.

Schulze, HCAW "Conflicting Laws of Conflict in Cases of International Succession" 2001 *Comparative and International Law Journal of Southern Africa* 34.

Schulze, HCAW "*Forum non conveniens* in Comparative Private International Law" 2001 *South African Law Journal* 812.

Schulze, HCAW "Free Trade Zones at the Beginning of the 21st Century" 2002 *Comparative and International Law Journal of Southern Africa* 198.

Schulze, HCAW "Free Trade Zones and the Facilitation and Globalisation of Trade" 2004 *South African Yearbook of International Law* 193.

Schulze, HCAW "Immigration to South Africa: Not a Cheap Affair" 2004 *Codicillus* 28.

Schulze, HCAW "Practical Problems Regarding the Enforcement of Foreign Money Judgments" 2005 *South African Mercantile Law Journal* 125.

Schulze, HCAW "International Commercial Arbitration: An Overview" 2005 *Codicillus* 45.

Schulze, HCAW "Conflict of Laws" 2006 *Annual Survey of South African Law* 836.

Schulze, HCAW "Electronic Commerce and Civil Jurisdiction, With Special Reference to Consumer Contracts" 2006 *South African Mercantile Law Journal* 31.

Schulze, HCAW "Formalistic and Discretionary Approaches to Characterization in Private International Law" 2006 *South African Law Journal* 161.

Schulze, HCAW "Conflict of Laws" 2007 *Annual Survey of South African Law* 205.

Schulze, HCAW "Should a Peregrine Plaintiff Furnish Security for Costs for the Counterclaim of an *Incola* Defendant?" 2007 *South African Mercantile Law Journal* 393.

Schulze, HCAW "The 2005 Hague Convention on Choice of Court Agreements" 2007 *South African Mercantile Law Journal* 140.

Schulze, HCAW "Conflict of Laws" 2008 *Annual Survey of South African Law* 167.

Schulze, HCAW "International Jurisdiction in Claims Sounding in Money: Is *Richman v Ben-Tovim* the Last Word?" 2008 *South African Mercantile Law Journal* 61.

Schulze, HCAW "Conflict of Laws" 2009 *Annual Survey of South African Law* 134.

Schulze, HCAW "Conflict of Laws" 2010 *Annual Survey of South African Law* 179.

Schulze, HCAW "Arbitration Agreements and Jurisdiction in Terms of the Judgments Regulation" 2010 *Comparative and International Law Journal of Southern Africa* 68.

Schulze, HCAW "*Gifts – A Study in Comparative Law* by Richard Hyland" (book review) 2010 *Comparative and International Law Journal of Southern Africa* 379.

Schulze, HCAW "Conflict of Laws" 2011 *Annual Survey of South African Law* 178.

Schulze, HCAW "Conflict of Laws" 2012 *Annual Survey of South African Law* 104.

Schulze, HCAW "Conflict of Laws" 2013 *Annual Survey of South African Law* 140.

Schulze, HCAW "Conflict of Laws" 2014 *Annual Survey of South African Law* 116.

Schulze, HCAW "Conflict of Laws" 2015 *Annual Survey of South African Law* 118.

Part V

African Principles on the Law Applicable to International Commercial Contracts

African Principles on the Law Applicable to International Commercial Contracts

*Jan L Neels**

Preamble

1. This instrument sets forth general principles for determining the law applicable to international commercial contracts.
2. They may be used as a model for national, regional and supranational legislative instruments in Africa.
3. They may be used by African courts in the interpretation, supplementation and development of the rules of private international law of contract.
4. They may be used by arbitral tribunals in the interpretation, supplementation and development of the rules of private international law of contract, whenever appropriate and whether the tribunal is seated in Africa or elsewhere.

Article 1

Scope of the Principles

1. These Principles apply, in situations involving a conflict of laws, to international contractual obligations in civil and commercial matters, where each party is acting in the exercise of its trade or profession.
2. These Principles do not address the law governing the following types of contracts –
   a. consumer contracts;
   b. contracts of carriage;
   c. employment contracts;
   d. insurance contracts.
3. These Principles do not address the law governing arbitration agreements and agreements on choice of court.
4. These Principles do not address the law governing the following topics –
   a. the capacity of natural persons;

* Professor of Private International Law and Director of the Research Centre for Private International Law in Emerging Countries, Faculty of Law, University of Johannesburg. See Neels *African Principles on the Law Applicable to International Commercial Contracts* (UJ Press, 2023) 7–16. The Principles were dedicated to Prof C F Forsyth KC (University of Cambridge) and Prof E A Fredericks (University of Johannesburg) for their continuing friendship and inspiration.

b. companies or other collective bodies and trusts;
c. evidence and procedure;
d. insolvency;
e. the issue of whether an agent is able to bind a principal to a third party;
f. negotiable instruments;
g. the proprietary effects of contracts;
h. revenue, customs or administrative matters.

Article 2

Universal application

Any law specified by this instrument is applicable whether or not it is the law of a Member State of the African Union.

Article 3

Freedom of choice of law

1. A contract is governed by the law chosen by the parties.
2. The parties may choose –
   a. the law applicable to the whole contract or to one or more aspects or parts thereof; and
   b. different laws for different aspects or parts of the contract.
3. No connection is required between the law chosen and the parties or their transaction.
4. The choice may be made or modified at any time. A choice or modification made after the contract has been concluded does not prejudice its formal validity or the rights of third parties.
5. A choice of law cannot be contested solely on the ground that the contract to which it applies is not valid.

Article 4

Choice of rules of law; incorporation by reference

1. A choice of one or more of the following instruments is recognised on the same level as the choice of the law of a country:
   a. the UNIDROIT Principles of International Commercial Contracts;
   b. a treaty, as defined in the United Nations Convention on the Law of Treaties;
   c. the Uniform Customs and Practice for Documentary Credits;

d. any instrument issued under the auspices of a regional economic integration organisation or an international, supranational or regional intergovernmental organisation, including any instrument issued by the *Organisation pour l'harmonisation en Afrique du droit des affaires*.

2. If the parties choose an instrument in terms of paragraph (1)(b), (c) or (d), the UNIDROIT Principles of International Commercial Contracts may be used in its interpretation and supplementation.
3. If the parties choose the general principles of law, the *lex mercatoria*, international commercial law or the like to govern their contract, the following instruments may be applied, where relevant –
   a. the UNIDROIT Principles of International Commercial Contracts;
   b. the United Nations Convention on the International Sale of Goods, as interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts;
   c. the Uniform Customs and Practice for Documentary Credits.
4. The law applicable to the contract in terms of this instrument determines whether the parties may incorporate by reference any set of rules or standard terms not listed in paragraph (1).

Article 5

Express and tacit choice of law

1. A choice of law, or any modification of a choice of law, can be made expressly or tacitly.
2. A tacit choice of law must be manifestly clear from the provisions of the contract, the circumstances of the case, or both.
3. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law.
4. An agreement between the parties to confer jurisdiction on a court or a localised arbitral tribunal may be taken into account in the determination of a tacit choice of law.

Article 6

Applicable law in the absence of choice of law

1. To the extent that the law applicable to the contract has not been chosen by the parties, the law governing the contract is to be determined as follows:
   a. a contract for the sale of goods is governed by the law of the country of the habitual residence of the seller;

b. a contract for the provision of services is governed by the law of the country of the habitual residence of the service provider;
c. a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property is governed by the law of the country where the property is situated;
d. a franchise contract is governed by the law of the country of the habitual residence of the franchisee;
e. a distribution contract is governed by the law of the country of the habitual residence of the distributor;
f. a contract for the sale of goods by auction is governed by the law of the country where the auction takes place.

