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Overriding Mandatory Rules Applicable to International Sales of Goods: Evidence from South Africa

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ABSTRACT

In private international law of contract, the law regulating the rights and obligations of contracting parties may (whether objectively determined or chosen by the parties), in some instances, be limited by either public policy considerations or other relevant mandatory rules. In this regard, the public policy and the overriding mandatory rules of three places – that of the forum state, the applicable law (if different from the *lex fori*) and the law of the place of performance (or a third state with relevant connection to the contract) – have been considered by both jurists and scholars as being important. However, this article is limited to matters concerning choice of law rules on overriding mandatory provisions (but not public policy considerations). This article assesses the various private international law rules utilised by the South African courts in ascertaining which overriding mandatory provisions must apply to international contracts for the sale of goods. The aim is to adopt a general private international law of contract rule that effectively addresses the difficulty in determining the state, whose overriding mandatory provisions may legitimately claim application over certain relevant issues in international sales contracts. To this end, the article considers the general application of the overriding mandatory rules of the forum and that of the applicable law state (*lex causae*) to determine if these laws may legitimately be applied to contracts as it is practiced by some courts. Thereafter, the article considers the application of the overriding mandatory rules of the place of performance (*locus solutionis*) or other relevant third states and demonstrate that it is the overriding mandatory provisions of “a relevant state” that may legitimately derogate the application of certain provisions of the proper law of an international contract.

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KEYWORDS

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Introduction

In private international law of contract, the law regulating the rights and obligations of contracting parties may (whether objectively determined or chosen by the parties), in some instances, be limited by either public policy considerations or other relevant mandatory rules (Lehmann, 2020)¹. In this regard, the public policy and the overriding mandatory

¹ While it is acknowledged that concepts of public policy and overriding mandatory rules are different, there is a similarity between them. Thus, it has been suggested that overriding mandatory rules are the expression of the public policy of a state. This is based on the idea that overriding mandatory rules are enacted to promote values that are often in the nature of public policy. Regardless of the supposed similarity between the two concepts, they are in fact different because public policy operates passively while mandatory rules operates in an active manner. Again, public policy functions negatively as its application generally leads to the non-application of the relevant applicable law of a contract that would have otherwise applied. On the other hand, mandatory rules function positively as these rules are generally superimposed on the applicable law of an international contract. Regardless of any similarity that may exist between public policy and mandatory rules, any attempt to treat the two concepts as aiming at the same objective must be discouraged. This is because the public policy of a states is “a set of normative principles underlying its legal system”, whilst overriding mandatory rules forward a state’s “concrete interests, or policies, which do not necessarily reflect the broad public policy principles” of its legal system (AN Zhilsov “Mandatory and Public Policy Rules in International Commercial Arbitration” (1995) 42 *Netherlands International Law*

rules of three places – that of the forum state, the applicable law (if different from the *lex fori*) and the law of the place of performance (or a third state with relevant connection to the contract) – have been considered by both jurists and scholars in South Africa as being important. With regard to overriding mandatory rules, South African courts consider that of the forum state and the applicable law (also known as the proper law) as important in the regulation of international sales contracts (Zhilsov, 1995). However, some scholars in the civil law world, particularly those of German origin, are sceptical about this position (Voser, 1996; Basedow et al., 2004). Further, there seem to be confusion about the circumstances under which this category of legal rules – overriding mandatory rules – are considered to “override” the applicable law of international contracts under choice of law theory. This has led to the position where courts of various jurisdictions, including South Africa, are unable to provide a definite choice of law rule regarding which overriding mandatory rules should be applicable to international sales contracts.

In view of the lack of a universally accepted choice of law rule on the application of overriding mandatory provisions and the resulting uncertainty as well as the illegitimate application of certain mandatory provisions to some transnational contractual matters, this article assesses the various private international law rules utilised by courts in ascertaining the overriding mandatory provisions that must apply to international sales contracts. The aim is to recommend for the adoption by the South African courts an appropriate rule that leads to the application of the overriding mandatory provisions of the state with relevant connection to the contract concerned.

