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The Law Applicable to an International Contract of Sale in the Absence of a Choice of Law – A Comparative study of Brazilian, Russian, Indian, Chinese and South African Private International Law

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1. Behind The Layers of BRICS

The Original BRIC Organization comprising Brazil, Russia, India and China, was first conceived in 2001 as part of an economic modeling exercise to forecast global economic trends.\(^1\) Fast forward almost a decade into its existence and BRIC was up for a change. The BRIC foreign Ministers at a meeting held in New York in 2010, came to an agreement to invite South Africa to join the Organization.\(^2\) On the 14 April 2011, South Africa attended the first joint summit, evolving the former BRIC to what is known today as BRICS, the “S” referring to South Africa.\(^3\) This move is seen as a significant step, as its members’ now come from four different continents and is sure to turn heads in the “old North”, what used to be the traditional Western dominance over the global economy.\(^4\) BRICS comprises some of the world’s fastest growing and biggest economies, as illustrated by the statistics that emanated from the most recent summit held in Durban in March 2013. Senior Goldman Sachs economist Jim O’ Neil, the person responsible for coining the ‘BRIC’ acronym, predicted in 2001 that the combined economies of Brazil, Russia and China would overtake the United States and the G-7 countries.\(^5\) Since that bold statement in 2001, the words uttered by O’Neil have become more than just a prediction. As Bidwai points out, BRICS account for over 40% of the world’s population, 18% of its market-exchange GDP, 15% of world trade and two-fifths of its foreign currency reserves.\(^6\) It goes without saying that the BRICS group has many advantages and strengths that would stand it in good stead going forward. As previously stated, its members are among the fastest growing in the world, economically speaking, and were also least affected by the financial crisis that rocked many of the world’s powerhouses.\(^7\) There has even been talk of a BRICS Development Bank, which was first tabled in 2012 at the Delhi summit. Although discussions are in its infancy, a proposed $100-billion currency-stabilization contingency reserve arrangement is to be negotiated.\(^8\) Should these talks come to fruition, it would seriously threaten Western economic

\(^1\) Masuku “Origin and evolution of BRICS [Brazil, Russia, India, China and South Africa]” http://www.brics5.co.za/about-brics/ (05-07-2013).
\(^2\) n 1 above.
\(^3\) n 1 above.
\(^5\) n 4 above.
\(^7\) n 4 above.
\(^8\) n 6 above.
dominance and would help end the dependency of emerging countries on the International Monetary Fund and the World Bank.9 With that being said however, the same strengths that the group enjoys have often contributed to the challenges that BRICS faces. The diversity of the group translates to dissimilar political and economic views with its members often at odds with what the priority of BRICS should be.10 As Russian president Vladimir Putin so adequately stated that BRICS is a motley gathering of Africa’s big-game trophy animals- the lion, elephant, leopard, buffalo and rhinoceros- each independently strong, but loathe accepting another as the leader.11 Be that as it may, the question of whether the BRICS group is a serious contender to Western dominance is not the focus of this paper. The mere fact that this coalition exists translates into major opportunities both in the public and the private sector, with international transactions surely to increase. As outlined in an article by Thuli Masuku, since joining the group, South Africa has attracted a number of BRICS investors.12 The potential investments include a planned visit by buyers from China who aim to spend R5-billion in the country later this year, the Chinese government coordinating a buying mission for their retail trading houses, agreements having been reached with China to explore the possibility of setting up cement plants and shipping building facilities, Russian counterparts sending buying missions to South Africa in an aim to expand the purchase of juices and other South African food products and an agreement with an Indian conglomerate to set up an agricultural export hub in Durban.13 These recent developments are sure to increase international trade between the governments of the BRICS group as such, but will also affect the importation and exportation of goods between private enterprises in these countries.

2. Introduction

With member countries of the BRICS group eager to invest and foster a good rapport within the coalition, one cannot over state the possible opportunities it would invariably create for private enterprises of these states to conclude business with one another. As trade between these states

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9 n 4 above.
10 n 4 above.
11 n 6 above.
12 n 1 above.
13 n 1 above.
continues to grow, the need for clarity and certainty of law has become apparent. One aspect that deserves consideration in this regard is the law applicable to international contracts of sale, the main instrument used in the importation and exportation of goods.\textsuperscript{14} When a contract for the international sale of goods is concluded between persons from different states, the first question to be answered is: which law governs the existence and consequences of the contract? It is at this point that the term “the proper law of the contract” comes into play. Known in parts of the world as the “governing law” and under the Rome 1 Regulation as the “applicable law”, the proper law of the contract refers to the law which creates and governs the contract.\textsuperscript{15} While the proper law of a contract might not govern all aspects, it does apply to most of the substantive issues of a contract, including its formation, essential validity and discharge of a contract.\textsuperscript{16} Given the vast problems which may arise in an international sales contract, parties are advised to express their intention as to the law that should be applied.\textsuperscript{17} However, ever so often, experienced business people in international trade enter into agreements involving large sums of money without taking precautions as to the choice of law with which to govern their contract.\textsuperscript{18} With that being said, it is unfeasible for a contract to exist in a legal vacuum.\textsuperscript{19} Lord Diplock put it best by describing a contract as nothing more than a piece of paper devoid of any legal effect unless it can be referenced to a legal system whose private law defines the obligations in respect of the parties to the contract.\textsuperscript{20} The aim of this paper is to illustrate how the courts of the diverse legal systems comprising the BRICS group would approach an international sales contract in circumstances where the parties to the contract have failed to choose a legal system either expressly or tacitly.

\begin{flushleft}
\textsuperscript{14} Van Niekerk and Schulze \textit{The South African Law of International Trade: Selected topics} (2011) 56. \\
\textsuperscript{15} Forsyth \textit{Private International Law} (2012) 294. \\
\textsuperscript{16} Edwards, Sykes and Pryles \textit{Australian Private International Law} (1991) 584. \\
\textsuperscript{17} Van Niekerk and Schulze (n 14) 60. \\
\textsuperscript{18} Forsyth “Enforcement of foreign arbitral awards, choice of law in contract, characterization and a new attitude to private international law” 1987 \textit{SALJ} 4 14. \\
\textsuperscript{19} Forsyth (n 15) 294. \\
\textsuperscript{20} \textit{Amin Rasheed Shipping Corporation v Kuwait Insurance Co} 1984 AC 50.
\end{flushleft}
3. Brazil

(a) Background

A country with a population hovering around 200 million and blessed with an abundance of natural resources, it is no surprise that Brazil is a major player in international trade. Brazil has recently experienced a significant interest from the international investment community, while at the same time, local enterprises are going global. What might come as a shock, though, is that the Brazilian Conflict of laws has remained somewhat stagnant amidst constant developments in the private international law systems of other jurisdictions. As a result of its Portuguese roots, Brazilian legal doctrine and institutions follow a civil law model. The year 1916 saw the first efforts to codify a number of conflict rules which were adopted in the Introduction to the Civil Code. These were replaced in 1942 by the Law of Introduction to the Civil Code, the “LICC”, which has remained standing for over seventy years as Brazil’s central source of conflict of laws. Despite the best efforts of the drafters of the 1942 LICC, only a fraction of the principles of private international law was incorporated into legislation. Adding to the problem is a lack of reported case law which might have been valuable in bridging the gaps created by the incompleteness of its statutory conflict rules. In the area of conflict of laws, Brazil is a member of the Pan American System of private international law as a consequence of its adherence to the Pan American Code of Private International Law, so-called the Bustamante Code. The exact scope of the Bustamante Code remains uncertain, with some Brazilian courts adamant that the Code is to be applied in all cases, regardless of the nationality of the parties, while others state that it should only apply in cases where nationals of the signatory States are involved. Despite the Code continuing to have a significant, albeit secondary influence within Brazil, Professor Amilcar de Castro is of the opinion the Code will eventually be abandoned as a result of the inconsistent provisions of the Law of Introduction to the Civil Code.