2. Where the contract is not covered by paragraph (1) or where the elements of the contract would be covered by more than one of points (a) to (f) of paragraph (1), the contract is governed by the law of the country of the habitual residence of the party required to effect the performance which is most characteristic of the contract.
3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs (1) or (2), the contract is governed by the law of that other country.
4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract is governed by the law of the country with which it is most closely connected.

Article 7

Role of international instruments

The law applicable to a contract by virtue of this instrument may be interpreted, supplemented and developed along the lines of the instruments listed in Article 4(3).

Article 8

Consent and material validity; choice of law in the battle of forms

1. The existence and material validity of a contract, or of any provision in a contract, must be determined by the law which would govern it under this instrument if the contract or provision were valid.
2. Nevertheless, the law of the habitual residence of a party determines whether that party has consented to the contract, or any provision in the contract, if, in the particular circumstances, it would be unreasonable to make that determination under the law specified in paragraph (1).

3. If the parties have used two sets of standard terms designating different laws, or if a law is designated in one of the sets of standard terms only, there is no express choice of law.

Article 9

Formal validity

1. A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.
2. Without prejudice to paragraph (1), a contract is formally valid if it complies with the requirements in this regard of at least one of the following legal systems:
   a. the law of the country of the conclusion of the contract, as determined according to (i) the law of the forum, or (ii) the law applicable to the contract by virtue of this instrument;
   b. the law applicable to the contract in terms of this instrument;
   c. the law of the country of the habitual residence of any one of the parties under the contract;
   d. the law of the country of the habitual residence of the agent of any one of the parties under the contract;
   e. the law of the country of the agreed place of any substantial performance under the contract.
3. As an exception to paragraph (2), but without prejudice to paragraph (1), the formal validity of a provision in a contract with the subject matter of a right *in rem* in immovable property, or of a tenancy of immovable property, is governed by the law of the country where the immovable is situated.

Article 10

Renvoi

The application of the law of any country specified by this instrument entails the application of the rules of law in force in that country other than its rules of private international law, unless the parties expressly provide otherwise.

Article 11

Overriding mandatory provisions

1. Overriding mandatory provisions are rules of law which are regarded as crucial by a country for safeguarding its public interests (including its political, social or economic organisation) to such an extent that they are

applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this instrument.

2. The overriding mandatory rules of the law governing the contract by virtue of this instrument are in principle applicable.
3. Effect may be given to the overriding mandatory rules of –
   a. the law of the forum;
   b. the law of the country of the agreed place of any substantial performance under the contract (including the country of commencement, continuation or completion of such performance).
4. In exceptional circumstances, the overriding mandatory rules of another country may be applied, provided that such law has a manifestly close connection to the particular situation.
5. In considering whether to give effect to any of the overriding mandatory rules mentioned in paragraph (3) or (4), regard must be had to their nature and purpose and to the consequences of their application or nonapplication.

Article 12

Public policy of the forum

The application of a provision of the law applicable in terms of this instrument may be refused only if such application would be manifestly incompatible with fundamental notions of the public policy of the forum.

Article 13

Scope of the law applicable to the contract

1. The law applicable to a contract by virtue of this instrument governs all aspects of the contract between the parties, including but not limited to –
   a. interpretation;
   b. rights and obligations arising from the contract;
   c. the various ways of extinguishing obligations, and prescription and limitation periods;
   d. the consequences of the formal or material invalidity of the contract;
   e. burden of proof and legal presumptions;
   f. pre-contractual obligations.
2.
   a. The law applicable to the contract by virtue of this instrument governs performance and the consequences of a total or partial breach of obligations, including the assessment of damages in as far as such is governed by rules of law.

b. However, a court or arbitral tribunal may refuse to award damages in terms of the law applicable by virtue of paragraph (a) to the extent that the damages would exceed compensation for actual loss (exemplary or punitive damages).

c. Nevertheless, a court or arbitral tribunal must take into account whether and to what extent exemplary or punitive damages in terms of the law applicable to the contract serve to cover costs and expenses relating to the procedure.

d. In relation to the manner of performance and the steps to be taken in the event of defective performance, the law of the country of the agreed place of performance must be taken into account.

Article 14

Set-off

Set-off is governed by the law applicable to the claim against which the right to set-off is asserted, unless otherwise agreed by the parties.

Article 15

Habitual residence

1. For the purposes of this instrument, the habitual residence of companies and other bodies, corporate or unincorporated, is in the country of their central administration.
2. The habitual residence of a natural person acting in the course of his or her business activities is in the country of his or her principal place of business.
3. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the country where the branch, agency or any other establishment is located must be treated as the country of habitual residence.
4. For the purposes of determining habitual residence, the relevant point in time is the moment of the conclusion of the contract.

Article 16

Interpretation and uniformity of application

In the interpretation of this instrument, its regional character and international relevance, and the need to promote uniformity in its application must be taken into account.

Article 17

Entry into force and application in time

This instrument was adopted by the African Union on [date] and applies to contracts concluded as from [date]. In disputes relating to contracts concluded prior to this date, the court or arbitral tribunal may take the provisions of this instrument into account.

Arabic Translation of the African Principles on the Law Applicable to International Commercial Contracts

Jan L Neels *African Principles on the Law Applicable to International Commercial Contracts* ***(UJ Press, 2023) 7-16****

Translated by Béligh Elbalti**

الديباجة

1. تحدد هذه الأداة المبادئ العامة لتعيين القانون الواجب التطبيق على العقود التجارية الدولية.
2. يجوز استخدام هذه المبادئ كنموذج لوضع أدوات تشريعية وطنية أو إقليمية أو فوق وطنية في إفريقيا.
3. يجوز للمحاكم الإفريقية استخدام هذه المبادئ في تفسير قواعد القانون الدولي الخاص للعقود وتكميليها وتطويرها.
4. يجوز لهيئات التحكيم استخدام هذه المبادئ في تفسير قواعد القانون الدولي الخاص للعقود وتكميليها وتطويرها، كلما كان ذلك مناسبا، وسواء كان مقر الهيئة في إفريقيا أو في أي مكان آخر.

المادة 1

نطاق تطبيق المبادئ

1. تنطبق هذه المبادئ، في الحالات التي تنطوي على تنازع القوانين، على الالتزامات التعاقدية الدولية في المسائل المدنية والتجارية حيثما كان كل طرف فيها يتصرف في إطار ممارسته لتجارته أو مهنته.
2. لا تتناول هذه المبادئ القانون الذي ينظم ما يلي من العقود -
   أ. عقود الاستهلاك؛
   ب. عقود النقل؛
   ج. عقود العمل؛
   د. عقود التأمين.
3. لا تتناول هذه المبادئ القانون الذي ينظم اتفاقات التحكيم واتفاقات اختيار المحكمة.
4. لا تتناول هذه المبادئ القانون المنطبق على المواضيع التالية -
   أ. أهلية الأشخاص الطبيعيين؛
   ب. الشركات وغيرها من الهيئات الجماعية والصناديق الاستئمانية [تراست]؛
   ج. وسائل الاثبات والإجراءات؛
   د. الإعسار؛
   ه. مسألة تحديد ما إذا كان الوكيل قادرًا على ربط الأصيل بطرف ثالث؛
   و. الصكوك القابلة للتداول؛
   ز. الآثار الناقلة للملكية في العقود؛
   ح. الإيرادات أو الجمارك أو الأمور الإدارية.

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* أستاذ، كلية الدراسات العليا للقانون والسياسة، جامعة أوساكا وباحث مشارك في مركز القانون الدولي الخاص في البلدان الناشئة في جامعة جوهانسبرغ. ترجمة للعربية جان ل. نيلز، المبادئ الأفريقية بشأن القانون المنطبق على العقود التجارية الدولية (مطبعة جامعة جوهانسبرغ، 2023) 7-16.

