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**PARTY AUTONOMY IN BRAZILIAN AND SOUTH AFRICAN
PRIVATE INTERNATIONAL LAW OF CONTRACT**

BY

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INTRODUCTION

The principle of party autonomy enables parties in a contract to choose the proper law of their contract.¹ The proper law of a contract is the law applicable to a contract or the law that governs the contract.² As defined by Symeonides, “party autonomy is a shorthand expression for the principle that parties to a multistate contract should be allowed, within certain parameters and limitations, to agree in advance on which law will govern the contract.”³ Party autonomy is widely accepted and recognized in almost every legal system.⁴ The principle has been incorporated in international conventions such as the CISG, Rome convention, Rome I regulation and also in international principles such as the UNIDROIT and Hague principles.⁵

The doctrine of party autonomy has its origins in the 19th century, being advocated through the need of ensuring certainty in contractual matters. By the 20th century the doctrine had been incorporated into most legal systems. In 1955 through the ratification of the CISG most civil law systems had accepted the doctrine.⁶ The Rome convention 1980 expressly outlined the principle of party autonomy in article 3; the article was not only accepted in Europe but also in Egypt, Israel and Japan.⁷ Several years later in 1994 the Mexico convention also embraced the principle in article 7. By the 21st century

¹ De Villiers “Limitations on party autonomy in the context of cross-border consumer contracts” 2013 *South African Law Journal* 478 478; Walsh “The uses and abuses of party autonomy in international contracts” 2009 *University of New Brunswick law journal* 12 30 <http://www.thefreelibrary.com/The+uses+and+abuses+of+party+autonomy+in+international+contracts.-a0237838570> (3-09-2015).

² Fredericks and Neels “The proper law of a documentary letter of credit (part1)” 2003 *South African Mercantile Law Journal* 63 64.

³ Symeonides *Codifying Choice of Law around the World: An International Comparative Analysis* (2014) 110.

⁴ Lando “Consumer contracts and party autonomy in the conflict of laws” 1972 *Nordisk Tidsskrift Int'l Ret* 208 208; Rabel *The Conflict of laws: A Comparative study* (1960) 370 <http://heinonline.org> (05-8-2015) and Forsyth *Private International Law: The Roman-Dutch Law including the Jurisdiction of High Courts* (2012) 320.

⁵ United Nations Convention for the International Sale of Goods (CISG) www.uncitral.org; Rome convention on the Law Applicable to Contractual Obligations 980/934/EEC) 1980 Article 3 states that a contract shall be governed by the law chosen by parties <http://euro-lex.europa.eu>; UNIDROIT Principles of International Commercial Contracts 2010 www.unidroit.org; Hague Principles on Choice of Law in International Commercial Contracts 2015 www.hcch.net; see also Regulation (EC) on the Law Applicable to Contractual Obligations [Rome I] 2008 <http://eur-lex.europa.eu>.

⁶ Article 2 provides that the contract of sale will be governed by the internal law of the country selected by parties.

⁷ Nygh *Autonomy in International Contracts* (1999) 12-14.

it is possible to say that the principle is universally accepted. Instruments such as the Rome I regulation 2008, UNIDROIT principles 2010 and Hague principles 2015 came into force showing the continued support for the doctrine. There are only a limited number of countries that are yet to embrace the principle of party autonomy.⁸

The principle of party autonomy is used to determine the law applicable to contracts.⁹ It is of paramount importance for parties in an international contract to choose the applicable law of their contract. As pointed out by several authors party autonomy is one of the cornerstones of the conflict of law rules in contractual matters.¹⁰ Parties may wish to select the law applicable to their contract for any number of reasons being, the neutrality of the law, the developed nature of the law, convenience or suitability of the law.¹¹ A legal system may be selected based on its compatibility with the agreement; hence parties in a sales contract may agree on the CISG as the law governing the contract. Contracting parties may also choose a law based on the fact that it is common to both of them and they are familiar with it. Sometimes parties select the law of the country with jurisdiction over the contract which bolsters convenience.

⁸ Albornoz "Choice of law in international contracts in Latin American legal systems" 2010 *Journal of Private International Law* 23 some Latin American countries such as Uruguay, Chile and Argentina do not accept the principle.

⁹ Zhang "Party autonomy and beyond: an international perspective of contractual choice of law" 2006 *Emory International Law Review* 511 545.

¹⁰ Siehr "International contracts , party autonomy and mandatory rules" 2014 *Revue Hellenique de Droit International* 801 802; Wethmar-Lemmer "Party autonomy and international sales contracts" 2011 *Journal of South African Law* 431 431; Mandery "Party autonomy in contractual and non-contractual obligations: a European and Anglo common law perspective on the freedom of choice in the Rome I regulation on the law applicable to contractual obligations and the Rome II regulation on the law applicable to non-contractual obligations" Frankfurt/main academic research 2014 www.peterlang.com/download/extract/81271/extract-265321.pdf (05-8-2015).

¹¹ Ruhl "Party autonomy in the private international law of contracts: transatlantic convergence and economic efficiency" 2005 Comparative Research in Law and Political Economy Research Paper no 4/2007 33; Zhang (n9) 560 and Schafer *Application of Mandatory Rules in the Private International Law of Contracts: a Critical Analysis of Approaches in Selected Continental and Common Law Jurisdictions, with a View to the Development of South African Law* 2010 61 <http://hdl.handle.net/11427/11036> (24-09-2015) "It promotes certainty, lowers transaction costs, avoids the sometimes difficult task of determining the law applicable by reference to various factors, protects justified expectations, and ensures predictability of results and convenience."

The principle of party autonomy (the principle) provides legal certainty, predictability, and protection of parties' expectations and promotes free and efficient trade in international contracts.¹² Marshall highlights that:

“...in contracts, there is but one basic policy, namely protection of the expectations of the parties, including those expectations as to choice of law. Predictability in choice-of-law is served, and party expectations are protected, by giving effect to the parties' own choice of the applicable law (party autonomy) where they have expressly or tacitly made a choice.”¹³

Nygh mentions that legal certainty is imperative for international contracts and allowing the court to determine the applicable law leads to uncertainty.¹⁴ When parties choose the law applicable to their contract, then certainty is ensured. There is no need to check for connecting factors which may lead to a determination of the applicable law when party autonomy prevails. Thus party autonomy leads to a more expeditious rendering of court decisions.