Methodology

This article assesses the various private international law rules utilised by the South African courts in ascertaining which overriding mandatory provisions must apply to international sales contracts. The aim is to adopt a general private international law of contract rule that effectively addresses the difficulty in determining the state, whose overriding mandatory provisions may legitimately claim application over certain relevant issues in international sales contracts. To this end, the article considers the general application of the overriding mandatory rules of the forum and that of the applicable law state (*lex causae*) to determine if these laws may legitimately be applied to contracts as it is practiced by some courts. Thereafter, the article considers the application of the overriding mandatory rules of the place of performance (*locus solutionis*) or other relevant third states and demonstrate that it is the overriding mandatory provisions of “a relevant state” that may legitimately derogate the application of certain provisions of the proper law of an international contract.

1. Overriding Mandatory Rule

Generally, mandatory rules are regarded as rules that cannot be derogated by the agreements of parties (Cordero-Moss, 2017). For example, consumer protection and employment legislation mostly come in the form of mandatory rules, hence, it is expected that contracting parties observe these rules at all times. This is because, with respect to commercial contracts, such legal rules are generally enacted by states to protect certain persons within a society that are regarded to be “weaker parties”. In cases regarding

Review 81 88). Further, public policy tends to fluctuate and vary depending on the changing values of society as well as the circumstances of a particular time. This is not the case for overriding mandatory rules. Additionally, and unlike mandatory rules, there is no real “scale of value” with regard to which behaviour might be condemned by the courts as being contrary to the public policy of a state.

transnational contracts such international sales contracts, however, the term “overriding mandatory rules” is used instead.

Overriding mandatory rules, as employed in private international law, are mandatory rules which require application regardless of the fact that the provisions of these rules are not applicable to the merits of the dispute (Cordero-Moss, 2017; Harris, 2019; Hellner 2009). A comprehensive definition of the term – overriding mandatory rules – has been laid down by the European Court of Justice (ECJ). According to the ECJ, overriding mandatory rules are “national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the member state concerned as to require compliance therewith by all persons present on the national territory of that member state and all legal relationships within that state”¹. Thus, the provisions of relevant legislation that qualifies as overriding mandatory rule are always applicable so far as the facts of the case fall within its scope of operation (Lehmann, 2020; Chong, 2006). This is so irrespective of the law otherwise applicable to the merits of the contract. In simple terms, overriding mandatory rules override the applicable law of international contracts regardless of whether this law (the applicable law) was objectively determined by the courts or chosen by the parties (Harris, 2019; Chong, 2006). Although these rules mostly come in the form of public law², since they aim to protect public interests, there are others that fall under private law³.

As with the applicable law of international sales contracts, under choice of law, it is important for states to adopt rules, which will allow for the easy determination of the overriding mandatory provisions by both contracting parties and the courts (Obiri-Korang, 2022). To do this, legislators will need to provide choice of law rules with categorical provisions as to which state’s mandatory norms are applicable to such contracts. This solution should be backed by the relevant legal theory that underlie the function and operation of overriding mandatory rules so that legitimate rules are applied in all instances. To achieve this purpose it is important to, first, consider the functions that the applicable law or the proper law serve in choice of law literature.

In general, the applicable law of an international sales contract fulfils three different functions – supplementary, interpretative and restrictive functions. First, this law provides a supplementary function by filling gaps within the relevant international contract with default rules. Second, it provides an interpretative function as it is used to determine the meaning of obscure or ambiguous terms in an international contract. Third, it provides a restrictive function in that it helps to avoid contractual terms that are deemed contrary to mandatory rules (Lorenzo, 2010). Being able to differentiate these functions from one another is important for one to determine the link between contractual terms and the applicable law, especially in situations where there is no choice of this law by the parties (Vidal, 2005).

It should be noted that where the parties exercise their autonomy to select the applicable law of their contract, a basic principle of interpretation suggests that the restrictive function of the law be limited or, in extreme cases, be disregarded (Lorenzo, 2010). This is based

¹ Joined cases *Arblade* (Case C–369/96) and *Leloup* (Case C–376/96) 1999 ECR I–8453 30. The passage in this paragraph (30) of the ruling was the inspiration for the European Commission’s definition of the term “international mandatory provisions” in Article 8(1) of the Rome I Regulation.