** Professor, Graduate School of Law and Politics, Osaka University and Senior Research Associate at the Center for Private International Law in Emerging Countries at the University of Johannesburg. This is a translation of Jan L Neels *African Principles on the Law Applicable to International Commercial Contracts* (UJ Press, 2023) 7-16.

المادة2
التطبيق الشمولي

يطبق القانون المعين بموجب هذه الأداة سواء كان ذلك قانون دولة عضو في الاتحاد الأفريقي أم لا.

المادة 3
حرية اختيار القانون الواجب التطبيق

1. يخضع العقد للقانون الذي يختاره الأطراف.
2. يجوز للأطراف اختيار -
   أ. القانون الواجب التطبيق على العقد بأكمله أو على جانب أو جزء منه أو أكثر؛
   ب. قوانين مختلفة لجوانب أو أجزاء مختلفة من العقد.
3. لا يشترط وجود صلة بين القانون المختار والأطراف أو معاملاتها.
4. يجوز إجراء اختيار القانون المنطبق أو تعديله في أي وقت. لا يخل الاختيار أو التعديل الذي يتم بعد إبرام العقد بصحته الشكلية أو بحقوق الغير.
5. لا يجوز التمسك بعدم صحة العقد فقط للاعتراض على اختيار القانون المنطبق عليه.

المادة 4
اختيار قواعد القانون؛ التضمين عن طريق الإحالة

1. اختيار واحد أو أكثر من الأدوات القانونية التالية يُعترف به تماما مثل اختيار قانون دولة:
   أ. مبادئ اليونيدروا للعقود التجارية الدولية؛
   ب. المعاهدات، كما هي معرّفة في اتفاقية الأمم المتحدة لقانون المعاهدات؛
   ج. الأعراف والممارسات الموحدة للاعتمادات المستندية؛
   د. أي أداة تصدر تحت رعاية منظمة إقليمية للتكامل الاقتصادي أو منظمة حكومية دولية أو فوق وطنية أو إقليمية بما في ذلك أي أداة قانونية صادرة عن المنظمة الإفريقية لمواءمة قانون الأعمال [أوهادا].
2. إذا اختارت الأطراف أداة بموجب الفقرة (1) (ب) أو (ج) أو (د)، يجوز استخدام مبادئ اليونيدروا المتعلقة بالعقود التجارية الدولية في تفسيرها وتكميلها.
3. إذا اختارت الأطراف إخضاع العقد للمبادئ العامة للقانون، أو قانون التجار (ليكس ميركاتوريا)، أو قانون التجارة الدولية أو ما شابه ذلك، يجوز تطبيق الأدوات القانونية التالية، حيثما كان ذلك مناسبًا -
   أ. مبادئ اليونيدروا للعقود التجارية الدولية؛
   ب. اتفاقية الأمم المتحدة بشأن البيع الدولي للبضائع، كما تم تفسيرها واستكمالها بمبادئ اليونيدروا للعقود التجارية الدولية؛
   ج. الأعراف والممارسات الموحدة للاعتمادات المستندية.
4. يحدد القانون المنطبق على العقد بموجب هذه الأداة ما إذا كان يجوز للأطراف تضمين أي مجموعة من القواعد أو الشروط الموحدة غير المدرجة في الفقرة (1) عن طريق الإحالة.

المادة 5
الاختيار الصريح والضمني للقانون الواجب التطبيق

1. يمكن أن يتم اختيار القانون الواجب التطبيق، أو أي تعديل في اختيار القانون الواجب التطبيق، صراحةً أو ضمناً.
2. يجب أن يكون الاختيار الضمني للقانون الواجب التطبيق واضحا بشكل يقيني من خلال أحكام العقد أو ملابسات النزاع أو كليهما.
3. اتفاق الأطراف على منح الاختصاص لمحكمة أو هيئة تحكيم للفصل في النزاعات بموجب العقد لا يكون معادلا في حد ذاته لاختيار للقانون الواجب التطبيق.

4. يجوز الأخذ بعين الاعتبار اتفاق الأطراف على منح الاختصاص لمحكمة أو هيئة تحكيم معينة عند تحديد الاختيار الضمني للقانون الواجب التطبيق.

المادة 6

القانون الواجب التطبيق في حالة عدم اختيار القانون المنطبق

1. يحدد القانون المنطبق على النحو التالي ما لم يتم اختيار القانون الواجب التطبيق على العقد من قبل الأطراف:
   أ. يخضع عقد بيع البضائع لقانون دولة الإقامة المعتادة للبائع؛
   ب. يخضع عقد تقديم الخدمات لقانون دولة الإقامة المعتادة لمقدم الخدمة؛
   ج. يخضع العقد المتعلق بحق عيني على عقار أو بايجارات عقارية لقانون الدولة الذي يقع فيه العقار؛
   د. يخضع عقد الترخيص (الفرانشايز) لقانون دولة الإقامة المعتادة للمرخص له؛
   ه. يخضع عقد التوزيع لقانون دولة الإقامة المعتادة للموزع؛
   و. يخضع عقد بيع البضائع بالمزاد لقانون الدولة الذي يقام فيه المزاد.
2. عندما يكون العقد غير مشمول بالفقرة (1) أو عندما تكون عناصر العقد مشمولة بأكثر من بند منصوص عليه من (أ) إلى (و) من الفقرة (1)، فإن العقد يخضع لقانون دولة الإقامة المعتادة للطرف المطلوب إليه تنفيذ الالتزام الأكثر تمييزا للعقد.
3. عندما يتضح من جميع ملابسات النزاع أن العقد مرتبط بشكل واضح بدولة أخرى غير تلك المشار إليها في الفقرتين (1) أو (2)، فإن العقد يخضع لقانون تلك الدولة.
4. عندما يتعذر تحديد القانون الواجب التطبيق وفقًا للفقرتين (1) أو (2)، يخضع العقد لقانون الدولة التي يكون له معها أوثق الروابط.

المادة 7

دور الأدوات القانونية الدولية

يجوز تفسير القانون المنطبق على العقد بموجب هذه الأداة واستكماله وتطويره إقتداءا بالأدوات القانونية المذكورة في المادة 4 (3).

المادة 8

التراضي والصحة الموضوعية؛ اختيار القانون المنطبق في حالة تنازع الشروط الموحدة

1. يحدد القانون المنطبق بموجب هذه الأداة وجود العقد وصحته الموضوعية، أو أي شرط في العقد، كما لو كان العقد أو الشرط نشأ صحيحًا.
2. ومع ذلك، فإن قانون مكان الإقامة المعتادة لطرف معين يحدد ما إذا كان ذلك الطرف قد وافق على العقد، أو على أي شرط في العقد، في حال ما إذا تبين، لأسباب خاصة، انه من غير المعقول تحديد ذلك بموجب القانون المعين في الفقرة (1).
3. لا يتحقق اختيار القانون المنطبق صراحةً إذا استخدم الأطراف شروطا موحدة تشير إلى قوانين مختلفة، أو إذا تم تحديد القانون [المنطبق] في إحدى تلك الشروط فقط.

المادة 9

الصحة من حيث الشكل

1. لا يخضع اختيار القانون لأي شرط يتعلق بالشكل ما لم يتفق الأطراف على خلاف ذلك.
2. مع عدم الإخلال بالفقرة (1)، يكون العقد صحيحاً من الناحية الشكلية إذا استوفى في هذا الصدد الشروط الواردة في أحد الأنظمة القانونية التالية على الأقل:

أ. قانون الدولة الذي تم فيه إبرام العقد، كما يحدده (1) قانون دولة المحكمة التي تُقام أمامها الدعوى، أو (2) القانون المنطبق على العقد بموجب هذه الأداة؛
ب. القانون المطبق على العقد حسب هذه الأداة؛
ج. قانون دولة الإقامة المعتادة لأي من الأطراف بموجب العقد؛
د. قانون دولة الإقامة المعتادة لوكيل أي من الأطراف بموجب العقد؛
ه. قانون دولة المكان المتفق عليه لتنفيذ أي التزام جوهري بموجب العقد.