Different legal systems regulate party autonomy differently. As determining the proper law varies according to states, the same transaction may be governed differently depending on the legal system regulating it.¹⁵ Thus it is important to know how legal systems apply the principle. This paper's focus is on how the principle is applied in the South African and Brazilian private international law of contract. Before discussing party autonomy, the author will provide a brief overview of the separate legal systems under discussion.

¹² Zhang (n9) 512,553; Forsyth (n4)319 “ The chief advantage of upholding party autonomy is that it lends certainty to the contract and avoids the difficult and unpredictable task inevitably associated with localizing a contract with a number of international contracts, and no choice of law.”

¹³ Marshall “Reconsidering proper law of contract” 2012 *Melbourne Journal of International Law* 505 508.

¹⁴ Nygh (n7) 2-3.

¹⁵ Ruhl “the problem of international transactions: conflict of laws revisited” 2010 *Journal of Private International Law* 59 73.

SOUTH AFRICA

South Africa is a common law system that is based on Roman Dutch law and English law. There is no single codification that regulates private international law. The sources of conflict rules are found in South African constitution, legislation, case law and authors, Roman Dutch authors, foreign authors and case law, English private international law as a direct source, and international conventions and model laws.¹⁶

Party autonomy

In South African private international law parties may choose the proper law of their contract expressly, tacitly or the court may assign the governing law to contract.¹⁷ The principle of party autonomy gives parties the freedom to replace all or part of the *ius dispositivum* (system's rules of contract that parties may alter) and define the rules they will be bound by and cannot replace.¹⁸ The South African system generally accepts the principle without difficulties. This is evidenced by several court decisions recognizing party autonomy.¹⁹ In *Creutzburg v Commercial Bank of Namibia Mpati AP* asserts that:

“The expression proper law of a contract has been used to indicate the appropriate legal system governing an international contract as a whole or a particular issue raised by the

¹⁶ *S v Banda* 1989 (B), it was held that a court may take judicial notice of international conventions, including those to which South Africa is not a party; S 39(1) (b) of the Constitution; S 6(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983, English law (including English private international law) applies to all matters over which the Colonial Courts of Admiralty previously had jurisdiction, while South African law applies to all other admiralty matters; Courts frequently refer to authors such as Van Niekerk and Neels.

¹⁷ Forsyth (n4)316 the law to govern a contract in South African private international law is either the law chosen by the parties or in the absence of choice, the law that is mostly connected to the contract or the law they are presumed to have intended to govern their contract; Fredericks and Neels (n2) 64; Rabel (n4)365.

¹⁸ Forsyth (n4) 317; Nygh (n7) 1; Van Niekerk “Choice of foreign law in South African marine insurance policy: an unjustified limitation of party autonomy?” 2011 *Journal of South African Law* 159 167.

¹⁹ *Guggenheim v Rosenbaum* 1961 4 SA 21 (W) 31A “our proper law of the contract is the law of the country which parties have agreed or intended to govern it”; *Improvair Cape (pty) Ltd v Establisments Neu* 1983 2 SA 138 145B where there is an express choice there is no difficulty in finding that the agreed system constitutes the proper law of the contract.

contract, and where parties have made an express choice of law to govern a contract their choice should be upheld.”²⁰

The freedom that parties enjoy in selecting the proper law of the contract is even justified by the constitutional values of freedom, equality and dignity as explained by Olivier AR.²¹ One can argue that autonomy is hardly limited; there is no reasonable bar to its existence especially in international contracts but only reasons to support its application.²²

Ancillary aspects of party autonomy

The law chosen by parties does not have to be connected to the contract. As commented on by Oppong in the study of private international law in selected African countries, there is no express requirement that there must be a connection between the system and the choice of law made by parties.²³ Van Niekerk outlines that:

“it used to be thought that the parties’ choice of a legal system totally unconnected to them or their contract (often called a “third legal system”) should not be given effect to, on the basis that it is presumably not one made in good faith. However, courts have come to realize that there may be sound commercial reasons for choosing an unconnected, neutral system, one that may be more developed or suitable to regulate the parties’ relationship and one that will not even raise the suggestion of favoring either one of them over the other.”²⁴

One can say that selecting an unconnected law is part of the benefits of party autonomy. This is also the position of the Hague principles which provides that no connection is required between the law chosen and the parties or their transaction.²⁵ Therefore parties are free to choose a law that does not have any connection to the contract.

²⁰ 2006 4 All SA 327 SCA 330; Forsyth 4ed 304; Joubert LAWSA 2ed 2 328.

²¹ *Brisley v Drotzky* 2002 4 SA 1 28.

²² Forsyth (n4) 320.

²³ Oppong *Private International Law in Commonwealth Africa* (2013) 135.

²⁴ Van Niekerk (n18) 166-167.

²⁵ Article 2(4).

Parties can choose different laws to govern different sections of their contract. This is the rule of *dépeçage* (severance/scission).²⁶ The rule is clearly stated in article 2(2) of Hague principles which state that parties may choose the law applicable to the whole contract or to only part of it and different laws for different parts of contract. In *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* the court outlined that:

“...the fact remains this scission principle has been approved to an extent in a number of decisions...²⁷if one accepts the approach that in the absence of a super-law we are merely dealing with conflicts between legal rules seen to be potentially applicable and not legal systems or parts of legal systems, then scission is a necessary and welcome principle...”²⁸

However, as discussed by Adams, the application of this rule is not definite in the South African private international law.²⁹ Van Niekerk and Schulze support the view that parties may choose several applicable laws whilst Fredericks and Neels suggest that there should only be one applicable law to govern the contract.³⁰

A choice of law should be expressly made. Parties should make a clear assertion that they require a specific law to govern their contract. The choice may be modified at any time as long as it does not prejudice the contracts formal validity and rights of third parties.³¹ Also, in as much as a tacit choice would be enforced it is recommended that the choice expressed. Including a choice of law clause in the contract would be wise. One should also note that a choice of court does not necessarily mean a choice of law.