² Example will be overriding mandatory rules, which criminalise transactions in certain types of goods within a particular jurisdiction.

³ For example, consumer protection legislation that regulate commercial transactions between individuals and businesses.

on the argument that the parties will not, in their right mind, choose a law that will invariably make their agreement void. However, this reasoning can be challenged as it is true that even in entirely domestic contracts the applicable law may be applied to make a contract void, if the enforcement of such a contract or any part of it is regarded to be contrary to the dictates of the law. Again, it should be noted that the parties, by choosing the applicable law, may be interested in establishing a legal framework to control their relation in a sense that is self-limiting and it would, therefore, not be unreasonable for these rules to void aspects or even the whole of their contract. Also, in situations where the parties seek to assert that the clauses in their contract should prevail over the chosen law, they will still not be able to prevent the consequence of having their contract being voided since the determination of the validity of the clauses in their contract may not be excluded from any law (Gaillard & Savage, 1999)¹.

A critical look at both the principle of party autonomy with regards to the applicable law and the need for legal certainty in international contracts, prevents one from concluding that contracting parties have inserted conditions that are incompatible with their chosen law. This is so because it is not necessary for the parties to demonstrate that the law they have chosen has a close connection with their contract (Obiri-Korang, 2021). Thus, by adhering to the fundamental principles of legal certainty as well as interpretation of contracts, it can be concluded that the conditions that parties include in their contract are those that are valid and compatible with the law chosen by them. Where this interpretation is not possible, then the conditions of the contract should be deemed to prevail over the relevant legal rules because only this interpretation will be able to uphold the parties' will. This position will be much clearer in situations where it is reasonable to assume that the parties had foreseen any potential interplay between the chosen law and the relevant mandatory rule, although this is not necessary.

Before considering the state whose mandatory provisions should be considered by the courts as overriding and, hence, applicable to international contracts, it is important to understand why the application of such laws cannot be derogated. This will provide information on the state that may have a legitimate claim over the application of its law by the forum regardless of the applicable law of the contract. Thus, it is not merely a matter of which of the three categories of states – forum state, the state of performance (or relevant third state) and the state whose law is applicable – may have its mandatory rules applied by the courts, but rather this law, which is to be applied alongside the applicable law, must be one which, for all purposes, have a legitimate interest in the particular contract. As it is generally known, overriding mandatory rules are mainly rules of public law (such as import and export restrictions laws, and competition law) enacted to meet a specific purpose of the political, economic or social nature which the legal order of which they are a part consider as very important (Chong, 2006)². Thus, such laws are made to protect the essential interests of the relevant state and may also come in the form of private law enacted to protect the interests of groups considered by the government as weaker parties in certain types of contracts.

From the description of overriding mandatory rules provided above, it is evident that the relevant provisions in such enactments are not merely mandatory. In fact, unlike ordinary mandatory rules, their application cannot be avoided by a choice of the applicable law by contracting parties. Thus, these rules are regarded to be internationally binding to all contracts that may fall within its scope of application.

¹ This particular interpretation is also defended in the area of international commercial arbitration.

² Art 9(1) of the EU Regulation on the Applicable Law to Contractual Obligations of 2008.

Again, overriding mandatory rules may be distinguished from “provisions that cannot be derogated from by agreement”¹ as phrased in the EU’s Rome I Regulation which is also applicable to international contracts. Thus, these provisions do not just override the provisions of the applicable law chosen by contracting parties, they also supersede the provisions of the objective proper law as determined by the courts. This is because the application of such provisions – overriding mandatory provisions – is solely dependent on whether or not the relevant situation falls within its scope of application. The level of importance attached to the application of this type of mandatory rule – overriding mandatory rules – is very high because they are enacted to protect the essential interests of particular states (for example, laws regulating companies and immovable property).