3. استثناء من الفقرة (2)، ولكن دون الإخلال بأحكام الفقرة (1)، تخضع الصحة الشكلية لشرط عقدي يتعلق بموضوع حق عيني على عقار أو بإيجارات عقارية لقانون الدولة الذي يقع فيه العقار.

المادة 10

الاحالة (الرد)

يقتضي تطبيق قانون أي دولة معينة بموجب هذه الأداة تطبيق القواعد القانونية النافذة بها بخلاف تلك المتعلقة بالقانون الدولي الخاص، ما لم تنص الأطراف صراحة على خلاف ذلك.

المادة 11

الأحكام ذات التطبيق الضروري

1. الأحكام ذات التطبيق الضروري هي القواعد القانونية التي تعتبرها الدولة بالغة الأهمية لحماية مصالحها العامة (بما في ذلك تنظيمها السياسي أو الاجتماعي أو الاقتصادي) بما يجعلها قابلة للتطبيق على أي وضعية تدخل ضمن مجال تطبيقها، بغض النظر عن القانون الواجب التطبيق على العقد بموجب هذه الأداة.
2. تكون الأحكام ذات التطبيق الضروري للقانون الذي يخضع له العقد بموجب هذه الأداة منطبقة من حيث المبدأ.
3. يجوز إنفاذ مفعول الأحكام ذات التطبيق الضروري الواردة في -
أ. قانون دولة المحكمة التي تُقام أمامها الدعوى؛
ب. قانون دولة المكان المتفق عليه لتنفيذ أي التزام جوهري بموجب العقد (بما في ذلك الدولة التي بدء، استمر أو اكتمل فيها تنفيذ الالتزام).
4. في ظروف استثنائية، يجوز تطبيق الأحكام ذات التطبيق الضروري لدولة آخر، بشرط أن يكون لهذا القانون علاقة وثيقة بشكل واضح بالوضعية المعينة.
5. عند النظر في إنفاذ مفعول الأحكام ذات التطبيق الضروري المذكورة في الفقرة (3) أو (4)، يجب مراعاة طبيعتها والغرض منها والنتائج المترتبة عن تطبيقها أو عدم تطبيقها.

المادة 12

النظام العام لدولة المحكمة

لا يجوز رفض تطبيق أحكام القانون المنطبق بموجب هذه الأداة إلا إذا كان هذا التطبيق يتعارض بشكل واضح مع المفاهيم الأساسية للنظام العام في دولة المحكمة.

المادة 13

نطاق القانون الواجب التطبيق على العقد

1. ينظم القانون الواجب التطبيق على العقد بموجب هذه الأداة جميع جوانب العقد المبرم بين الأطراف، بما يشمل على سبيل المثال لا الحصر ما يلي-
أ. تفسير العقد؛
ب. الحقوق والالتزامات الناشئة عن العقد؛
ج. الأوجه المختلفة لانقضاء الالتزامات، وسقوطها بمرور الزمن وتقادمها المؤسسة على انقضاء

الآجال؛
د. الآثار المترتبة عن بطلان العقد لأسباب شكلية أو موضوعية؛
ه. عبء الإثبات والقرائن القانونية؛
و. الالتزامات الناشئة في المرحلة القبل تعاقدية.

2.
أ. يحكم القانون الواجب التطبيق على العقد بموجب هذه الأداة تنفيذه والنتائج المترتبة عن عدم التنفيذ الكلي أو الجزئي للالتزامات، بما في ذلك تقييم الأضرار بقدر ما تنظمه قواعد القانون.
ب. إلا أنه يجوز للمحكمة أو هيئة التحكيم رفض الحكم بالتعويضات المقررة بالقانون الواجب التطبيق بموجب الفقرة (أ) بالقدر الذي تتجاوز فيه التعويض الخسائر الفعلية (التعويضات ذات الطابع الرادع أو العقابي).
ج. ومع ذلك، يجب على المحكمة أو هيئة التحكيم أن تأخذ بعين الاعتبار ما إذا كانت التعويضات ذات الطابع الرادع أو العقابي المقررة بالقانون الواجب التطبيق على العقد تهدف إلى تغطية التكاليف والمصاريف المتعلقة بالإجراءات.
د. وفيما يخص طرق التنفيذ والوسائل التي يجب اتخاذها في حالة وجود عيب في التنفيذ، فإنه يجب مراعاة قانون الدولة الذي يقع فيه مكان التنفيذ المتفق عليه.

المادة 14
المقاصة

تخضع المقاصة للقانون الواجب التطبيق على الدين الذي بخصوصه وقع التمسك بالمقاصة، ما لم يتفق الطرفان على خلاف ذلك.

المادة 15
الإقامة المعتادة

1.وفقا لأغراض هذه الأداة، يكون مكان الإقامة المعتادة بالنسبة للشركات والهيئات الاعتبارية الأخرى، مسجلة كان أم غير المسجلة، في الدولة التي توجد فيها إدارتها المركزية.
2. يقع مكان الإقامة المعتاد بالنسبة للأشخاص الطبيعيين الذي يعملون في سياق أنشطتهم التجارية في الدولة التي يمارسون فيها عملهم الرئيسي.
3. إذا تم إبرام العقد في سياق عمليات فرع أو وكالة أو أي منشأة أخرى، أو إذا كان التنفيذ بموجب العقد يقع في مسؤولية هذا الفرع أو الوكالة أو المنشأة، يجب اعتبار الدولة التي يقع فيها الفرع أو الوكالة أو أي منشأة أخرى على أنها دولة الإقامة المعتادة.
4. لأغراض تحديد مكان الإقامة المعتادة، يتم الاعتداد في ذلك بوقت إبرام العقد.

المادة 16
التفسير وتوحيد التطبيق

يجب أن يراعى في تفسير نصوص هذه الأداة طابعها الإقليمي وأهميتها الدولية، وضرورة تحقيق التوحيد في تطبيقها.

المادة 17
الدخول حيز التنفيذ والتطبيق الزماني

صادق الإتحاد الافريقي على هذه الأداة في [التاريخ] وتنطبق على العقود المبرمة اعتبارًا من [التاريخ]. بالنسبة للمنازعات المتعلقة بالعقود المبرمة قبل هذا التاريخ، يجوز للمحكمة أو هيئة التحكيم أن تأخذ في الاعتبار أحكام المقررة في هذه الأداة.

Arabic Translation of the African Principles on the Law Applicable to International Commercial Contracts (with references)

Jan L Neels *African Principles on the Law Applicable to International Commercial Contracts* ***(UJ Press, 2023) 17-29****

Translated by Béligh Elbalti**

*تحتوي هذه النسخة على إشارات إلى الأحكام المقابلة في الأدوات الدولية وفوق الوطنية والإقليمية*****.