²⁶ “The separation of the elements making up the legal situation in order to subject them to the application of several different sets of rules.” Permanent Bureau of The Hague conference 2012 “Consolidated version of the preparatory work leading to the draft Hague principles on choice of law in international contracts” 17 <http://www.hcch.net> (03-09-2015).

²⁷ *Shacklock v Shacklock* 1948 2 SA40 W 41, 1949 1 SA 91 A; *Executors of Muter v Jones* 1860 3 Searle 356 358-359; *De Wet v Browning* 1930 TPD 411.

²⁸ 1986 3 SA 509 D 529B-E.

²⁹ Adams “The compatibility of Australian and South African private international law with the Hague principles on choice of law in international commercial contracts” (2013 dissertation UJ) 14.

³⁰ Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2011) 61; Fredericks and Neels (n2) 70 “As the obligations of parties are naturally always closely connected, their contractual relationship should be governed by one proper law. The scission principle complicates matters by making more than one legal system applicable to the same contract.”

³¹ Article 2(3) of Hague principles. Even though there is no precedence in South Africa in support of modifying the choice, according to English law which has persuasive force in South Africa modification is possible. However, this is open for debate.

Even though a choice of court would be used as a connecting factor, if parties want the laws of the court of jurisdiction to apply they should expressly state so. Therefore, in order for a choice of law to be enforced it should be clearly outlined.

The choice of foreign law should be readily be ascertainable. In *Kwikspace Modular Buildings Ltd v Sabodala Mining Co SARL and Another*, parties had chosen Western Australian law and the court held that Australian law was applicable on the basis that it was readily ascertainable with sufficient certainty.³² Van Niekerk and Schulze point out that, “where the foreign law is not readily ascertainable, or the parties have provided no or insufficient proof of it – a local court will despite even a clear choice of foreign law, as a result nevertheless apply south African law.”³³ In *Asco Carbon Dioxide Ltd v Lahner*, parties to suretyship contract had chosen Swiss law as the applicable law but the court had to apply South African law because the claimant failed to prove contents of the Swiss law in regard to suretyship agreements.³⁴ Therefore for a choice to be enforced the contents should be readily ascertainable with sufficient certainty.

Limitations of freedom of choice

In spite of the almost unrestrictive nature of party autonomy South African private international law also recognizes the limitations of party autonomy. The principle of party autonomy does not go without limitations, hence legal systems themselves provide for the limitations and or restrictions.³⁵ Van Niekerk asserts that limitations will be applied when a choice is meaningless or practically incapable of implementation, there are mandatory rules, and there are matters which fall outside the scope of a choice of proper law and where a choice is made fraudulently.³⁶ Mandatory rules limit the parties’ freedom to select the applicable law.³⁷ These are absolute laws that override bilateralism, serving to protect the public interest and weaker parties to a contract and they cannot be altered nor be replaced by an agreement by parties through

³² 2010 6 SA 477 SCA.

³³ Van Niekerk and Schulze (n30) 59.

³⁴ 2005 3 SA 213 N.

³⁵ Van Niekerk (n18)166.

³⁶ Van Niekerk (n18) 166.

³⁷ De Villiers (n1) 478 “Mandatory rules are one of the methods employed by states to limit party autonomy”; Fredericks and Neels (n2) 64.

a choice of law.³⁸ These are important norms that cannot be avoided; they will always be final or absolute. Lewis JA explicitly outlined that complete party autonomy cannot prevail over the peremptory provisions of a statute, especially where the action is brought in terms of the statute.³⁹ Schafer distinguishes between different kinds of mandatory rules.⁴⁰ Mandatory rules can either be domestic or international statutory provisions. The international mandatory rules are considered to be ‘more mandatory’ than domestic mandatory rules hence parties to a contract cannot exclude them even if they choose the proper of law.⁴¹ Parties may not choose a law with the intention of evading the peremptory laws of the law that was supposed to be applicable. If they do so their chosen law would be disregarded. A *mala fide* choice designed to avoid the application of mandatory rules of an otherwise applicable law will lead to a limitation in party autonomy.⁴²

Mandatory rules are contained in legislative provisions.⁴³ Forsyth explains that the *ius cogens* that cannot be excluded are laws provided by statutes that will apply whether or not parties have made a choice.⁴⁴ These mandatory rules can perhaps be found in almost any piece of legislation but the most prominent pieces of legislation containing mandatory rules would most likely be the Consumer Protection Act, National Credit Act, Short-Term Insurance Act, Electronic Communications and Transactions Act, Merchant shipping act, Credit Agreements Act, Basic Conditions of Employment act, Carriage of Goods by Sea Act and Labour Relations act.⁴⁵ The Constitution of the Republic of South Africa also gives provisions that inevitably have an impact to the private international

³⁸ Nygh (n7) 199.

³⁹ *Representative of Lloyds v Classing Sailing Adventures* 2010 5 SA 90 SCA 96.

⁴⁰ Schafer (n11) 11 “These rules differ in the following respects:

- (1) Their nature as mandatory rules in a domestic or international sense,
- (2) Their origin, viz. the enacting country,
- (3) Their classification as rules of a public or private law nature, and
- (4) Whether the rule is applied as a rule or considered as factum.”

⁴¹ Schafer(n11) 12.

⁴² Beaumont *Private International Law* (1990) 267.

⁴³ It should be noted that it is not always that a South African statute will apply to matter where parties had chosen the proper law even if the court of jurisdiction is in South Africa. See Forsyth (n4) 12-14.

⁴⁴ Forsyth (n4) 321.