21 De Araujo “Recent developments and current trends on Brazilian private international law concerning international contracts” Panorama of Brazilian Law. Vol I, No 1 (2013) 73 75-76.
23 Garland (n 22) 16.
25 Garland (n 22) 16.
26 Garland (n 22) 16.
27 Garland (n 22) 12. See Dolinger (n 24) 240, the author of the Bustamante Code, Antonio Sanchez de Bustamante y Sireven produced the Code in 1928 at the 5th international of American States held in Havana, Cuba.
28 Garland (n 22) 18-19.
29 Garland (n 22) 21.
(b) The Law Applicable in the Absence of a Choice by the Parties

The position with regard to choice of law in Brazil is somewhat different than most other jurisdictions around the world. This is due to the fact that Brazilian courts do not accept the principle of party autonomy and seem to apply a set of mandatory rules regardless of whether or not the parties have chosen a system of law with which to govern the contract. The principle of party autonomy, allowing parties who enter into international contracts, to choose a system of law to govern the contract has been an accepted principle around the world now for quite some time. However, Latin American countries have historically shown their reticence to party autonomy. Despite a recent shift in the mindset of most Latin American States, others continue to remain hesitant in accepting the principle and continue their attachment to territorialism. Brazil is one such country, ignoring the obvious appeal of party autonomy and the legal certainty it brings to commercial transactions. Furthermore, due to the proliferation of transnational contracts, party autonomy and free choice stand on firm economic grounds. The previous 1916 Introduction to the Civil Code appeared to have included the concept of party autonomy. However, due to the vague drafting of the relevant article, two contradictory principles seem to have been incorporated, which led to a debate amongst Brazilian scholars on whether or not its inclusion was intended to form part of the Civil Code. On the one hand, Article 13 granted a broad freedom to the contracting parties, however, this freedom was then limited by providing Brazilian law should always be applied to contracts to be performed in Brazil. Another statutory provision provided that maritime freight contracts performable by delivery in Brazil,

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32 Rodriguez and Albornoz (n 31) 500.
33 Rodriguez and Albornoz (n 31) 500.
34 De Araujo (n 21) 75.
35 Garland (n 22) 52.
36 See Dolinger (n 24) 236 “The Introductory Law to the Civil Code provided in Article 13: In the absence of any stipulation to the contrary, the law of the place where they were assumed governs the substance and effects of obligations. But shall always be subject to Brazilian law: (i) Contracts celebrated in foreign countries when subject to execution in Brazil. (ii) Obligations contracted between Brazilians in foreign countries. (iii) Acts relating to immovable property situated in Brazil. (iv) Acts relating to the mortgage system of Brazil.”
37 Dolinger (n 24) 237.
were to be judged by Brazilian law.\textsuperscript{38} As a result, Brazilian courts generally applied Brazilian substantive law.\textsuperscript{39} When a conflicts problem did arise, the court would more often than not favour Brazilian law, provided Brazil had a connection to the contract either by way of being the “country of contracting” or “country of performance”.\textsuperscript{40} Thus, the inclination to apply Brazilian law overruled party choice of law, on the assumption that once the Brazilian substantive law appeared to be applicable, the court would rule out any stipulation that the parties may have included in the contract.\textsuperscript{41} Arguments against party autonomy appeared to have been strengthened after the introduction of the LICC in 1942.\textsuperscript{42} The rule regulating international agreements is set out in Article 9\textsuperscript{43} of the LICC, which states:

“In order to characterize and govern the obligations, the law of the State in which they are constituted shall apply. (i) In the event that the obligations shall be performed in Brazil and depending on an essential form, this one shall be observed, being admitted the peculiarities of the foreign law, as to the extrinsic requirements to the act. (ii) The obligations arising from the contract is deemed to be constituted at the place in which the proponent resides.”

It is quite evident that at this stage in its legal development, Brazil adopted a territorial and nationalist approach to conflict of laws.\textsuperscript{44} Article 9 made it clear that under Brazilian law, the law applicable to international agreements would in the first instance be “the law of the State in which they are constituted”, regardless of whether a choice was made or not.\textsuperscript{45} The article further provides that if the contract is to be performed in Brazil, Brazilian law shall be observed.

However, there is a certain group of Brazilian scholars that believe the principle of party autonomy does exist in the Brazilian Civil Code. Haroldo Valladão argues that the principle can be extracted from the 1942 LICC and refers to Article 9 (2) in this regard.\textsuperscript{46} Here, the verb “repute-se”, which translates to “is presumed”, is used.\textsuperscript{47} This is seen to represent the same caveat as “unless otherwise agreed by the parties”, which was also present in the old 1916

\begin{thebibliography}{99}
\bibitem{38} Garland (n 22) 52. See Article 628 of the Commercial Code (1850), which is still in force in Brazil.
\bibitem{39} Dolinger (n 24) 237.
\bibitem{40} Dolinger (n 24) 237.
\bibitem{41} Dolinger (n 24) 237.
\bibitem{42} Dolinger (n 24) 250.
\bibitem{43} De Araujo (n 21) 76-77.
\bibitem{44} De Araujo (n 21) 77, the 1942 Introductory Law to the Civil Code was enacted during the height of World War II, which saw an influx of immigrants to its shores and as a result, influenced its territorial and nationalist views.
\bibitem{45} De Araujo (n 21) 76.
\bibitem{46} Dolinger (n 24) 80.
\bibitem{47} De Araujo (n 21) 78.
\end{thebibliography}
Introduction. Valladão also refers to Article 42 of the 1916 Civil Code allowing parties, although domiciled in a certain place, being able to choose a special domicile for contractual purposes. Thus, parties were free to choose a national legal system to rule over the contract. More recently, Professor Da Gama e Souza Jr. has advocated the validity of party autonomy by pointing to the 1988 Brazilian Constitution, which has elevated civil liberties to the status of fundamental rights, and provides:

“No one shall be obliged to do or refrain from doing something expect by virtue of law.”

With the above provision in mind, one can construe Article 9 and the absence of a rule expressly excluding the parties from choosing a law to govern the contract, in meaning that such a freedom does exist. Unfortunately, this has not yet been clarified by Brazilian courts, and when the issue does come up, the courts are still in favour of applying the Brazilian law, either as the *lex loci contractus* or *lex loci solutionis* to govern the contract.

Regardless of the debate within Brazilian academic circles, the 1942 LICC in its current form has no clear provision authorizing party autonomy. Parties should bear this in mind and take precautions when contracting. It would seem that the only situation where a stipulated law or foreign *lex loci contractus* will probably find application in a Brazilian court is if both the *locus contractus* and the *locus solutionis* are outside Brazil. It is therefore advisable for the parties to stipulate that performance is to take place outside Brazil, as opposed to achieving the same result by a choice of law clause. In doing so, parties would indirectly choose the applicable law by choosing the law where the agreement is to be performed or making a choice in respect of the *lex loci contractus*.

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48 De Araujo (n 21) 78.
49 Dolinger (n 24) 238.
50 Dolinger (n 24) 238.
51 De Araujo (n 21) 78, Article 5 (ii) of the Constitucia da Republica Federativa do Brazil de 1988. Full text in English available at Political Database of the Americas at [http://pdba.georgetown.edu/constitutions/brazil/english96.html](http://pdba.georgetown.edu/constitutions/brazil/english96.html)
52 De Araujo (n 21) 78.
53 De Araujo (n 21) 79.
54 De Araujo (n 21) 79.
55 Garland (n 22) 56.
56 Garland (n 22) 56. This does not however, seem to be a practical solution.
57 De Araujo (n 21) 79.
There are signs that the Brazilian legislator is moving in the right direction though. It is important to note that in the realm of international arbitration, the legislator has enacted Law 9307 of 1996. Article 2 (1) and Article 11 provide for party autonomy in arbitration proceedings. With the existence of party autonomy in arbitration, it seems strange that such acceptance has not taken place in litigation. Nevertheless, there have been judges in isolated cases that have begun referring to party autonomy as valid in Brazil’s legal system. This shows that steps are being taken to modernize Brazilian law, albeit with a degree of hesitation.

4. Russia

(a) Background

Private international law issues in the former Soviet Union were researched by very few Russian scholars and taught in a limited number of law schools. However, the State has recognized the need to respond to the requirements of modern international life and as a result, have focused on creating a favourable legal environment to develop relations with other States and to meet the problems of its conflict of laws. With many of Russia’s private enterprises participating in transnational businesses and international contracts becoming the order of the day, the economic transformation in Russia has seen a considerable amount of attention placed on its private international law rules over the past few decades. A proposal was submitted in 1991 in an attempt by Russian scholars to formulate a separate act on private international law. For various practical reasons, this could not be achieved, and as a consequence, Russia’s private international laws are at present, incorporated into the Russian Federation Civil Code.