الديباجة

1. تحدد هذه الأداة المبادئ العامة لتعيين القانون الواجب التطبيق على العقود التجارية الدولية.[1]
2. يجوز استخدام هذه المبادئ كنموذج لوضع أدوات تشريعية وطنية أو إقليمية أو فوق وطنية في إفريقيا.[2]
3. يجوز للمحاكم الإفريقية استخدام هذه المبادئ في تفسير قواعد القانون الدولي الخاص للعقود وتكميليها وتطويرها.[3]
4. يجوز لهيئات التحكيم استخدام هذه المبادئ في تفسير قواعد القانون الدولي الخاص للعقود وتكميليها وتطويرها، كلما كان ذلك مناسبا، وسواء كان مقر الهيئة في إفريقيا أو في أي مكان آخر.[4]

المادة 1

نطاق تطبيق المبادئ

1. تنطبق هذه المبادئ، في الحالات التي تنطوي على تنازع القوانين، على الالتزامات التعاقدية الدولية في المسائل المدنية والتجارية حيثما كان كل طرف فيها يتصرف في إطار ممارسته لتجارته أو مهنته.[5]
2. لا تتناول هذه المبادئ القانون الذي ينظم ما يلي من العقود -
   أ. عقود الاستهلاك؛[6]
   ب. عقود النقل؛[7]

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*** لاختصارات

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"قانون الأونسيترال": "قانون الأونسيترال النموذجي للتحكيم التجاري الدولي (2006/1985)".
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"اتفاقية الأمم المتحدة": "اتفاقية الأمم المتحدة بشأن البيع الدولي للبضائع (1980)".

[1] راجع مبادئ لاهاي، الديباجة، الفقرة 1؛ مبادئ اليونيدروا ، الديباجة، الفقرة 1
[2] راجع مبادئ لاهاي، الديباجة، الفقرة 2.
[3] راجع مبادئ لاهاي، الديباجة، الفقرتان 3 و4؛ مبادئ اليونيدروا، الديباجة، الفقرة 5 و6.
[4] راجع مبادئ لاهاي، الديباجة، الفقرتان 3 و4.
[5] راجع مبادئ لاهاي، المادة 1 (1)؛ قانون لائحة روما الأول، المادة 1 (1).
[6] راجع مبادئ لاهاي، المادة 1 (1). انظر التراتيب الخاصة في المادة 6 من قانون لائحة روما الأول.
[7] انظر التراتيب الخاصة في المادة 5 من قانون لائحة روما الأول.

ج. عقود العمل؛[8]
د. عقود التأمين.[9]
3. لا تتناول هذه المبادئ القانون الذي ينظم اتفاقات التحكيم واتفاقات اختيار المحكمة.[10]
4. لا تتناول هذه المبادئ القانون المنطبق على المواضيع التالية -
أ. أهلية الأشخاص الطبيعيين؛[11]
ب. الشركات وغيرها من الهيئات الجماعية والصناديق الاستئمانية [تراست]؛[12]
ج. وسائل الاثبات والإجراءات؛[13]
د. الإعسار؛[14]
ه. مسألة تحديد ما إذا كان الوكيل قادرًا على ربط الأصيل بطرف ثالث؛[15]
و. الصكوك القابلة للتداول؛[16]
ز. الآثار الناقلة للملكية في العقود؛[17]
ح. الإيرادات أو الجمارك أو الأمور الإدارية.[18]

المادة 2
التطبيق الشمولي

يطبق القانون المعين بموجب هذه الأداة سواء كان ذلك قانون دولة عضو في الاتحاد الأفريقي أم لا.[19]

المادة 3
حرية اختيار القانون الواجب التطبيق

1. يخضع العقد للقانون الذي يختاره الأطراف.[20]
2. يجوز للأطراف اختيار -
أ. القانون الواجب التطبيق على العقد بأكمله أو على جانب[21] أو جزء[22] منه أو أكثر؛
ب. قوانين مختلفة لجوانب[23] أو أجزاء مختلفة من العقد.[24]
3. لا يشترط وجود صلة بين القانون المختار والأطراف أو معاملاتها.[25]
4. يجوز إجراء اختيار القانون المنطبق أو تعديله في أي وقت. لا يخل الاختيار أو التعديل الذي يتم بعد إبرام العقد

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[8] انظر التراتيب الخاصة في المادة 8 من قانون لائحة روما الأول.
[9] انظر التراتيب الخاصة في المادة 7 من قانون لائحة روما الأول.
[10] راجع مبادئ لاهاي، المادة 1 (3) (ب)؛ قانون لائحة روما الأول، المادة 1 (2) (هـ).
[11] راجع مبادئ لاهاي، المادة 1 (3) (أ)؛ قانون لائحة روما الأول، المادة 1 (2) (أ). انظر المادة 13 من قانون لائحة روما الأول بشأن قاعدة التضارب الجزئي الخاصة بالأهلية التعاقدية للشخص الطبيعي. انظر بخصوص مقترح بديل في هذا الصدد،
Eesa A Fredericks, *Contractual Capacity in Private International Law* (Meijers Research Institute, Leiden 2016) 248-249.
[12] راجع مبادئ لاهاي، المادة 1 (3) (ج)؛ قانون لائحة روما الأول، المادة 1 (2) (و).
[13] راجع قانون لائحة روما، المادة 1(3)
[14] راجع مبادئ لاهاي، المادة 1 (3) (د)؛ قانون لائحة روما الأول، المادة 1 (2) (و).
[15] راجع مبادئ لاهاي، المادة 1 (3) (و)؛ قانون لائحة روما الأول، المادة 1 (2) (ز).
[16] راجع قانون لائحة روما الأول، المادة 1 (2) (د).
[17] راجع مبادئ لاهاي، المادة 1 (3) (هـ).
[18] راجع قانون لائحة روما الأول، المادة 1 (1).
[19] راجع قانون لائحة روما الأول، المادة 2.
[20] مبادئ لاهاي، المادة 2 (1)؛ راجع قانون لائحة روما الأول، المادة 3 (1)؛ قانون الأونسيترال, المادة 28(1).
[21] التعليق رسمي على مبادئ لاهاي، المثال التوضيحي 2.2.
[22] راجع مبادئ لاهاي، المادة 2 (2) (أ)؛ قانون لائحة روما الأول، المادة 3 (1).
[23] التعليق رسمي على مبادئ لاهاي، المثال التوضيحي 2.3.
[24] راجع مبادئ لاهاي، المادة 2 (2) (ب).
[25] مبادئ لاهاي، المادة 2 (4).

بصحته الشكلية أو بحقوق الغير.[26]

5. لا يجوز التمسك بعدم صحة العقد فقط للاعتراض على اختيار القانون المنطبق عليه.[27]

المادة 4

اختيار قواعد القانون؛ التضمين عن طريق الإحالة

1. اختيار واحد أو أكثر من الأدوات القانونية التالية يُعترف به تماما مثل اختيار قانون دولة:
   أ. مبادئ اليونيدروا للعقود التجارية الدولية؛
   ب. المعاهدات، كما هي معرّفة في اتفاقية الأمم المتحدة لقانون المعاهدات؛[28]
   ج. الأعراف والممارسات الموحدة للاعتمادات المستندية؛
   د. أي أداة تصدر تحت رعاية منظمة إقليمية للتكامل الاقتصادي أو منظمة حكومية دولية أو فوق وطنية أو إقليمية[29] بما في ذلك أي أداة قانونية صادرة عن المنظمة الإفريقية لمواءمة قانون الأعمال [أوهادا].
2. إذا اختارت الأطراف أداة بموجب الفقرة (1) (ب) أو (ج) أو (د)، يجوز استخدام مبادئ اليونيدروا المتعلقة بالعقود التجارية الدولية في تفسيرها وتكميلها.[30]
3. إذا اختارت الأطراف إخضاع العقد للمبادئ العامة للقانون، أو قانون التجار (ليكس ميركاتوريا)، أو قانون التجارة الدولية أو ما شابه ذلك، يجوز تطبيق الأدوات القانونية التالية، حيثما كان ذلك مناسبًا -
   أ. مبادئ اليونيدروا للعقود التجارية الدولية؛[31]
   ب. اتفاقية الأمم المتحدة بشأن البيع الدولي للبضائع، كما تم تفسيرها واستكمالها بمبادئ اليونيدروا للعقود التجارية الدولية؛[32]
   ج. الأعراف والممارسات الموحدة للاعتمادات المستندية.[33]
4. يحدد القانون المنطبق على العقد بموجب هذه الأداة ما إذا كان يجوز للأطراف تضمين أي مجموعة من القواعد أو الشروط الموحدة غير المدرجة في الفقرة (1) عن طريق الإحالة.[34]

المادة 5

الاختيار الصريح والضمني للقانون الواجب التطبيق

1. يمكن أن يتم اختيار القانون الواجب التطبيق، أو أي تعديل في اختيار القانون الواجب التطبيق، صراحةً أو ضمناً.[35]
2. يجب أن يكون الاختيار الضمني للقانون الواجب التطبيق واضحا بشكل يقيني من خلال أحكام العقد أو ملابسات النزاع أو كليهما.[36]

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[26] راجع مبادئ لاهاي، المادة 2 (3)؛ قانون لائحة روما الأول، المادة 3 (2).