⁴⁵ 34 of 2005; 68 of 2008; 53 of 1998; 25 of 2002; 57 of 1951; 75 of 1980; 3 of 1983; 1 of 1986; 66 of 1995.

law of the state.⁴⁶ The application of these statutes can render a contract that is otherwise legal and valid under the proper law of that contract illegal or unenforceable.⁴⁷ Mandatory rules are therefore a limitation on the principle of party autonomy.⁴⁸

One of the specific or crystallised instances in which party autonomy is limited is with regard to consumer contracts. The need to protect consumers is more pronounced as applying the normal rules of choice of law may work to the consumers' detriment.⁴⁹ The Consumer Protection Act aims at promoting fair business practices, protecting consumers from unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices and deceptive, misleading, unfair or fraudulent conduct etc.⁵⁰ The act provides that it applies to every transaction occurring within the republic, unless it is exempted by subsection (2) or in terms of subsection (3) and (4).⁵¹ In electronic contracts an agreement made to exclude consumer protection provisions provided for by the Electronic Communications and Transactions Act will be null and void.⁵² Section 47 on applicability of foreign law states that, "The protection provided to consumers in this Chapter, applies irrespective of the legal system applicable to the agreement in question."⁵³ Buys elaborates on this by outlining that:

"a supplier cannot simply declare (in the governing law clause of its web site use agreement or similar legal document) that its web site and all electronic transactions concluded with the consumer will be governed by the laws of another jurisdiction to escape the duties and obligations detailed in chapter 7."⁵⁴

Thus the application of the chosen law will be limited in so far as the provisions of the act apply to protect consumers.

⁴⁶ Rights that affect international contracts are also contained in the bill of rights. Section 8 provides that the bill of rights applies to all law, and binds the legislature, the executive and the judiciary and all organs of the state. See Forsyth (n4) 19-20.

⁴⁷ Schafer (n11) 290.

⁴⁸ For an in-depth discussion of mandatory rules in South African private international law see Schafer (n11) 290-322.

⁴⁹ De Villiers (n1) 481.

⁵⁰ Section 3(1) purpose and policy of act.

⁵¹ Section 5(1) application of the act.

⁵² Section 48 (non-exclusion provision).

⁵³ Chapter VII (consumer protection sections 42-49).

⁵⁴ Buys *Cyberlaw @SA II* (2004) 157-158 www.cyberlaw.co.za; see also De Villiers "Consumer protection under the electronic communications and transactions act 25 of 2002" (2004 dissertation UJ) 128.

The freedom to choose the law applicable is also limited with regard to employment contracts. This is so because the parties are considered not to have equal bargaining power. Massyn points out that the South African labour court will readily assume jurisdiction and apply South African law as the proper law of contract so as to protect the constitutional rights of employees working in or outside South Africa.⁵⁵ The law of the place of work is favoured by courts as the applicable law of the employment contract. In *Parry v Astral Operations* it was indicated that:

“...employees are too weak to resist a choice of law imposed by the employer. The law of the place of work then becomes normally applicable. Another reason for preferring the law of the place of work is that, as discussed above, protective labour laws are so closely connected to the social order of the state of the forum, that their application is mandatory and independent of the proper law of the contract. The territoriality of labour laws reinforces preference for the law of the place of work.”⁵⁶

In an effort to protect employees, party autonomy is therefore limited.

Another ground for restricting party autonomy is public policy.⁵⁷ Public policy is rules that protect the important social or juridical concepts of the forum and they may sometimes be used to re-enforce mandatory rules.⁵⁸ In as much as parties can exclude the operation of statutory provisions by choosing another system of law, if the exclusion made is contrary to public policy the choice will be struck down. Legislative provisions that protect public policy may apply to a matter regardless of the parties' choice of law.⁵⁹ Van Niekerk point out that, “general provisions may be renounced by the party for whose benefit they were enacted. But they cannot be waived where public policy or interest would be prejudiced by so doing.”⁶⁰ This view is reinforced by the court in the *Representative of*

⁵⁵ Massyn “The employment contract in private international law” (2014 dissertation UJ) 29.

⁵⁶ 2005 26 ILJ 1479 LC 1494 par67C-D.

⁵⁷ Massyn (n55) “south African law allows public policy to be used to bar the application of foreign rules.”; Schafer (n11) 294 “in South Africa, the forum's public policy constitutes an exception to the general rule that the mandatory rules of the proper law must be applied. Mandatory rules that violate the forum's *ordre public* are therefore not applied.”

⁵⁸ Nygh (n7) 206-207.

⁵⁹ Forsyth (n4) 14-16.

⁶⁰ Van Niekerk (n18).

Lloyds v Classic Sailing Adventures case.⁶¹ In determining the application of the English marine insurance act of 1906 and the provisions of the short-term insurance act 53 of 1998 Lewis JA points out that section 54 ensures that policy is not avoided hence parties should not have the discretion to opt out of application of the provisions by choosing a law to govern their contract.⁶² In *South Africa Cooperative Citrus Exchange Ltd v Director General Trade and Industry and Another* in which the Harms JA commented that, "...while that person (party to a contract) may waive compliance with an imperative statutory requirement for whose sole benefit is enacted, yet if the performance of that requirement is invested with any substantial degree of public interest, waiver will be impossible."⁶³ Therefore public policy limits the freedom of choice.



⁶¹ *Representative of Lloyds* case (n39).

⁶² Short-term insurance act; *Representative of Lloyd's* (n39) 97F-G, However, while it is still good law the decision has been heavily criticized especially by Van Niekerk.

⁶³ 1997 3 SA 236 SCA 244.

BRAZIL

Brazil is a civil law state with traces of Portuguese law as it was once colonized by Portugal. From 1916 to 1942 the old introduction to the civil code regulated conflicts of laws matters. Much like the Portuguese civil code, the 1916 code relied on the Napoleonic code and also contained German influences, these influences remain significant although they are of less prominence in the new civil code.⁶⁴ Brazilian private international law scope follows the French orientation. The sources of conflict of law rules are mainly found in the civil code (introductory law). The law of introduction to the Brazilian civil code 1942 replaced the 1916 code and currently there is the new civil code of 2002 regulating private international law issues. Other sources include international agreements and conventions.⁶⁵

Party autonomy

The Brazilian civil code provides for the conflict of law rules but it is not really certain whether freedom of choice to choose the applicable law is present in the legal system. There is no express legislative provision allowing party autonomy but neither is there a provision prohibiting the principle.⁶⁶ As stipulated by Dolinger - the Bustamante code is the main source providing for the application of foreign law in Brazil. Some scholars believe that party autonomy is recognized and subsists.^{67 68} Whilst others such as De

⁶⁴Badcock and Fazio "international issues for Brazilian clients" (2012) <http://www.collyerbristow.com/images/Pdf/PCB-Article.pdf> (24-9-2015).