There has been considerable change since the Fundamentals of Civil Legislation of USSR and Republics of 1991 (FCL 1991), Russia’s main source of conflict of laws rules prior to the

58 Albornoz (n 30) 33.
59 Article 2: Arbitration will be based on law or equity, according to the wish of the parties. (i) Parties may freely choose the legal rules to be applied in the arbitration, provided that there is no violation of good customs and public policy. Article 11: The arbitral agreement may also contain: (iv) the choice of the national law or the corporate rules to be applied to the arbitration as per agreement of the parties.
60 Dolinger (n 24) 239.
61 Albornoz (n 30) 33.
63 Vorobiuva Private International Law in Russia (2012) 87 88.
64 Lebedev, Muranov, Khodykin and Kabatova (n 62) 119.
65 Lebedev, Muranov, Khodykin and Kabatova (n 62) 117-118.
incorporation of Section VI of the Russian Code, was replaced.\textsuperscript{67} The new Russian legislation has been heavily influenced by similar rules in private international law codifications of Western States and in particular, the Rome Convention on the Law Applicable to Contractual Obligations of 1980.\textsuperscript{68}

\textbf{(b) The Law Applicable in the Absence of a Choice by the Parties}

In the absence of the parties’ choice of law, a Russian court would use its statutory conflict of laws rules in determining the applicable law.\textsuperscript{69} It is quite evident that the inspiration behind a considerable part of Russian private international law has been by way of the developments that have taken place in Continental Europe. Much of the conflict provisions contained in Part III of the Civil Code of the Russian Federation\textsuperscript{70} have been influenced by the Rome Convention.\textsuperscript{71} As a result of the similarities between the two, the Rome Convention provides us with valuable guidance in interpreting the provision of the Russian Civil Code. The rules that apply in the absence of a choice of law, are contained in Article 1211 of the Russian Code titled “The Law Governing a Contract in the Case of Lack of Parties’ Agreement on Applicable Law”. The Article contains two main tests, namely the “closest connection test” and the “characteristic performance test”. Interestingly, the comparable provision contained in Article 4 of the Rome Convention is similarly formulated, in that it also contains a two-pronged approach as set out in the code. However, while the content of the closest connection test in the Code is identical to that in the Convention, the characteristic performance test in Article 1211 (2) is formulated slightly differently from the one outlined in Article 4 (2) of the Rome Convention.\textsuperscript{72} Article 1211 (1) states:

“Where there is no agreement of the parties on the applicable law, the contract shall be subject to the law of the country with which the contract has the closest relation.”\textsuperscript{73}

While Article 1211 (2) further provides:

\textsuperscript{67} Lebedev, Muranov, Khodykin and Kabatova (n 62) 130.
\textsuperscript{69} Vorobiuva (n 63) 91.
\textsuperscript{70} Civil Code of Russia (n 66) 349.
\textsuperscript{71} Rome Convention (n 68).
\textsuperscript{73} Civil Code of Russia (n 66) 349.
“The law of the country with which a contract has the closest relation shall be deemed the law of the country where the party responsible for the performance under the contract of crucial significance for the content of the contract has its place of residence or main place of business, except as otherwise ensuing from the law, the terms or substance of the contract or the group of circumstances of the case in question.”

Article 1211 (1) clearly states that when no choice of law is made, the contract shall be governed by the law of the country with which the contract has its closest connection. Russian legislation then creates a presumption in terms of the closest connection criterion by utilizing the characteristic performance test in Article 1211 (2). The characteristic performer is a term given to the party who is to carry out the performance that is essential or “characteristic” of the contract. This test is based on the presumption that the connection between a contract and the country of location of the characteristic performer in the contract is the closest one.

The issue that invariably comes up is: which performance and why that performance, is deemed the one characteristic of the contract? The Giuliano and Lagarde Report, an official report of the working group in respect of the Convention provides some useful insight with regard to the characteristic performance test as set out in Article 4 (2) of the Rome Convention. According to the report, the characteristic performance is the one that “gives a contract its name”, typically “constitutes the centre of gravity … of the contractual obligation” and the performance “for which payment is due”. The justification for preferring the characteristic performer’s law to govern the contract lies in the belief that his obligations are considered to be more important and involve more complexities. Consider the following scenario, a contract of sale, between a South African seller specializing in citrus farming and the distribution of fruit products, negotiates and contracts with an Indian buyer for the delivery of 100,000 packaged fruit juices and fruit products. Typically, the buyer’s only obligation is to pay the agreed purchase price in a manner stipulated by the agreement. In contrast, the seller has to have the knowledge necessary for the proper preparation of the fruit, ensure the quality of the packaging, has to organize suitable storage and bears the risk of decaying fruit. It is clear that the seller’s performance is

74 Civil Code of Russia (n 66) 358.
75 Vorobiuva (n 63) 92.
76 Vorobiuva (n 63) 92.
77 Badykov (n 72) 270.
80 Badykov (n 72) 272.
more complex or in terms of Article 1211 (2) “of crucial significance” and would invariably affect the economy of the seller’s country and therefore connect his country more closely to the contract.\footnote{Badykov (n 72) 273.} This seems to be the view of the drafters of the Civil Code, as capsulated in Article 1211 (3), which states further:

“A party responsible for the performance under a contract of crucial significance for the content of the contract shall be a party which, in particular, is the following, except as otherwise ensuing from law, the terms or substance of the contract or the group of circumstances of the case in question: (1) a seller – in a sales contract (2) a donor in a donation contract (3) a lessor/landlord in a lease…”\footnote{Civil Code of Russia (n 66).}

Here, the Russian Civil Code lays down rules to be applied in various specific contracts. For the purpose of this discussion, we will focus on the first presumption, that the characteristic performer in a sales contract is the seller. From the above example, it seems a logical position and one that would provide more simplicity and clarity for Russian judges in applying the Article. However, there may be instances where the surrounding circumstances of the contract are atypical and applying the provisions may prove to be a challenging task for Russian courts. For instance, in the same scenario of the South African seller and the Indian buyer, on this occasion, the Indian buyer simply buys the packaged juices and fruit products and immediately sells the goods to a Turkish wholesaler. In this situation the Indian seller doesn’t see or handle the goods and is merely the middle man of the sale chain.\footnote{Badykov (n 72) 273.} In terms of the contract between the Indian seller and the Turkish buyer, the Indian seller’s performance would be far less complex than that of the second buyer, while the buyer would in reality bear more of the risk, since he is the one that physically takes the goods and has to see to their storage and distribution to other businesses. It may be the case that the characteristic performance is undeterminable or the contract is more closely connected to another country.\footnote{Badykov (n 72) 279.} In this regard, the presumption as stipulated in Article 1211 (3) cannot be satisfactory in all cases. Although the drafters of the Civil Code recognize the need to limit the presumption, the Code fails to stipulate the precise circumstances in which the application of the presumption may be refused in favour of the closest connection test. In this regard, Article 1211 (3) merely provides that the only exceptions would be those “ensuing from the law, the terms or substance of the contract or the group of
circumstances of the case in question”. With that being said, one should keep in mind that the Russian legislator intended the Code to be close to the Convention. Despite the Russian Civil Code lacking a specific escape clause, as compared to Article 4 (5) of the Rome Convention, it seems as though the two situations expressed in Article 4 (5), in which the characteristic performance may be ignored are covered by Article 1211 of the Code. Authors of the Concept for the Development of Civil Legislation of the Russian Federation has recommended that an additional provision be added to the Civil Code, that the refusal to apply the general connecting factor of the place of residence of the party carrying out the performance which is characteristic of the contract should be allowed only in situations when the contract manifestly demonstrates a closer connection with the law of the other country. The recommendation mirrors that of Article 4 (3) of the Rome Regulation and, once again, reiterates the eagerness on the part of Russia to follow the example of European private international law legislation.