[27] مبادئ لاهاي، المادة 7.

[28] انظر مشروع جمهورية الكونغو الديمقراطية، المادة 2 مكرر (1) (ب). تنص النسخة الأصلية للمؤلف على ما يلي: "اتفاقية دولية أو إقليمية، عندما لا تكون قابلة للتطبيق بطريقة أخرى".

[29] راجع مبادئ لاهاي، المادة 3؛ قانون الأونسيترال, المادة 28(1). تم اعتماد نسخة معدلة من المادة 4 (1) في مشروع جمهورية الكونغو الديمقراطية في المادة 2 مكرر (1).

[30] راجع مبادئ اليونيدروا، الديباجة، الفقرة 5. انظر Jan L Neels and Eesa A Fredericks "An introduction to the African Principles of Commercial Private International Law" 2018 Stellenbosch Law Review 350.

[31] راجع مبادئ اليونيدروا، الديباجة، الفقرة 3. انظر Neels and Fredericks (n 30, 2018) 350.

[32] راجع مبادئ اليونيدروا، الديباجة، الفقرة 5. انظر Neels and Fredericks (n 30, 2018) 350.

[33] تم اعتماد المادة 4 (3) في مشروع جمهورية الكونغو الديمقراطية في المادة 2 مكرر (2).

[34] راجع قانون لائحة روما الأول، الحيثية 13.

[35] راجع مبادئ لاهاي، المادة 4.

[36] راجع مبادئ لاهاي، المادة 4. انظر
Jan L Neels and Eesa A Fredericks "Tacit choice of law in the Hague Principles on Choice of Law in International Contracts" 2011 *De Jure* 101, 106.

3. اتفاق الأطراف على منح الاختصاص لمحكمة أو هيئة تحكيم للفصل في النزاعات بموجب العقد لا يكون معادلا في حد ذاته لاختيار للقانون الواجب التطبيق.[37]
4. يجوز الأخذ بعين الاعتبار اتفاق الأطراف على منح الاختصاص لمحكمة أو هيئة تحكيم معينة عند تحديد الاختيار الضمني للقانون الواجب التطبيق.[38]

المادة 6

القانون الواجب التطبيق في حالة عدم اختيار القانون المنطبق

1. يحدد القانون المنطبق على النحو التالي ما لم يتم اختيار القانون الواجب التطبيق على العقد من قبل الأطراف:
   أ. يخضع عقد بيع البضائع لقانون دولة الإقامة المعتادة للبائع؛
   ب. يخضع عقد تقديم الخدمات لقانون دولة الإقامة المعتادة لمقدم الخدمة؛
   ج. يخضع العقد المتعلق بحق عيني على عقار أو بايجارات عقارية لقانون الدولة الذي يقع فيه العقار؛
   د. يخضع عقد الترخيص (الفرانشايز) لقانون دولة الإقامة المعتادة للمرخص له؛
   ه. يخضع عقد التوزيع لقانون دولة الإقامة المعتادة للموزع؛
   و. يخضع عقد بيع البضائع بالمزاد لقانون الدولة الذي يقام فيه المزاد.[39]
2. عندما يكون العقد غير مشمول بالفقرة (1) أو عندما تكون عناصر العقد مشمولة بأكثر من بند منصوص عليه من (أ) إلى (و) من الفقرة (1)، فإن العقد يخضع لقانون دولة الإقامة المعتادة للطرف المطلوب إليه تنفيذ الالتزام الأكثر تمييزا للعقد.
3. عندما يتضح من جميع ملابسات النزاع أن العقد مرتبط بشكل واضح بدولة أخرى غير تلك المشار إليها في الفقرتين (1) أو (2)، فإن العقد يخضع لقانون تلك الدولة.
4. عندما يتعذر تحديد القانون الواجب التطبيق وفقًا للفقرتين (1) أو (2)، يخضع العقد لقانون الدولة التي يكون له معها أوثق الروابط.[40]

المادة 7

دور الأدوات القانونية الدولية

يجوز تفسير القانون المنطبق على العقد بموجب هذه الأداة واستكماله وتطويره إقتداءا بالأدوات القانونية المذكورة في المادة 4 (3).[41]

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[37] راجع مبادئ لاهاي، المادة 4 ؛
GEDIP "Third consolidated version of a proposal to amend Articles 1, 3, 4, 5, 6, 7, 9, 10bis, 12 and 13 of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, and Article 15 of Regulation 44/2001 EC (Brussels I)" (Vienna, 2003) in Marc Fallon, Patrick Kinsch and Christian Kohler (eds), *Le droit international privé européen en construction. Vingt ans de travaux du GEDIP. Building European Private International Law. Twenty Years' Work by GEDIP* (Intersentia, Cambridge 2011) 425-426.

[38] راجع قانون لائحة روما الأول، الحيثية 12؛ التعليق رسمي على مبادئ لاهاي، الفقرات 4.12-4.11 .

[39] راجع قانون لائحة روما الأول، المادة 4 (1)(ز)؛ مشروع جمهورية الكونغو الديمقراطية، المادة 3 (1)(و). بعض الحلول البديلة التي يمكن أخذها بعين الإعتبارها تشمل القوانين الموضوعية، (Neels and Fredericks (n 30, 2018) 352-354) والتطبيق بشكل اصلي (default application) لقانون بلد تنفيذ الإلتزام المميز على النحو المحدد في العقد (Neels and Fredericks (n 30, 2018) 354-355) .

[40] قانون لائحة روما الأول، المادة 4 ، مع بعض التغييرات الموضوعية واللغوية.

[41] راجع مبادئ اليونيدروا ، الديباجة، الفقرة 6؛ اتفاقية مكسيكو سيتي، المادة 10-9. انظر Neels and Fredericks (n 30, 2018) 350 .

المادة8

التراضي والصحة الموضوعية؛ اختيار القانون المنطبق في حالة تنازع الشروط الموحدة

1. يحدد القانون المنطبق بموجب هذه الأداة وجود العقد وصحته الموضوعية، أو أي شرط في العقد، كما لو كان العقد أو الشرط نشأ صحيحًا.[42]

2. ومع ذلك، فإن قانون مكان الإقامة المعتادة لطرف معين يحدد ما إذا كان ذلك الطرف قد وافق على العقد، أو على أي شرط في العقد، في حال ما إذا تبين، لأسباب خاصة، انه من غير المعقول تحديد ذلك بموجب القانون المعين في الفقرة (1).[43]

3. لا يتحقق اختيار القانون المنطبق صراحةً[44] إذا استخدم الأطراف شروطا موحدة تشير إلى قوانين مختلفة، أو إذا تم تحديد القانون [المنطبق] في إحدى تلك الشروط فقط.[45]

المادة 9

الصحة من حيث الشكل

1. لا يخضع اختيار القانون لأي شرط يتعلق بالشكل ما لم يتفق الأطراف على خلاف ذلك.[46]