⁶⁵ Dolinger *Private International Law in Brazil* (2012) 30.

⁶⁶ Vieira "The CISG and party autonomy in Brazilian international contract law" 2013 *Panorama of Brazilian Law* 173 182-183; Boggiano "The contribution of the Hague conference to the development of private international law in Latin America: universality and genius loci." 1992 *Collected Courses of The Hague Academy of International Law*. The Hague Academy of International Law Brill Online 2015 33 http://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/the-contribution-of-the-hague-conference-to-the-development-of-private-international-law-in-latin-america-universality-and-genius-loci-volume-233-ej.9780792324096.099_266 (10-9-2015).

⁶⁷ Dolinger (n65) 126. Article 408 of the code stipulates that the judge and courts of each contracting state shall apply *ex officio*, in suitable cases, the law of the others, without prejudice to the means of proof referred to in this chapter <http://www.oas.org/juridico/english/sigs/a-31.html>.

⁶⁸ Dolinger *Direito Internacional Privado* (1996) 608,611-614,622 (not available to me, see De Araujo and Saldanha (n69) 78; Dolinger (n65) 239 asserts that there is a clear indication in the 1942 code that article 9 is connected to the principle of party autonomy. "It would be absurd that the rule is interpreted one way when it concerns arbitration and another way when it refers to litigation. After all, LICC is the fundamental

Araujo and Saldanha suggest that Brazilian private international law still has to embrace party autonomy in choice of law.⁶⁹ Brazil adopts a territorial and nationalist approach to private international law.⁷⁰ This approach as explained by Albornoz, promotes the application of the law of a state to all the people and activities within its territory. Under the territoriality principle foreign law is only exceptionally applied.⁷¹ Thus Brazil does not readily accept the principle of party autonomy.

Article 9 of the introductory law outlines that, the law that will govern an agreement is that of the place where the contract was concluded in essence the *lex loci contractus*.⁷² It further indicates that where it is not clear where the contract is formed then an obligation resulting from the contract is presumed to be in the country where the proponent (characteristic performer) is based. The provision is expressed as follows:

“In order to characterize and govern the obligations, the law of the state in which they are constituted shall apply. 1- In the event that the obligation 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. 2- The obligation arising from the contract is deemed to be constituted at the place in which the proponent resides.”

This provision does not really provide for party autonomy. Thus it is not absolute that party autonomy is recognized in Brazilian private international law of contract.

The law is clearer when it comes to arbitration as provided by the arbitration act.⁷³ Parties may freely choose the law applicable to their agreement in cases of arbitration. As outlined by Stringer, whilst judges customarily enforce party autonomy in arbitration agreement, the introductory law compels these same judges to invalidate a choice of law whenever the parties fail to realize that Brazil's private international law is far more

guide to the whole civil law and actually to the whole Brazilian system in matters of conflict of laws in time and in space” and Tiburcio “Private international law of Brazil: a brief overview” 2013 *Panorama of Brazilian Law* 1 23.

⁶⁹ De Araujo and Saldanha “Recent developments and current trends on Brazilian private international law concerning international contracts” 2013 *Panorama of Brazilian Law* 73 75.

⁷⁰ De Araujo and Saldanha (n69) 77.

⁷¹ Albornoz (n8) 34.

⁷² Introductory Law to the Civil Code (LICC).

⁷³ Law no 9.307 of 1996.

restrictive outside the arbitration context.⁷⁴ In as much as choice of law clauses are enforced in arbitration, party autonomy is still yet to be absolutely recognized. Stringer further asserts that since there are no court decisions with party autonomy as a direct legal question, one cannot be certain whether courts accept the principle. However, where it comes as an incidental question courts tend to apply the *lex loci contractus* (law of place where contract is concluded) or *lex loci executionis* (law of place where performance occurs) in favour of Brazilian law.⁷⁵ Therefore one can postulate that party autonomy is limited to arbitration.

It should be noted that there have been some developments in the application of the principle in courts. The *Tribunal de Alcada* (before being extinguished), the Sao Paulo State Tribunal of justice and the Rio de Janeiro State Tribunal of Justice gave decisions that upheld the parties' choice of law. Some of the cases in which the principle was accepted are *Case Total Energie do Brasil, S.N.C. and others vs. Thorey Invest Negócios Ltda*, *Case R S Components Ltda vs. R S do Brasil Com. Imp. Exp. Cons. Repr. Ltda* and *Case Dexbrasil Ltda vs. Navisys Incorporated*.⁷⁶

Determining factors in choice of law

As discussed above, it is very unlikely for courts to take into account a choice made by parties. Hence, to determine the proper law of the contract the court will consider factors that connect the contract to the applicable law. As previously stated, in determining the law that will govern a contract Brazilian law is clearly in favour of the *lex loci contractus*. Therefore, in the absence of choice, in order to make a *quasi*-selection of the law parties may conclude the agreement at the desired place. The law of the place of contracting is very relevant in the Brazilian private international law as the law governing

⁷⁴ Stringer "Choice of law and choice of forum in Brazilian international commercial contracts: party autonomy, international jurisdiction and the emerging third way" 2005-2006 *Columbia Journal of Transnational law* 959 977.

⁷⁵ Stringer (n74) 974-976; Vieira (n66) 182; De Araujo and Saldanha (n69) 81 see footnote 25 for cases where courts favoured *lex executionis*.