5. **India**

(a) **Background**

“A moment comes, which but rarely in history, when we step out from the old to the new, when an age ends, and when the soul of a nation, long suppressed, finds utterance.” These were the words spoken by Jawaharlal Nehru, India’s first Prime Minister, after the British House of Commons passed the *Indian Independence Act* in 1947. Since that famous speech, India has come in leaps and bounds in developing its own identity and has captured the status of being one of the world’s fastest growing economies. However, the same cannot be said for the evolution of its English-dominated legal system. Colonial legislation dating back to the early nineteenth century still finds prevalence in India, much of which is dreadfully out of tune with modern needs. Despite the best efforts of the Indian Law Commission, India’s law reform body, the

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85 Vorobiuiua (n 63) 92.
86 Badykov (n 72) 277.
87 Badykov (n 72) 279.
88 Vorobiuva (n 63) 92.
91 Finding Dulcinea Staff (n 90).
Indian legislature has remained insensitive to shepherd in reformist measures.\textsuperscript{93} Be that as it may, the foundation of India’s choice of law rules inherited from its previous conqueror, remains an impressive stepping stone for Indian courts entrusted with evolving choice of law rules, to work in partnership with the Indian legislature in evolving this area of legal discipline and thus expand Indian conflict of laws into its own identity and responsibility.\textsuperscript{94} Until such time, Indian courts will continue to blindly adhere to the rules inherited from the English conflict of laws.\textsuperscript{95}

(b) The Law Applicable in the Absence of a Choice by the Parties

A statute applicable to the choice of law in international contracts remains non-existent in Indian private international law.\textsuperscript{96} Indian courts have to rely entirely on the common-law rules relating to the proper law of the contract.\textsuperscript{97} The English Professor Morris speaks of the doctrine of the ‘proper law’ for resolving disputes relating to international contracts.\textsuperscript{98} English courts have wholeheartedly embraced the proper law doctrine ever since and Indian courts have followed suit in this regard.\textsuperscript{99} The proper law term was defined in \textit{Indian General Investments Trust v Raja of Khalikote}\textsuperscript{100} where the court held: “The Proper law of a contract means the law which the court is to apply in determining the obligations under the contract.”\textsuperscript{101} The court observed that in deciding these matters, care should be taken not to apply rigid or arbitrary criteria, but rather considerations of the intention and situation of the parties as well as all other surrounding facts of the case.\textsuperscript{102} The modern proper law theory advocates different legs in the determination of the proper law.\textsuperscript{103} The same holds true in Indian law, and accordingly where the first two methods of determining the proper law are absent, namely an express or tacit choice, Indian courts would have to determine the law with which the contract has the most substantial connection. This view was confirmed in
the leading Indian case of *National Thermal Power Corporation v Singer Company*\(^{104}\) where the
Supreme Court of India held:

“Where parties have not expressly or impliedly selected the proper law, the courts impute an intention by
applying the objective test to determine what the parties would have as just and reasonable persons intended as
regards the applicable law had they applied their minds to the question.”\(^{105}\)

For this purpose, the judge has to put himself in the place of a “reasonable person” in his
determination of the proper law.\(^{106}\) This entails an investigation of the case to ascertain the
relevant objective factors surrounding the contract and attaching weight to them in order to
determine which system of law has the closest relation to the contract- this will then govern the
contract.\(^{107}\) Factors that have been taken into account in this regard include: the place where the
contract was concluded, the form and object of the contract, the place of performance, the place
of residence or business of the parties, reference to the court having jurisdiction and other links
relevant to the contract are to be examined by the court to establish which system of law the
contract has its closest and most real connection.\(^{108}\) A fine example of an Indian court applying
the proper law doctrine is found in the decision of *Rabindra N. Maitra v Life Insurance
Corporation of India*,\(^{109}\) where the Calcutta High Court had to consider the validity of an
assignment of an insurance policy from a father to his son. The court, in reaching its conclusion
to apply Indian law as the system of closest connection, placed emphasis on the fact that both
father and son resided in India at the time of the assignment, notice of the assignment was
communicated to Life Insurance Corporation of India with its head office at Bombay (India), it
was registered under Indian law and the monthly premium was paid in Indian Rupees. This was
weighed against the law of Pakistan- only a few elements called for the consideration of
Pakistani law, namely that the register relating to the policy was attached to a Dhaka branch,
which was part of Pakistan at the time. Previously, Indian courts had a tendency of applying
presumptions in their search of the proper law. When no such choice of law was made by the

\(^{104}\) (7 May 1992) per www.supremecourtofindia.nic.in

\(^{105}\) (n 104) 120 A-C.

\(^{106}\) (n 104) 120 A-C.

\(^{107}\) See also *Delhi Cloth & General Mills Co. Ltd v Harnam Singh*, AIR 1955 SC 590, where the court held: “the law
of the country in which its elements were most densely grouped and with which factually the contract was most closely connected.”

\(^{108}\) (n 104) 121 A-B. See also *State Aided Bank of Travancore Ltd v Dhrit Ram LR 69 1A 1 AIR 1942 PC 6; Dhanrajmal Govindram v M/S Shamji Kalidas & Co AIR 1961 SC 1285, (1961) 3 SC 1020; Gas Authority of India
Ltd v SPIE CAPAG SA AIR 1994 Del 75.

\(^{109}\) AIR 1964 CAL 141.
parties, the courts have favoured the *lex loci contractus*. This presumption is based on the fact that the law of the place where the contract was concluded should govern the contract.\(^{110}\) The second presumption used for determining the proper law was the *lex loci solutionis*. The idea behind this belief was that, if the contract was made in one country but performed in another, the contract was presumed to be intended by the parties to be governed by the law of the place of performance.\(^{111}\) These presumptions have however, fallen out of favour in recent times.\(^{112}\) As discussed earlier, the contemporary view in Indian private international law is to consider all relevant factors without recourse to specific presumptions.\(^{113}\) The only instances in which a court would utilize the presumption of the *lex loci solutionis* to be the proper law of the contract is where the contract was concluded in a country that happens to be the place where it is to be performed.\(^{114}\)

6. China

(a) Background

Despite boasting a long history and a legal origin that dates back thousands of years, Chinese social and legal development has lagged behind the West since the 17th century.\(^{115}\) It has been over sixty years since the establishment of the People’s Republic of China, but the country still lacks a complete private international law system.\(^{116}\) In fact, it was only after opening up to the outside world in the late 1970’s that the study of private international law was regarded as an independent discipline in China.\(^{117}\) Nevertheless, since the 1980’s, which brought with it economic reform aimed at moving towards the main stream of the world economy, China has made remarkable progress in legislation, particularly in the area of contract.\(^{118}\) It was at this stage that the choice of law in contracts started to gain the attention it deserved amongst legal scholars in China. The first statute containing conflict rules was the Law of the Peoples

\(^{110}\) Agrawal and Singh (n 96) 96. See also *Shankar v Manilal* AIR 1940 Bom 799.

\(^{111}\) Agrawal and Singh (n 96) 96.

\(^{112}\) *Thermal Power Corporation v Singer Company* (7 May 1992) [www.supremecourtofindia.nic.in]; *Delhi Cloth & General Mills Co. Ltd v Harnam Singh*, AIR 1955 SC 590.

\(^{113}\) Govindaraj (n 92) 60.

\(^{114}\) Govindaraj (n 92) 60.


\(^{116}\) Zhengxin (n 115) 53.

\(^{117}\) Zhengxin (n 115) 53. Prior to the economic reform, China was a closed and self-sufficient society and saw little need to engage in foreign business transactions.