2. مع عدم الإخلال بالفقرة (1)، يكون العقد صحيحاً من الناحية الشكلية إذا استوفى في هذا الصدد الشروط الواردة في أحد الأنظمة القانونية التالية على الأقل:

أ. قانون الدولة الذي تم فيه إبرام العقد، كما يحدده (1) قانون دولة المحكمة التي تُقام أمامها الدعوى، أو (2) القانون المنطبق على العقد بموجب هذه الأداة؛[47]

ب. القانون المطبق على العقد حسب هذه الأداة؛

ج. قانون دولة الإقامة المعتادة لأي من الأطراف بموجب العقد؛

د. قانون دولة الإقامة المعتادة لوكيل أي من الأطراف بموجب العقد؛[48]

ه. قانون دولة المكان المتفق عليه لتنفيذ أي التزام جوهري بموجب العقد.[49]

3. استثناء من الفقرة (2)، ولكن دون الإخلال بأحكام الفقرة (1)، تخضع الصحة الشكلية لشرط عقدي يتعلق بموضوع حق عيني على عقار أو بإيجارات عقارية لقانون الدولة الذي يقع فيه العقار.[50]

المادة 10

الاحالة (الرد)

يقتضي تطبيق قانون أي دولة معينة بموجب هذه الأداة تطبيق القواعد القانونية النافذة بها بخلاف تلك المتعلقة بالقانون الدولي الخاص، ما لم تنص الأطراف صراحة على خلاف ذلك.[51]

المادة 11

الأحكام ذات التطبيق الضروري

1. الأحكام ذات التطبيق الضروري هي القواعد القانونية التي تعتبرها الدولة بالغة الأهمية لحماية مصالحها العامة (بما في ذلك تنظيمها السياسي أو الاجتماعي أو الاقتصادي) بما يجعلها قابلة للتطبيق على أي وضعية تدخل ضمن مجال تطبيقها، بغض النظر عن القانون الواجب التطبيق على العقد بموجب هذه الأداة.

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[42] راجع قانون لائحة روما الأول، المادة 10 (1)؛ مبادئ لاهاي، المادة 6 (1) (أ).

[43] راجع مبادئ لاهاي، المادة 6(2)؛ قانون لائحة روما الأول، المادة 10(2) .

[44] راجع مبادئ لاهاي، المادة 6(1)(ب). انظر Neels and Fredericks (n 30, 2018) 352 والمراجع المشار إليها هناك.

[45] المادة 6(1)(ب) من مبادئ لاهاي لا تنص (صراحة) على هذه الإحتمالية.

[46] مبادئ لاهاي، المادة 5 .

[47] راجع مبادئ لاهاي، المادة 9)(1)(هـ) والمادة 9(2) .

[48] راجع قانون لائحة روما الأول، المادة 11 .

[49] راجع اتفاقية مكسيكو سيتي، المادة 13 .

[50] راجع قانون لائحة روما الأول، المادة 11(5) .

[51] راجع مبادئ لاهاي، المادة 8؛ قانون لائحة روما الأول، المادة 20؛ قانون الأونسيترال, المادة 28(1) .

2. تكون الأحكام ذات التطبيق الضروري للقانون الذي يخضع له العقد بموجب هذه الأداة منطبقة من حيث المبدأ.
3. يجوز إنفاذ مفعول الأحكام ذات التطبيق الضروري الواردة في -
أ. قانون دولة المحكمة التي تُقام أمامها الدعوى؛
ب. قانون دولة المكان المتفق عليه لتنفيذ أي التزام جوهري بموجب العقد (بما في ذلك الدولة التي بدء، استمر أو اكتمل فيها تنفيذ الالتزام).
4. في ظروف استثنائية، يجوز تطبيق الأحكام ذات التطبيق الضروري لدولة آخر، بشرط أن يكون لهذا القانون علاقة وثيقة بشكل واضح بالوضعية المعينة.
5. عند النظر في إنفاذ مفعول الأحكام ذات التطبيق الضروري المذكورة في الفقرة (3) أو (4)، يجب مراعاة طبيعتها والغرض منها والنتائج المترتبة عن تطبيقها أو عدم تطبيقها.[52]

المادة 12
النظام العام لدولة المحكمة

لا يجوز رفض تطبيق أحكام القانون المنطبق بموجب هذه الأداة إلا إذا كان هذا التطبيق يتعارض بشكل واضح مع المفاهيم الأساسية للنظام العام في دولة المحكمة.[53]

المادة 13
نطاق القانون الواجب التطبيق على العقد

1. ينظم القانون الواجب التطبيق على العقد بموجب هذه الأداة جميع جوانب العقد المبرم بين الأطراف، بما يشمل على سبيل المثال لا الحصر ما يلي-
أ. تفسير العقد؛[54]
ب. الحقوق والالتزامات الناشئة عن العقد؛[55]
ج. الأوجه المختلفة لانقضاء الالتزامات، وسقوطها بمرور الزمن وتقادمها المؤسسة على انقضاء الآجال؛[56]
د. الآثار المترتبة عن بطلان العقد لأسباب شكلية أو موضوعية؛[57]
ه. عبء الإثبات والقرائن القانونية؛[58]
و. الالتزامات الناشئة في المرحلة القبل تعاقدية.[59]
.2
أ. يحكم القانون الواجب التطبيق على العقد بموجب هذه الأداة تنفيذه[60] والنتائج المترتبة عن عدم

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[52] راجع اتفاقية روما، المادة 7؛ قانون لائحة روما الأول، المادة 9؛ مبادئ لاهاي، المادة 11(1) و(2) و(5). ربما ينبغي أن تقتصر الإشارة إلى الفقرتين 3 و4 في المادة 11(5) على الفقرتين 3(ب) و4. انظر
Jan L Neels and Eesa A Fredericks "Covid-19 regulations as overriding mandatory provisions in private international law – a comparison of regional, supranational and international instruments with the proposed African Principles on the Law Applicable to International Commercial Contracts" in Murdoch Watney (ed) *The Impact of COVID-19 on the Future of Law and Related Disciplines* (UJ Press, 2022) 1 at 14 n 78.
[53] راجع قانون لائحة روما الأول، المادة 21؛ مبادئ لاهاي، المادة 11(3)-(5).
[54] مبادئ لاهاي، المادة 9 (1) (أ)؛ قانون لائحة روما الأول، المادة 12 (1) (أ).
[55] مبادئ لاهاي، المادة 9 (1) (ب).
[56] راجع مبادئ لاهاي، المادة 9 (1) (د)؛ قانون لائحة روما الأول، المادة 12 (1) (د).
[57] راجع مبادئ لاهاي، المادة 9 (1) (هـ)؛ قانون لائحة روما الأول، المادة 12 (1) (هـ).
[58] راجع مبادئ لاهاي، المادة 9 (1) (و)؛ قانون لائحة روما الأول، المادة 18 (1).
[59] مبادئ لاهاي، المادة 9 (1) (ز).
[60] مبادئ لاهاي، المادة 9 (1) (ج)؛ قانون لائحة روما الأول، المادة 12 (1) (ب).