⁷⁶ 7ª Câmara do 1º Tribunal de Alcada do Estado de São Paulo, Registro N° 00.551794-0. Judgment from September 24th, 2002; 12ª Câmara do 1º Tribunal de Alcada do Estado de São Paulo, AG N° 1.247.070 Judgment from December 18th, 2003, Judgment from June 7th, 2002 Tribunal de Justiça do Estado de São Paulo, 30ª Vara Cível de São Paulo and Decision from March 27th, 2007, 15ª Câmara Civil do Tribunal de Justiça do Estado do Rio de Janeiro, Agravo de Instrumento N° 2007 002.02431 (not available to me, see Vieira (n66) 183.

the contract. Article 9 makes provision for the law of the state where the contract is constituted to be the proper law of contract.⁷⁷ The provision indicates that choice of a foreign law will be enforced in Brazil if the agreement resulting in the contract was concluded in that foreign state. Parties wishing to have their choice govern their contract should therefore make sure they conclude their contract in the particular state.

There should be a connection between the law and the contract. Despite the contract being concluded in a particular state, when the obligations arising from the contract are to be performed in Brazil, then Brazilian law will be the proper law of the contract. Brazilian law will always be applicable to contracts performed in Brazil.⁷⁸ Garland further comments that the Brazilian courts apply Brazilian law without considering any other possible choice of law.⁷⁹ He further asserts that as long as Brazil has a substantial connection with the contract either as place of performance or place of contracting the courts apply Brazilian law.⁸⁰ Thus for a foreign choice of law to be enforced, the contract should have less connection to the Brazilian law and have a strong connection to the parties choice.

Including arbitration clause will ensure that the choice of law made by parties in that agreement will be upheld. Parties to an international contract should submit disputes to arbitration for their choice of law to be recognized. The principle of party autonomy is recognized in an arbitration agreement. This is provided by article 2 of the arbitration act which stipulates that, “arbitration will be based on law or equity, according to the wish of the parties. 1- 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.”⁸¹ The parties may also stipulate that the arbitration shall be conducted under general principles of law, customs, usages and the rules of international trade.⁸² Thus arbitration rules comply with international standards given in article 2 of the Hague Principles.⁸³ The freedom to choose the

⁷⁷ Garland *American Brazilian Private International Law* (1959) 52.

⁷⁸ Garland (n77); Dolinger (n65) 236.

⁷⁹ Garland (n77).

⁸⁰ Garland (n77) 53.

⁸¹ (n73).

⁸² Article 11 the arbitral agreement may also contain...the choice of the national law or the corporate rules to be applied to the arbitration as per agreement of the parties.

⁸³ (n5)

applicable law in arbitration is also evidenced by conventional instruments adopted by Brazil under the Brazilian legal order.⁸⁴ Araujo and Saldanha point out that until the law of introduction is revised, party autonomy will be limited to contracts subject to arbitration proceedings.⁸⁵ Therefore it will be wise for parties in an international contract to submit to arbitration for their choice of law to be enforced in Brazil.

In cases where parties concludes a contract through negotiations expressly point out who the proponent and its domicile. The party who advocates in favour of the contract is presumed to be the proponent. The proponent is the one with characteristic performance. Dolinger explains that this refers to a situation where parties conclude a contract through negotiations whilst in different countries.⁸⁶ As provided for in article 9(2), obligation of a contract is presumed to be at the place in which the proponent resides. If it is outlined who the proponent is then the law of the place of his residency will govern the contract.

Selecting the Convention for the International Sale of Goods (CISG) to govern the contract is another way of ensuring that the parties' choice will be upheld. As from 1 April 2014 Brazil ratified the CISG through promulgation by the Presidential Decree No 8,327/2014 hence it can be selected by parties as law governing their contract.⁸⁷ As the CISG applies to contracts for the sale of goods, parties entering into an international sales contract can therefore enjoy autonomy.⁸⁸ The CISG will apply to international sales contracts entered into by Brazilians and parties from other states subject to an exception outlined in article 6 of the convention.⁸⁹ The selection and application of the CISG means that legal certainty will be bolstered in international contracts of sale.

⁸⁴ The Buenos Aires Protocol 1994 incorporated by decree 2.095 in 1996; The Agreement on International Trade Arbitration of MERCUSOR 1998 incorporated by legislative decree no2 65 in 2000.

⁸⁵ De Araujo and Saldanha (n69) 80.

⁸⁶ Dolinger (n65) 238.

⁸⁷ http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2014/Decreto/D8327.htm

⁸⁸ Davis, "Brazil becomes the 79th state party to the United Nations Convention on Contracts for the International Sales of Goods" 2013; De Araujo and Saldanha (n69) 80. <https://www.dlapiper.com/en/canada/insights/publications/2013/05/brazil-becomes-the-79th-state-party-to-the-unite/> (last accessed 02-11-2015).

⁸⁹ Article 6 provides that parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Limitations of freedom of choice

Brazilian law will always be applicable in cases where one of the parties is a Brazilian with assets in Brazil. In order to characterize property and govern the relations concerning it, the *lex rei sitae* or the law of the country in which it is situated shall be applied.⁹⁰ Montgomery and Marques are of the view that even if a foreign law could possibly be chosen as that governing the agreement, if one of the parties is based in Brazil and his assets are probably located in Brazil, it could potentially make sense for the other party to have such an international contract governed by Brazilian law.⁹¹ Therefore party autonomy is limited when a party has movable or immovable property in Brazil.

The Brazilian Consumer Protection Code provides mandatory rules that parties may not exclude through a choice of law.⁹² The code serves to protect consumers, public policy and social interest.⁹³ Chapter VI of the code provides for the contractual protection of consumers expressly stating rules that should be observed from article 46 to 50. Article 51 outlines abusive clauses that will be regarded as null and void by operation of law when relating to supply of products and services. Thus consumer protection laws limit free choice in commercial contracts.

In employment contracts the applicable law will either be law of the nationality of the worker, of the nationality of the employer (place of the employers company), law of place of execution of the employment (where the work is performed) or law of place where the contract was concluded.⁹⁴ The highest labour court (*Tribunal Superior do Trabalho*) has established that the law of place of performance and not of contracting will govern the contract⁹⁵ this protects the employee and has been enshrined in the *Enunciado* (a tenet of case law published by a high court after a long series of consistent decisions on the same subject matter).⁹⁶ The tenet provides that, “the labor

⁹⁰ Article 8.