\(^{118}\) Zhengxin (n 115) 181.
Republic of China on Economic Contracts Involving Foreign Interests of 1 July 1985, 119 which was later replaced by the Contracts Law of 1999. 120 In 1986, China promulgated the GPCL with Chapter viii entitled “Application of Law in Relation to Foreign Related Matters”. 121 With a number of statutes on private international law having subsequently been enacted, Chinese scholars were adamant that the codification of China’s private international law would inevitably be the next step. 122 On 28 October 2010, the Law of the People’s Republic of China on the Law Applicable to Foreign-related Civil Relations of 2010 123 was adopted, representing the first self-contained statute on private international law in China. 124 However, this single statute does not unify the sources of Chinese private international law, as current legislation remains scattered throughout different laws without systematic from. 125 Another unique feature of China’s private international law is that the country has in effect, three different legal systems. Despite Hong Kong and Macau becoming part of China in the late 1990’s, the two regions are deemed foreign in the context of private international law in mainland China. 126 Hong Kong and Macau have obtained the status of a Special Administrative Region (SAR), which means that they enjoy their own legal, economic and political system quite distinct from mainland China. 127 As a consequence, the laws of the two regions are not applied in mainland China and vice versa, resulting in the peculiar position that disputes having Hong Kong or Macau elements are regarded as disputes involving foreign elements within mainland China. The upshot of all of this is that there exists three different methods of determining the law applicable in the absence of

119 Qisheng He “The EU conflicts of laws communitarization and the modernization of Chinese private international law” 2012 Rabels Zeitschrift für ausländisches und internationals Privatrecht/ The Rabel Journal of Comparative and International Private Law 47 54; Adopted at the Tenth Session of the Standing Committee of the Sixth National People’s Congress, promulgated by Order No. 22 of the President of the People’s Republic of China on 21 March 1985, and effective as of 1 July 1985, NPC Gazzette 1985, Vol. 2, pp. 4-8.
120 Qisheng He (n 119) 54; Adopted and promulgated by the Second Session of the Ninth National People’s Congress on 15 March 1999.
121 Qisheng He (n 119) 55.
122 Qisheng He (n 119) 56.
123 Per www.conflictoflaws.net (search for “P.R. China’s first statute on choice of law (translation in English)”) or in the appendix to Ning Zhao “The first codification of choice-of-law rules in the People’s Republic of China: an overview” 2011 Nederlands Internationaal Privaatrecht 303 312 (hereinafter referred to as “Law on the Application of Laws).
124 Qisheng He (n 119) 56; the Law on the Application of Laws came into force on 1 April 2011.
125 Zhengxin (n 115) 54.
126 Zhengxin (n 115) 9.
choice by the parties within one country. The position in respect of mainland China will be discussed first, to be followed by a discussion of the position in Hong Kong.\footnote{The position in Macau will not be discussed in this paper. Article 41 of the Civil Code of Macau provides the only relevant provision with regard to absence of choice. Article 41 states: “In the absence of a designation of the applicable law, the law of the place most closely connected with the transaction shall apply.”}

(b) The Law Applicable in the Absence of a Choice by the Parties

Mainland China:

Even after the Law on the Application of Law of 2010 came into force, it does not mean that it is the only source of conflict of laws in China. China’s existing private international law system adopts a mixed model that includes separate statutes which are still effective, provided these statutes do not conflict with the Law on the Application of Laws of 2010.\footnote{Qisheng He (n 119) 57-58.} In addition to this, the Supreme People’s Court, with the aim of achieving a better implementation of choice of law rules, decided to issue several opinions relating to the determination of the applicable law in contractual cases.\footnote{Zhengxin (n 115) 181.} This piece of judicial explanation constitutes a major source for Chinese courts to refer to when dealing with contractual disputes involving foreign elements.\footnote{Zhengxin (n 115) 181.} In 2007, the so-called Guideline of the Supreme People’s Court promulgated “Rules of the Supreme People’s Court on the Relevant Issues concerning the Application of Law in Hearing Foreign-related Contractual Dispute Cases in Civil and Commercial Matters of 2007”.\footnote{Neels “Rome in the Far East” (unpublished lecture University of Amsterdam, University of British Columbia and the University of Johannesburg) (2011-2012) 1 6; Hereinafter referred to as “the Guideline of the Supreme People’s Court”.} Chinese authors are of the opinion that the Law on the Application of Laws 2010 must be read in conjunction with the Guideline of the Supreme People’s Court.\footnote{Neels (n 132); See Guangjian Tu and Muchi Xu “Contractual conflicts in the People’s Republic of China: the applicable law in the absence of choice” 2011 Journal of Private International Law 179.} Bearing in mind that the Guideline is to be read together with the Law on the Application of Laws 2010, Professor Neels suggests that the latter must provide the starting point of the enquiry in determining the applicable law in the absence of choice.\footnote{Neels (n 132) 7.} Article 41 of the Codification sets out the following in terms of a choice of law:

\footnote{\textsuperscript{128} The position in Macau will not be discussed in this paper. Article 41 of the Civil Code of Macau provides the only relevant provision with regard to absence of choice. Article 41 states: “In the absence of a designation of the applicable law, the law of the place most closely connected with the transaction shall apply.”
\textsuperscript{129} Qisheng He (n 119) 57-58.
\textsuperscript{130} Zhengxin (n 115) 181.
\textsuperscript{131} Zhengxin (n 115) 181.
\textsuperscript{132} Neels “Rome in the Far East” (unpublished lecture University of Amsterdam, University of British Columbia and the University of Johannesburg) (2011-2012) 1 6; Hereinafter referred to as “the Guideline of the Supreme People’s Court”.
\textsuperscript{133} Neels (n 132); See Guangjian Tu and Muchi Xu “Contractual conflicts in the People’s Republic of China: the applicable law in the absence of choice” 2011 Journal of Private International Law 179.
\textsuperscript{134} Neels (n 132) 7.}
“The parties may by agreement choose the law applicable to their contract. Absence of any choice by the parties, the law of the habitual residence of a party whose performance of obligation is most characteristic of the contract or the law that’s most closely connected with the contract shall be applied.”

This Article is somewhat problematic, as it fails to state in clear terms what the order of preference in respect of the “characteristic performance” and the “closest connection” test should be. However, the sequence of the tests in the Article suggests that the characteristic performance test should be applied first before shifting to the closest connection.\(^{135}\) On the other hand, the Guideline of the Supreme People’s Court seem to contradict the 2010 Law. Article 5 (1) states:

“In the case of the parties concerned fail to choose the law applicable to contractual disputes, the law of the country or region with the closest connection thereto shall be the applicable law.”

Article 5 (2) continues to state:

“In determining the applicable law according to the most closely connected principle, the People’s Court shall take into account the factors of the nature of the contract in dispute and the obligation performed by one party that can best embody the essential characteristic of the contract and other factors to find out the law of the place with which the contract is most closely connected.”

At first glance, it seems as though the Supreme People’s Court Guideline do not correspond with the 2010 Law, and instead call for an enquiry into the closest connection test as a point of departure. However, on further inspection of Art 5, it provides judges with further guidance in terms of the closest connection test by prescribing seventeen presumptions to be applied in respect of specific contracts.\(^{136}\) It is quite evident that the characteristic obligation test is heavily relied upon in the Guideline to build up fixed choice of law rules for different contracts, and thus ensuring Chinese judges, who are generally not very experienced in dealing with international cases, are assisted in the process.\(^{137}\) Only after enumerating the list of rules, does Art 5 go on to provide an escape clause which reads as follows: “In case of the contract above [in terms of the list of presumptions] is of obvious and closest connection to another country or region, the law of that country or region shall prevail.”

I would suggest that the Guideline in fact calls for the application of the list of presumptions which refers to the characteristic performance test in the first place. This reiterates the reasoning provided earlier for the interpretation of Art 41 and that the “characteristic performance” test

\(^{135}\) Neels (n 132) 7. Neels points out that the order of the phrases in Art 41 should be taken seriously and therefore one should start with the characteristic performance test.

\(^{136}\) Guangjian Tu and Muchi Xu (n 133) 183.

\(^{137}\) Guangjian Tu and Muchi Xu (n 133) 184-186.
should come first in the enquiry because “one should take the order of phrases in Art 41 of the 2010 law seriously”. Thus, only when the application of a particular presumption in Art 5 does not point to the characteristic obligation as provided for in Art 41, or when the characteristic performance in terms of the said contract is indeterminable, should one apply the escape clause as set out at the end of Art 5 and rely on the closest connection test. In terms of a contract of sale, however, the Guideline lists exceptions to applying the law of domicile of the seller, which are not provided for by the Law on the Application of Laws of 2010. Here Neels proposes that the exceptions should only be applied if they are in compliance with the escape clause of a closer connection. Clearly some light needs to be shed on the application of Art 41 of the Law on the Application Laws of 2010. It seems strange that there has yet to be any substantial debate on the application of these provisions in China. As long as Art 41 remains in its ambiguous form, it will be a difficult task to predict in which way exactly Chinese courts will go in its application.