التنفيذ الكلي أو الجزئي للالتزامات، بما في ذلك تقييم الأضرار[61] بقدر ما تنظمه قواعد القانون.[62]

ب. إلا أنه يجوز للمحكمة أو هيئة التحكيم رفض الحكم بالتعويضات المقررة بالقانون الواجب التطبيق بموجب الفقرة (أ) بالقدر الذي تتجاوز فيه التعويض الخسائر الفعلية (التعويضات ذات الطابع الرادع أو العقابي).[63]

ج. ومع ذلك، يجب على المحكمة أو هيئة التحكيم أن تأخذ بعين الاعتبار ما إذا كانت التعويضات ذات الطابع الرادع أو العقابي المقررة بالقانون الواجب التطبيق على العقد تهدف إلى تغطية التكاليف والمصاريف المتعلقة بالإجراءات.[64]

د. وفيما يخص طرق التنفيذ والوسائل التي يجب اتخاذها في حالة وجود عيب في التنفيذ، فإنه يجب مراعاة قانون الدولة الذي يقع فيه مكان التنفيذ المتفق عليه.[65]

المادة 14

المقاصة

تخضع المقاصة للقانون الواجب التطبيق على الدين الذي بخصوصه وقع التمسك بالمقاصة، ما لم يتفق الطرفان على خلاف ذلك.[66]

المادة 15

الإقامة المعتادة

1.وفقا لأغراض هذه الأداة، يكون مكان الإقامة المعتادة بالنسبة للشركات والهيئات الاعتبارية الأخرى، مسجلة كان أم غير المسجلة، في الدولة التي توجد فيها إدارتها المركزية.[67]

2. يقع مكان الإقامة المعتاد بالنسبة للأشخاص الطبيعيين الذي يعملون في سياق أنشطتهم التجارية في الدولة التي يمارسون فيها عملهم الرئيسي.[68]

3. إذا تم إبرام العقد في سياق عمليات فرع أو وكالة أو أي منشأة أخرى، أو إذا كان التنفيذ بموجب العقد يقع في مسؤولية هذا الفرع أو الوكالة أو المنشأة، يجب اعتبار الدولة التي يقع فيها الفرع أو الوكالة أو أي منشأة أخرى على أنها دولة الإقامة المعتادة.[69]

4. لأغراض تحديد مكان الإقامة المعتادة، يتم الاعتداد في ذلك بوقت إبرام العقد.[70]

المادة 16

التفسير وتوحيد التطبيق

يجب أن يراعى في تفسير نصوص هذه الأداة طابعها الإقليمي وأهميتها الدولية، وضرورة تحقيق التوحيد في تطبيقها.[71]

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[61] راجع مبادئ لاهاي المادة 9 (1) (ج)؛ قانون لائحة روما الأول، المادة 12 (1) (ج).

[62] راجع قانون لائحة روما الأول، المادة 12(1)(ج) .

[63] انظر قانون لائحة روما الثاني، الحيثية 32؛ راجع اتفاقية لاهاي بشأن اتفاقيات اختيار المحكمة، المادة 11(1)؛ اتفاقية لاهاي بشأن الاعتراف بالأحكام الأجنبية وتنفيذها في المسائل المدنية أو التجارية، المادة 10(1).

[64] راجع اتفاقية لاهاي بشأن اتفاقيات اختيار المحكمة، المادة 11(2) ؛ اتفاقية لاهاي بشأن الاعتراف بالأحكام الأجنبية وتنفيذها في المسائل المدنية أو التجارية، المادة 10(2).

[65] قانون لائحة روما الأول، المادة 12(2).

[66] راجع قانون لائحة روما الأول، المادة 17 .

[67] راجع قانون لائحة روما الأول، المادة 19(1).

[68] راجع لائحة روما الأولى، المادة 19(1) ؛ Fredericks (n 11) 248.

[69] راجع قانون لائحة روما الأول، المادة 19(2)؛ مبادئ لاهاي، المادة 12.

[70] راجع قانون لائحة روما الأول، المادة 19(3).

[71] راجع اتفاقية الأمم المتحدة، المادة 7 (1)؛ اتفاقية مكسيكو سيتي، المادة 4؛ اتفاقية لاهاي بشأن اتفاقات اختيار المحكمة، المادة 23؛ اتفاقية لاهاي بشأن الاعتراف بالأحكام الأجنبية وتنفيذها في المسائل المدنية أو التجارية، المادة 20.

المادة 17

الدخول حيز التنفيذ والتطبيق الزماني

صادق الإتحاد الافريقي على هذه الأداة في [التاريخ] وتنطبق على العقود المبرمة اعتبارًا من [التاريخ]. بالنسبة للمنازعات المتعلقة بالعقود المبرمة قبل هذا التاريخ، يجوز للمحكمة أو هيئة التحكيم أن تأخذ في الاعتبار أحكام المقررة في هذه الأداة.[72]

[72] بخصوص الجملة الثانية، انظر مشروع جمهورية الكونغو الديمقراطية، المادة 24 (الجملة الثانية).

Part VI

List of Publications by Prof C F Forsyth

Compiled by Jan L Neels and Solomon Okorley***

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Photo Section



Christopher on the boat from Southampton to Cape Town, early 1950s.



Christopher Forsyth and Johann Schiller, Table Mountain,
Cape Town, 1970s.



Christopher Forsyth and Gillian Charles, 1982.



Christopher Forsyth as Proctor, Robinson College, 1990.



Christopher Forsyth in the late 1990s.



Prof Forsyth with the Solicitor General of Malawi, Mr Steve Matenje, 1998.



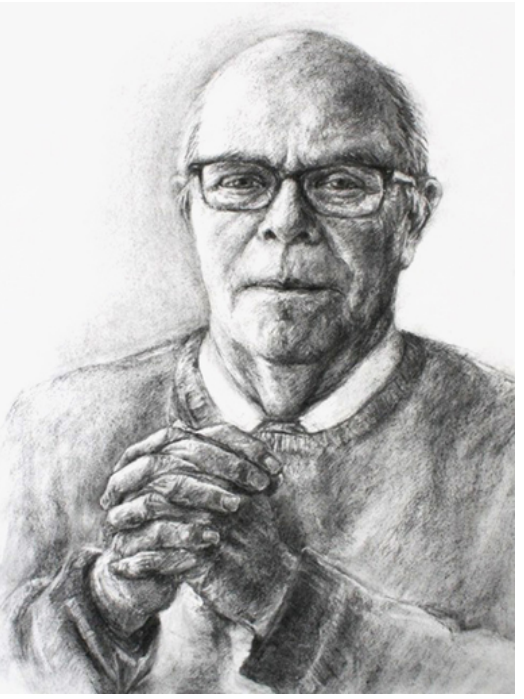
Prof Michael Martinek, Prof Ellison Kahn and Prof Christopher Forsyth, Private International Law conference, Rand Afrikaans University, 28–30 March 2001 (picture found in the RCPILEC archives by Ms Zahra A Fredericks).



Speakers at the Commercial Private International Law conference, 13 September 2005, UNISA (Sunnyside campus).



Prof Forsyth at Xiangtan University, China, 28 October 2005.



Portrait of Prof Forsyth at Robinson College (artist: Ms Diane Firth).



Prof Forsyth at the doctoral graduation of Prof Eesa Fredericks, University of Leiden, 30 June 2016.



Prof Forsyth at the Commercial Private International Law conference, University of Johannesburg, 21 November 2018.

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UJ Press

Commercial Private International Law in Southern Africa: Comparative and International Perspectives

This book contains a collection of essays in honour of Professor Christopher F Forsyth KC, *emeritus* Sir David Williams Professor of Public Law, sometime Professor of Private International Law, and Life Fellow of Robinson College, University of Cambridge. The essays focus on Professor Forsyth's contribution to the development of commercial private international law in Southern Africa, particularly through his monograph *Private International Law. The Modern Roman-Dutch Law* (five editions between 1981 and 2012). This standard text is authoritative in Botswana, Eswatini, Lesotho, Namibia, South Africa, Sri Lanka and Zimbabwe. The essays are written from a variety of comparative and international perspectives, but all focus on the further development of commercial private international law in the Southern African region. The authors are from Austria, Belgium, Botswana, Canada, China, the Democratic Republic of the Congo, Germany, Ghana, Japan, Malawi, Mauritius, the Netherlands, New Zealand, Nigeria, Portugal, South Africa, Switzerland, Tunisia, the United Kingdom and the United States of America.

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