⁹¹ Fazio *Brazilian Commercial Law: A Practical Guide* (2013) 68.

⁹² Law Number 8.078 of September 11, 1990.

⁹³ Article 1 of the code.

⁹⁴ Dolinger (n65) 265.

⁹⁵ (n94).

⁹⁶ *Enunciado* no 207 of the *Tribunal Superior do Trabalho*.

relationship is ruled by law in force in the country where the labor is performed and not by law of place of contracting.” *Enunciado* has been explained as a mandatory rule as labour laws are *ius cogens* by nature.⁹⁷

Public policy is also a factor limiting freedom of choice in Brazil.⁹⁸ Article 17 of the LICC provides that laws, acts and judgments of another country, as well as any kind of declaration of private intention, shall not be effective in Brazil when they offend national sovereignty, public order or good customs. *The Tribunal de Justica do Estado do Rio de Janeiro* in 2003 rejected a choice of foreign law in order to protect public interest.⁹⁹ In arbitration parties may freely choose the rules of law applicable in the arbitration, as long as their choice does not violate good morals and public policy.¹⁰⁰ Thus there will be a limitation of free choice where the choice is contrary to public policy



⁹⁷ (n94).

⁹⁸ See definition of public policy (n58) above.

⁹⁹ *Acordao no Agravo de Instrumento* n.7839 Tribunal de Justica do Estado do Rio de Janeiro October 29 2003 (not available to me, see De Araujo and Saldanha (n69) 81.

¹⁰⁰ Article 2 (n73).

COMPARISON

Generally the distinction between these two legal systems is that Brazil is a civil law jurisdiction and South Africa is a common law jurisdiction. Party autonomy is widely accepted in the South African private international law whilst in the Brazilian private international law it is rarely accepted. In South Africa the party autonomy is the general rule and the limitations are exceptions. In Brazil the party autonomy is only allowed in exceptional circumstances, whilst generally it is not accepted.¹⁰¹ Brazilian law lags behind the rest of the world as most legal systems (including China, European Union countries, South Africa, Russia etc.) accept party autonomy as the norm in international commercial contracts.¹⁰²

As discussed above under the Brazilian private international law, when a party to an international contract is Brazilian it is considered a connection to Brazilian law. Hence Brazilian law will be law applicable to the contract. Under South African private international law, having a national as party to a contract does not confer a connection to South African law. In the absence of choice by parties several factors are used to determine the proper law. These factors include but not limited to; the *locus solutionis* (the place of performance), the *locus contractus* (the place of the conclusion of the contract), the place of the offer, the place of the acceptance, the place of agreed arbitration, the choice of jurisdiction, the domicile of the parties, the place where the parties carry on business, the domicile of the agents or mandataries of the parties, the future domicile of the parties, the (habitual) residence of the parties and the nationality of the parties.¹⁰³

Even though there is a widespread acceptance of party autonomy, it is rarely unlimited, especially in consumer contracts.¹⁰⁴ Both Brazilian and South African private

¹⁰¹ See note 27 of Marshall (n13) 7.

¹⁰² De Araujo and Saldanha (n69) 82.

¹⁰³ Fredericks and Neels (n2) 67-69; on a discussion about the applicable law in the absence of choice of both legal systems see Bouwers "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" (2013 dissertation UJ).

¹⁰⁴ Ruhl "Consumer protection in choice of law" 2011 *Cornell International Law Journal* 570 595.

international law of contract limit parties' choice in regard to consumer contracts. The reason as indicated by De Villiers is:

“...the relatively weaker bargaining position of the consumer. Consumers act outside of their profession or trade. They are not legal experts, nor do they generally have the funds necessary to access the same level of legal advice available to suppliers. Therefore they do not have at their disposal the same knowledge and information as the supplier. Accordingly, applying the normal rules on commercial transactions to these situations may work to the consumer's disadvantage.”¹⁰⁵

Furthermore, in both legal systems the principle is limited by public policy. A choice made that is against good morals and public order will not be enforced. Thus the principle's application is limited in both Brazilian and South African private international law.



¹⁰⁵ (n1)

RECOMMENDATIONS

Adopting the position of the Rome I regulation on employment contracts is recommended. In the *Parry* case the court suggested that the application of the Rome Convention would be advantageous in employment contracts cases where parties choose foreign law to apply to a contract concluded in South Africa.¹⁰⁶ Pillay J pointed out that:

“guided by the convention, the first enquiry would be to establish that the employee has not been deprived of the protection of mandatory rules. Given the breadth of the mandatory provisions of South African labour legislation, discharging this onus is a hard row to hoe. Added to this is the onus on the party relying on the foreign law to prove its contents. A convention will not only facilitate adjudication of international employment contracts in South Africa but also discourage foreign law being chosen to avoid the protection provided by South African law. Effectively, a convention similar to the Rome Convention will complete the circle of protection afforded by the regulatory framework.”¹⁰⁷

In Brazil the *tribunal superior do trabalho* held that application of the Rome convention is recommended to protect workers where the enunciando 207 cannot be applied.¹⁰⁸ Hence, the relevant provision should be adopted.¹⁰⁹ Therefore it is recommended that in both legal systems, with regard to employment contracts courts should take into consideration provisions of the regulation in determining applicable law.

¹⁰⁶ *Parry* case (n56).

¹⁰⁷ (n56)1495 par 72F-H.

¹⁰⁸ Recurso de revista no. 47.200 (2010)

¹⁰⁹ Article 6 – individual employment contracts

1. Notwithstanding the provisions of article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of law which would be applicable under paragraph 2 in the absence of choice
2. Notwithstanding the provisions of article 4, a contract of employment shall, in the absence of choice in accordance with article 3, be governed:
 - (a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or
 - (b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated; unless it appears from the circumstances as a whole that the contract shall be governed by the law of that country.