**Hong Kong:**
After just more than 150 years under British colonial rule, Hong Kong was finally handed over and became part of the People’s Republic of China on 1 July 1997. However, as previously stated, Hong Kong has obtained the status of Special Administrative Region “SAR”. This denotes that Hong Kong’s legal system will remain distinct from that of mainland China for at least another 50 years after the handover. As a result, the conflict of laws regime in Hong Kong still follows English common-law rules which were developed by English courts during

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138 Neels (n 132) 7.
139 Neels (n 132) 7. Neels recommends the following order of enquiry “the presumption in the guidelines (unless in conflict with the characteristic performance test and not justified by the escape clause); secondly: the escape clause with reference to a closer connection.”
140 Rules of the Supreme People’s Court on the Relevant Issues Concerning the Application of the Law in Hearing Foreign-related Dispute Cases in Civil and Commercial Matters (2007) per www.tradeinservices.mofcom.gov.cn: Art 5 (2) provides: (1) as for contracts of sale, the applicable law shall be the law of domicile of the seller at the time of contract conclusion. In case a contract is concluded after negotiation at the domicile of the buyer, or the contract clearly prescribes that the seller shall fulfill the consignment obligation at the domicile of the buyer, the law of the domicile of the buyer shall be the applicable law.”
141 Neels (n 132) 8.
142 Guangjian Tu and Muchi Xu (n 133) 185.
143 Guangjian Tu and Muchi Xu (n 133) 187.
144 Wolff (n 127) 465.
145 Wolff (n 127) 465.
the 19th and 20th century. It must be noted that Hong Kong courts are no longer bound by the old English authority, but nevertheless, this still appears to be the trend in the region. Keeping in mind that Hong Kong courts follow the traditional common-law regime, in circumstances where parties have failed to express the applicable law or no implied choice is apparent, the next step under the proper law rule is to identify a system of law with which the contract has its most real connection. In determining which law has the closest or most real connection to the contract, the common-law system calls for an investigation of all the factors contained within the contract as well as the surrounding circumstances. There are a number of factors that a court should take into account in its determination of the proper law, however, it is suggested that certain factors may be more important than others and indicative of a real connection. One such factor is the place of performance. The *locus solutionis* was regarded by common-law courts as a significant factor in determining which system of law the contract is most closely connected. Another factor that was previously thought of as important was the *locus contractus*. Despite the *locus contractus* remaining a factor that the courts take in account, its significance has over recent times diminished, especially in the wake of modern contracting where the place that the parties happen to find themselves at the conclusion of the contract may very well be fortuitous. Another factor that may also count in the favour of a contract being closely connected with a particular system of law is where the parties have chosen a place for dispute resolution. In this instance, the chosen place may be taken to imply a choice of the governing law of that place. However, the rule that an express choice of tribunal can be implied as a choice of a proper law is in no way conclusive. It must be remembered that, although the courts have in the past placed a considerable amount of emphasis on certain factors,

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146 Wolff (n 127) 465.
147 Johnston *The Conflict of Laws in Hong Kong* (2005) 187 188.
148 Wolff (n 127) 468.
149 Wolff (n 127) 468.
150 Johnston (n 147) 195.
151 Also take note of the proposal in *Bank of India v Gobindram Narainadas Sadhwani* (1988) 2 HKLR 262 High Court, Nazareth J confirmed that “great weight” should be given to the law of place of performance. In *Cim Co Ltd v Koo Chi Yun* (2002) HKCU 1203, Chung J applied the place of performance as a guide to the governing law (as quoted in Johnston (n 44) 196: also see *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171 where it was held that the law of the place where the contract was concluded governs the contract unless the contract is performed elsewhere, then the law of the latter place governs the contract.
152 Van Niekerk and Schulze (n 14) 64.
153 Johnston (n 147) 197.
154 In *Compagnie d’Armement SA v Compagnie Tunisienne de Navigation* 1970 3 SA 389, the court held that no rule of law can provide a conclusive guide as to actual intention.
namely the *locus contractus* and the *locus solutionis*, the contemporary approach is to weigh all the factors relevant to the contract in determining the closest connection of the contract. Other factors worth a mention include, but are not limited to domicile or residence of the parties; adoption of particular legal terminology; language and currency.\(^{155}\) This open approach has its advantages and disadvantages in practice. On the one hand, it does allow the court considerable flexibility in applying the test to a variety of cases, but at the same time creates much unpredictability and uncertainty as to how the court may weigh different factors.\(^{156}\)

7. **South Africa**

(a) **Background**

With South Africa’s relatively small population and economy when compared to the other members of the BRICS group, one would think that it would be disadvantageous and they would not play a significant a role in the growth of the coalition. However, this cannot be further from the truth. Goldman Sachs Economist Jim O’ Neil believes South Africa has a vital role within BRICS, both as a gateway to the African continent and as a catalyst for African integration.\(^{157}\) As previously mentioned, South Africa has been at the centre of investment interest and has seen an influx in foreign buyers, with the other members of the BRICS group showing a particular interest in what South Africa has to offer. As long as foreign nationals continue showing a willingness to do business in South Africa, its international trade will continue to flourish. With that in mind, more emphasis should be placed on the South African private international law system, and whether it is up to international standards in dealing with the issues that invariably arise in international transactions. Some are of the opinion that South Africa lags behind its trading partners in these respects and, despite some convergence over recent times with other systems, South African conflict laws continues to diverge in many respects and displays its own unique features.\(^{158}\)

\(^{155}\) Johnston (n 147) 196-198.
\(^{156}\) Wolff (n 127) 195.
\(^{157}\) Masuku (n 1).
\(^{158}\) Van Niekerk and Schulze (n 14) 64.
(b) The Law Applicable in the Absence of a Choice by the Parties

In the absence of an express or tacit choice of law, a South African court must assign a proper law to govern the contract. A court is compelled to assign a proper law and cannot hold that there exists no such system.\(^{159}\) There is some confusion in this regard, as the courts have on occasion blurred the lines between a tacit choice of law and the assignment of the appropriate law. On the one hand it is incorrectly suggested that the court should ask itself in the light of the subject-matter and surrounding circumstances of the contract, what the parties may have presumed to be intended to govern the contract.\(^{160}\) This view was adopted in *Standard Bank of South Africa v Efoiken and Newman*\(^{161}\) where De Villiers, JA held:

“It 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 effect are to be governed. [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.”\(^{162}\)

This approach cannot be supported, as the minds of the parties have not met on the question of choice of law in the first place.\(^{163}\) It would be nonsensical for a court of law to presume the parties have chosen a particular law if it has already established there exists no express or tacit choice.\(^{164}\) This seems to be the orthodox view in South Africa, one which certainly needs to be redressed.\(^{165}\) An alternative view and one which has seen some preference over the orthodox view, refers ours courts to assign a system of law with which the contract has its closest connection, or the centre of gravity of the contract.\(^{166}\) In both *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd*\(^{167}\) and *Improvair Cape (Pty) Ltd v Establishments Neu*\(^{168}\), the court favoured this formulation despite being bound by the Appellate Division in the *Efoiken* case.\(^{169}\)

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\(^{159}\) Van Niekerk and Schulze (n 14) 64.

\(^{160}\) Forsyth “Enforcement of foreign arbitral awards, choice of law in contract, characterization and a new attitude to private international law” 1987 *SALJ* 4 15.

\(^{161}\) 1924 AD 171.

\(^{162}\) (n 161) 185.

\(^{163}\) Forsyth (n 160) 15.

\(^{164}\) Forsyth (n 160) 15.

\(^{165}\) Forsyth (n 160) 15.


\(^{167}\) 1986 3 SA 509 (D) at 529J-530H.

\(^{168}\) 1983 2 SA 138 (C).

\(^{169}\) See, for example, *Ex parte Spinazze* 1985 (3) SA 633 (A) at 665H, where Corbett CJ refers to “the system with which the contract had its closest and most real connection”. See also *Society of Lloyd’s v Price; Society of Lloyd’s v Lee* 2006 (5) SA 393 (SCA).
Despite the approach in the *Standard Bank* case still standing, there seems to be a growing trend in favour of adopting the “closest and most real connection” test.\(^{170}\)

Recent case law advocates two approaches in assigning the appropriate law to govern the contract.\(^{171}\) In the *Laconian* case, the court, after weighing all the relevant factors, had found that the contract pointed to English law as the proper law.\(^{172}\) Neels and Fredericks identify a number of factors that may be relevant in this regard, *inter alia* the factors include: the place of performance (*locus solutionis*); the place of conclusion of the contract (*locus contractus*); the place of offer; the place of acceptance; the place of agreed arbitration; choice of jurisdiction; domicile of the parties; the place where the parties carry on business; the nationality of the parties; the form, terminology, and language of the contract.\(^{173}\) These factors according to Neels and Fredericks are not simply to be countered in ascertaining the proper law.\(^{174}\) Instead weight should be attached to these factors in arriving at the correct result, pointing out that the *locus solutionis* as being considerably more important than some of the other factors.\(^{175}\) However, where these factors do not point to any particular legal system or point equally to more than one system, a lack of certainty remains and the second approach might be a more viable one.\(^{176}\)

Here the court would refer to the *lex loci solutionis* as the default rule in determining the proper law unless the contract is substantially closer connected to another legal system, taking into account all factors of the contract.\(^{177}\) It seems then, that the *locus solutionis* is afforded considerable weight by the court.\(^{178}\) As discussed below, this cannot be a satisfactory solution in all cases.\(^{179}\) In an international contract of sale, performance would be required from both parties, and it may very well mean that the seller has to deliver and the buyer has to pay in


\(^{171}\) Neels and Fredericks “The music performance contract in European and Southern African private international law” (part 2) 2008 *THRHR* 529.

\(^{172}\) *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 3 SA 509 (D) at 529J-530H.

\(^{173}\) Neels and Fredericks (n 171) 529.

\(^{174}\) Fredericks and Neels (n 170) 69.

\(^{175}\) Fredericks and Neels (n 170) 69.

\(^{176}\) See *Guggenheim v Rosenbaum* 1961 4 SA 15 (W) 31D-G.

\(^{177}\) Neels and Fredericks (n 171) 529.

\(^{178}\) Forsyth (n 166) 311.

\(^{179}\) Forsyth (n 166) 307-308.
In this case the *locus solutionis* in respect of delivery will differ from the *locus solutionis* in respect of payment. There are two possible principles, namely the scission and unitary principle that have been referred to in this regard. The former principle has seen much application by our courts. In terms of the scission principle, the court has to determine each party’s performance. The principle purports that the proper law of the *locus solutionis* in respect of delivery will differ from that of the payment. This approach has seen support in *Laconian Maritime Enterprises Ltd v Agromar lineas Ltd*, where Booysen J held that the scission is a “necessary and welcome” principle, since some cases could not possibly point to a single system. However, the scission principle seems inadequate and tends to complicate matters by referring to more than one system of law to govern the same contract. It is submitted, and correctly so, that the obligations of each party are always closely linked, and therefore should be governed by the same law. The unitary principle which asserts one proper law should govern the entire contract was adopted by Grosskopf J in *Improvair Cape (Pty) Ltd v Establishments Neu*, where he voiced his disapproval of the scission principle as follows:

“In *Efroiken’s case supra at 188-9 and Shacklock v Shacklock 1948 (2) SA 40 (W) at 51 appear suggestions to the effect that a single contract would or might be governed by different proper laws merely because there are more than one *locus solutionis*. If this is the true meaning of these dicta which were *obiter* only, I am in respectful disagreement therewith.”

It is suggested however, where parties are bound to perform in different places the *locus solutionis* is of little use, as the different places of performance will tend to cancel each other out. Despite this, Neels and Fredericks argue that the *locus solutionis* is still to be taken into account with other supporting factors of the contract in determining which one should be the proper law of the contract. In circumstances where factors are evenly divided, there seems to be support for both the place of payment enjoying preference as well as the argument that the *locus solutionis* in respect of delivery should have preference. Van Rooyen is in support of

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180 Van Niekerk and Schulze (n 14) 65.
181 Neels and Fredericks (n 171) 529.
182 Forsyth (n 166) 311.
183 1986 3 SA 509 (D) 529. See also, *Standard Bank v Efroiken and Newman* 1924 AD 171 at 188.
184 Neels and Fredericks (n 171) 529.
185 Forsyth (n 160) 16.
186 1983 2 SA 138 (C) 147.
187 Forsyth (n 166) 312.
188 Fredericks and Neels (n 170) 70.
189 *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 3 SA 509 (D).
190 *Maschinen Frommer GmsH & Co KG v Trisave Engineering & Machinery Supplies (Pty) Ltd* 2003 6 SA 69 (C).
the unitary principle but states that in these circumstances, one is left with little choice but to apply the scission principle. Another approach based on an obiter dictum in the *Lacoonian* case, purports that all relevant factors are to be considered, while the place of payment has priority over the place of the characteristic performance in circumstances where the *locus solutionis* does not indicate an obvious choice. The decision in the *Maschinen* case however, favoured the law of the country of characteristic performance.

8. **Comparison**

It was no overstatement when Frederic Harrison expressed his view of the importance of private international law when he said:

“It starts unexpectedly in any court and in the midst of any process. It may be sprung like a mine in a plain common law action, in any administrative proceeding, in equity or in a divorce case, or a bankruptcy case… The most trivial action of debt, the most complex case of equitable claims, may be suddenly interrupted by the appearance of a knot to be untied only by Private International Law.”

From local Chinese enterprises expanding globally to international sales contracts becoming the order of the day in Russian life, it remains the role of private international law to move with the times and provide suitable rules to meet the needs of modern trade. It is true that international trade law and aspects of private international law are not only influenced by economic factors but also historical, political and ideological considerations. With these factors in mind, one would be hard pressed to find a coalition as diverse as the BRICS group. It stands apart from other more conventional coalitions, by not having any political, economic or cultural links. Its members are situated on four different continents and their level of development varies. To add to this, the private international law systems within the BRICS group are further divided into two divergent legal families. With Brazil, Russia and mainland China all classified as civil-

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192 *Lacoonian* at 529 e-f.
193 Neels and Fredericks (n 171) 530.
194 (n 190). Also see Neels and Fredericks (n171) 530: this method is in line with the Restatement 2nd in terms of contracts of sale, restatement 2nd being the majority approach in the USA, which is significant because the USA is South Africa’s second biggest trading partner.
195 Govindaraj (n 92) 1.
197 (n 4).
198 (n 4).
199 De Cruz (n 196) 32.
law systems, while India and Hong Kong fall into the common-law regime, together with South Africa who is classified as a mixed system as far as private international law is concerned but is comparable to the common-law system. Therefore, any thought of the unification of choice of law rules in their respective private international law systems seems a pipe dream at best.\textsuperscript{200} However, one should look no further than the developments that have taken place on the European continent to see that the harmonization of elements of different systems are not unattainable.\textsuperscript{201} For someone ambitious enough to suggest that harmonization of choice of law rules within the BRICS group is not out of the realm of possibility, a considerable amount of compromise and reform would have to be involved, as pronounced by the different methods of dealing with ‘absence of choice’ in the various countries of the BRICS group.

From the outset, it is quite clear that the Brazilian system stands apart from the other members of BRICS on this issue. Before choice of law rules in Brazil can be addressed, the Brazilian legislature together with the courts needs to clarify the position with regard to party autonomy. As previously stated, the principle is well-established in most jurisdictions, and accordingly, the sooner party autonomy is fully recognized in Brazil, the better it would be for the modernization of its choice of law system. Brazil is moving in the right direction however, with party choice of law now permitted in arbitration proceedings, which shows that Brazil is finally beginning to understand the importance of allowing parties freedom of choice. Nevertheless, Brazil has a long way to go before their choice of law rules are anywhere close to conforming to any other member of the BRICS group.