Adopting relevant provisions from international principles is recommended. The UNIDROIT principles may be applied in the absence of a choice of law, in interpreting and supplementing domestic law and also serves as a model in developing national legislation.¹¹⁰ The Hague conference on private international law has several instruments that support the principle of party autonomy.¹¹¹ The most recent instrument, the principles on choice of law in international commercial contracts which was approved on 19 March 2015, is an important soft law instrument that can be used in international contracts and also serve as a model for national legislators.¹¹² Party autonomy is provided for by article 2- freedom of choice which stipulates that:

- “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 only part of it; and
 - b) different laws for different parts of the contract.
3. The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties.
4. No connection is required between the law chosen and the parties or their transaction.”

The principles have so far been implemented by Paraguay on 20 June 2015 and endorsed by the UNCITRAL on 8 July 2015.¹¹³ The principles comprise the most up to

¹¹⁰ UNIDROIT Principles 2010 preamble.

¹¹¹ (HCCH) a world organisation for cross-border co-operation in civil and commercial matters formed in 1893 with 80 members including the European Union. Both Brazil and South Africa are member states; The instruments include but not limited to:

The Hague convention on the law applicable to agency 1978 article 5

The Hague convention on choice of court agreements 2005 article 3

The Hague principles on choice of law in international commercial contracts 2015 article 2.

¹¹² Preamble:

1. This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions.
2. They may be used as a model for national, regional, supranational or international instruments.
3. They may be used to interpret, supplement and develop rules of private international law.
4. They may be applied by courts and by arbitral tribunals.

¹¹³ Paraguay adopted the whole text in its Paraguayan Law 5393 of 2015 “Regarding the Applicable Law to International Contracts” English text available at http://www.hcch.net/upload/contractslaw_py.pdf; United Nations Commission on International Trade Law report par 238-240 “It was noted that the main objective of the Hague Principles is to reinforce party autonomy and to ensure that the law chosen by the parties in international commercial transactions has the widest scope of application, subject to certain limits. In this context, the Commission noted that the Hague Principles, in article 3, allow parties to

date provisions in respect of choice of law while they still respect mandatory rules and public policy of the forum.¹¹⁴ Although, there is not much evidence yet to demonstrate the effectiveness of the principles in practice, this author proposes that both legal systems make reference to the Hague Principles when developing their private international law in matters relating to party autonomy. Therefore both systems should consider the UNIDROIT and Hague principles to supplement their own domestic laws and in interpreting and developing their private international law.

Brazil should ratify the Inter-American Convention on the Law Applicable to Contracts.¹¹⁵ Scholars have written in support of the ratification of the convention on numerous occasions.¹¹⁶ The convention contains the principle of party autonomy in article 7 which state that, “if the parties have not selected the applicable law, or if their selection proves ineffective the contract shall be governed by the law of the state with which it has the closest ties” this will be a development that is also compatible with other legal systems as in the absence of parties choice the law of closest connection will apply.



choose not only the law of a State but also “rules of law”, within certain parameters and unless the law of the forum provides otherwise. The Commission noted with approval that that provision might facilitate the choice of UNCITRAL texts, such as the United Nations Sales Convention, where they would not otherwise apply, thus enhancing the harmonizing impact of those texts” http://www.un.org/ga/search/view_doc.asp?symbol=A/70/17 Its endorsement increases awareness of the principles.

¹¹⁴ Reddi “The potential impact of the Hague principles on choice of law in international commercial contracts in the BRICS countries” (2015 dissertation UJ) 35 and as outlined by Adams in his analysis of the compatibility of South African law with the principle, compatibility was a success although there were some uncertainties Adams (n29).

¹¹⁵ 1994 Mexico city convention

¹¹⁶ Dolinger (n65)243.

CONCLUSION

Party autonomy has gained prominence in the last few decades; national legal systems as well as the conventions have adopted the principle which helps structure choice of law rules.¹¹⁷ However, even in jurisdictions which strongly support a choice of law principle, the circumstances of that choice are not unrestricted.¹¹⁸ This restriction is mainly due to the application of mandatory rules which are there to protect interests of the forum,¹¹⁹ other countries, third parties and/or weaker party to the contract.¹²⁰ Although, mandatory rules limit party autonomy, South African courts will in principle allow the parties to choose a law to govern their transaction, thereby replacing not only *ius dispositivum* but also the *ius cogens* of the forum state and of the otherwise applicable law.¹²¹ Under Brazilian law the principle may only be applied in an indirect way. Allowing party autonomy in international contracts subject to arbitration and ratifying the CISG is a step towards accepting the principle.¹²²



¹¹⁷ Dolinger (n65) 123.

¹¹⁸ Schwenger, Hachem and Kee *Global Sales and Contract Law* (2012) 53; Graves “Party autonomy in choice of commercial law: the failure of revised UCC § 1-301 and a proposal for broader reform” 2005 *Seton Hall Law Review* 59 66; Stringer (n74) 959; Zhang “Choice of law in contracts: a Chinese approach” 2006 *Northwestern Journal of International Law and Business* 289 314; Symeonides (n3) 115 “although virtually all modern codifications and conventions espouse the principle of party autonomy, they also subject it to certain parameters and limitations.”

¹¹⁹ Kruger “Feasibility study on the choice of law in international contracts: overview and analysis of existing instruments” 2007 Notes for the Hague Permanent Bureau 8 “The existence of mandatory rules is probably the most important limitation to the principle of party autonomy. Even if parties can freely determine their contractual obligations, they are still limited by certain rules that are too important to derogate from.” http://www.hcch.net/index_en.php?act=text.display&tid=49 (10-09-2015) and Schafer (n11) 6 “The tendency to grant the contracting parties a nearly unlimited freedom to choose a law to govern their transaction (party autonomy) has increased the importance of mandatory rules in the private international law of contracts.”

¹²⁰ Spiro “Autonomy of the parties to a contract and the conflict of laws: illegality” 1984 *Comparative and International Law Journal of Southern Africa* 197.

¹²¹ Schafer (n11) 63.

¹²² De Araujo and Saldanha (n69) 75; Vieira (n66) 184.

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