There are a number of similarities in the development of the Russian and Chinese private international law systems. Both countries, in realizing the need to respond to modern international life, have recently placed a considerable amount of emphasis on reforming their private international law systems. As a result, their choice of law rules are still very much in its infancy, with both Russian and Chinese courts still inexperienced in dealing with international issues.\textsuperscript{202} Russian law makers have opted to use the Rome model to quite an extent, as a result of

\textsuperscript{200} Govindaraj (n 92) 7.
\textsuperscript{201} De Cruz (n 196) 32.
\textsuperscript{202} Zhengxin (n 115) 170.
it being less problematic and user friendly in its application. The position in China is a bit more complicated and there remains a fair amount of uncertainty in spite of the introduction of the Law on the Application of Laws of 2010. Art 41 of the Code is ambiguous in its current form and to add to this, there is the fact that it needs to be read in conjunction with the Supreme People’s Court Guideline which further complicates matters. Chinese legislators should follow their Russian counterparts in not straying too far from the Rome template in clarifying its choice of law approach. Nonetheless, both the Russian and the Chinese Code makes mention of the “closest connection” and “characteristic performance” test. As we have seen, the Chinese Code fails to state the order of preference in application of the test. One can only speculate that its drafters intended the characteristic performance test to be applied first. The Russian Code however, seems to follow a more conventional approach, similar to that of the Rome model.

Art 1211 (3) of the Russian Code and Art 5 (2) of the Chinese Guideline then provides a list of presumptions to be applied in particular instances. With regard to an escape device, the Chinese Guideline makes specific reference to an escape option in respect of applying the presumptions, whereas the Russian Code fails to have a specific escape clause. However, as stated before, it seems as though Art 1211 may be construed as captulating an escape devise. While the influence of the Rome Convention has served Russia well in bringing some certainty of law, the Chinese choice of law system in its current state is unclear and it remains an unenviable task to predict in which direction a court would sway in its application of the relevant choice of law provisions.

The members of the BRICS group that fall within the common-law regime include India and Hong Kong with South Africa being classified as a mixed system as far as private international law is concerned, but is comparable to the common-law system. What is evident from the discussion of both Indian and Hong Kong private international law is the absolute adherence of their courts in applying the rules inherited from the traditional English private international law

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203 Neels (n 132) 5.
204 Guangjian Tu and Muchi Xu (n 133) 179.
205 Neels (n 132) 5.
206 Badykov (n 72) 270.
207 Badykov (n 72) 279.
208 Guangjian Tu and Muchi Xu (n 133) 187.
system. Both jurisdictions have shown their apprehension in taking reformist measures in their respective choice of law systems. It seems hard to justify this stance, especially of the fact that the common-law system leads to a fair amount of uncertainty and unpredictability of law. Seeing that one of the main pillars of the rule-of-law concept is predictability, legal certainty should be foremost in the minds of courts in these jurisdictions when applying their choice of law rules. Nevertheless, both Indian and Hong Kong choice of law systems turn to the closest and most real connection test as a method of determining the proper law of the contract in instances where parties have failed to make a choice as such. In approaching this test, the courts had previously placed a considerable amount of weight on the *lex loci contractus* as being the law of closest connection. It was believed that if a contract was concluded in a particular place, the law of that place should govern the contract in the absence of choice of law. Another presumption that the common-law courts favoured in the application of the closest connection test was the *lex loci solutionis*. As we have seen, these presumptions have since fallen out of favour, especially because in modern international transactions, the law of the place of contracting may be fortuitous and therefore not count for anything, while the law of the place of performance in respect of payment will in most instances cancel the law of the place of delivery. As a result, the *locus contractus* and the *locus solutionis*, although still important, are not as decisive as they once were. The approach followed in practice today by courts in India and Hong Kong is to take all factors into account in determining which system of law is the closest and has the most real connection to the contract without recourse to any particular presumptions. The closest connection test currently applied in these jurisdictions allow the courts too much flexibility and invariably leads to a lack of predictability in its application. This is especially true in the developing jurisdictions of India and Hong Kong where clarity and ease of application are essential. The position in South Africa is slightly different from that of the pure common-law approach of Hong Kong and India. Recent case law in South Africa also favours the closest connection test as a method of determining the proper law of the contract in

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209 Govindaraj (n 121) 10; Johnston (n 147) 188.
210 Wolff (n 127) 471.
211 See Shankar v Manilal AIR 1940 Bom 799.
212 (n 151).
213 Van Niekerk and Schulze (n 14) 64; National Thermal Power Corporation v Singer Company (n 112).
214 Wolff (n 127) 471.
215 Neels (n 132) 4.
the absence of a choice.\textsuperscript{216} South African academics are of the opinion that there is a growing trend of the courts in favour of adopting this approach, despite being bound by the earlier decision of the Appellate Division.\textsuperscript{217} In applying the closest connection test, two approaches have been preferred by the courts. The first approach is identical to the position under Hong Kong and India, where the court takes all relevant factors of the case into account in ascertaining which system of law has the closest connection.\textsuperscript{218} However, this approach is problematic as it leads to a considerable amount of uncertainty. The second approach, and one that provides a bit more clarity, refers to the \textit{lex loci solutionis} as the default rule, unless the contract is substantially connected to another legal system.\textsuperscript{219} One problem that might arise in applying the \textit{lex loci solutionis} as the default rule is that in international cases, the place of delivery and the place of payment would in most instances occur in different countries. Neels and Fredericks argue that the \textit{locus solutionis} is still to be taken into account, together with other supporting factors in respect of the contract, in determining which law should be the proper law of the contract.\textsuperscript{220} In circumstances where the closest connection remains indeterminable, there is support for either of the performances to enjoy preference.\textsuperscript{221} Common-law courts tend to prefer applying the \textit{lex loci solutionis} in respect of the characteristic performance and one would think that this approach, as supported by the \textit{Maschinen} case, should be the approach that the courts could in future cases indicate as the \textit{lex loci solutionis} that has the more real connection to the contract.\textsuperscript{222} The \textit{lex loci solutionis} as a default rule does not rid itself of all the uncertainty created by the traditional closest connection test still applied under the Indian and Hong Kong systems, but it nevertheless improves predictability and thus legal certainty while still recognizing the need to address special circumstances in certain cases.\textsuperscript{223}

\textsuperscript{216} (n 167); Forsyth (n 160) 15. See also, \textit{Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd} 1986 (3) SA 509 (D).
\textsuperscript{217} Fredericks and Neels (n 170) 67.
\textsuperscript{218} Neels and Fredericks (n 171) 529.
\textsuperscript{219} See \textit{Guggenheim v Rosenbaum} (n 176).
\textsuperscript{220} Fredericks and Neels (n 170) 69.
\textsuperscript{221} (n 189); (n 190).
\textsuperscript{222} Neels (n 132) 4.
\textsuperscript{223} Wolff (n 127) 471.
9. Concluding Remarks

The one commonality shared by the members of the BRICS group is that none of their private international law systems are anywhere near complete. Much work has to be done, especially in regard to their choice of law systems, in order for them to be able to cope with and provide the suitable clarity and certainty required in modern international trade. All five members of the group, albeit at different levels of development, are rapidly developing nations and in the midst of experiencing significant growth in international trade. With Chinese businesses leading the way in trade and industry, South Africa being the dominant player in Africa and essentially holding the key to the continent and the international community showing a considerable interest in Brazil, Russia and India, the need to have a settled private international law system in place to deal with the complexities of international transactions becomes even more apparent.

The private international law systems within the BRICS group diverge into distinct legal families. This inevitably brings with it rather substantial dissimilarities in respect of how these jurisdictions approach choice of law issues. Notably, Brazil’s choice of law system lags behind the other members of the group, as a result of their reticence in accepting party autonomy. The absence of choice rules applied in the traditional common-law jurisdiction of Hong Kong and India remains somewhat uncertain and unpredictable due to the openness of the closest connection test. The approach that the South African courts should apply is unclear at present. However, if given the opportunity to clarify the position, the courts should adopt the approach that sees the *lex loci solutionis* as the default rule. This would, at the very least, clear up some of the uncertainty of the pure closest connection test. The absence of choice method as pronounced in the Russian Civil Code, if it is to be similarly interpreted as the Rome model, provides the most certainty and may prove to be the most successful approach in any of the BRICS countries in practice.

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224 (n 6).
225 (n 1).
226 Neels and Fredericks (n 171) 529.
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