2. South African Private International Law Rules on the Application of Overriding Mandatory Rules to International Sales Contracts

In South Africa, like in many other places across the globe, the private international law rules on the application of overriding mandatory rules is quite confusing. Currently, there are very few cases that have discussed the subject². While there is not definitive rule on the subject, caselaw has provided us with a number of connecting factors considered by the courts in determining the legal system whose overriding mandatory rules should be applicable to international sales contracts. In South Africa, the courts have considered and applied the overriding mandatory rules of various categories of states. This situation makes it difficult for contracting parties (and, even, the courts) to accurately predict the rules that regulates their contractual relation. Below is a discussion and examination of the various private international law rules considered/applied by the South African courts.

3. Considering the Overriding Mandatory Rules of the Forum

As indicated above, there are three categories of overriding mandatory rules generally considered by the South African courts in cases of international sales contracts. The first to be discussed is the application of the overriding mandatory rules of the forum state. Under South African private international law, the overriding mandatory rules of South Africa (*lex fori*) may be applied to an international contract although South African law is not the *lex causae*³. This position is supported by both the courts (although by *obiter dicta*)⁴ and academic writers (Spiro, 1984).

Generally, the overriding mandatory rules of a forum are considered to have legitimate grounds with regard to their application to international commercial contracts (Zhilsov, 1995). This is also true even in situations where the applicable law of the contract itself is that of a state other than the law of the forum (*lex fori*). Thus, the overriding mandatory

¹ Arts 3(3) and 3(4), and arts 6(2) and 8(1) of the EU Regulation on the Applicable Law to Contractual Obligations of 2008.

² See, for example, *Cargo Motor Corporation Ltd v Tofalos Transport Ltd* 1972 (1) SA 186 (W); *Murata Machinery Ltd v Capelon Yarns (Pty) Ltd* 1986 (4) SA 671; *Standard Bank of SA Ltd & another v Ocean Commodities & others* 1980 (2) SA 175 (T); and *Herbst v Surti* 1991 (2) SA 75 (Z).

³ In *Taylor v Hollard* 1886 (2) SAR 78, which is about the recognition and enforcement of a foreign judgement, the South African court refused to enforce a judgment from an English court because the “underlying agreement exceeded the capital sum of the money advanced” and was therefore contrary to South African usury law; See, also, the dictum in *Murata Machinery Ltd v Cape/on Yarns (Pty) Ltd* 1986 (4) SA 671 (C), 673 1-1 which concerns international sales contract; and the dictum in *Commissioner of Inland Revenue v Estate Greenacre* 1936 NPD 225, 229.

⁴ *Murata Machinery Ltd v Cape/on Yarns (Pty) Ltd* 1986 (4) SA 671 (C), 673 1-1; *Commissioner of Inland Revenue v Estate Greenacre* 1936 NPD 225, 229.

rules of forum states seem to be considered important to international contracts even in situations where the forum state has little or no link to the contract. For example, let it be assumed that party A, an incorporated company habitually resident in Kenya, and party B, an individual habitually resident in Nigeria, enter into an international contract for the sale of rosewood furniture meant for B's personal use. The furniture is supposed to be acquired and delivered by A to B in Ghana where B will export same to his home in Nigeria. Again, let it be assumed that the parties include in their contract a choice of court agreement which stipulates that the High Court in Johannesburg (South Africa) shall have jurisdiction over any dispute that arises from the contract and, also, the parties choose the law of South Africa (or of India) as the applicable law of the contract. The relevant question here is whether it will be justifiable for the forum – the High Court in Johannesburg, South Africa – to apply the overriding mandatory rules of South Africa to the contract, merely because a South African court is the forum?

In answering the question above, it is important to first point out that overriding mandatory rules function to protect public interests that may come in the form of either private or public law. Thus, the interest to be protected should be that of the state whose protected interest will be undermined or becomes unenforceable if its overriding mandatory provisions are not applied. It can therefore be rightly posited that the state whose overriding mandatory rules should be applied by the courts must have relevant connection to the contract. Thus, there should be no room for the element of chance. Again, since overriding mandatory rules are made by states with the intention of preventing contracting parties from circumventing their application, it will be appropriate to suggest that contracting parties should have no say as to which mandatory rules apply or should be applicable to their contract. This should be entirely decided by the legislature who enacted the relevant overriding mandatory rules. From the example above, it will be absurd for the court in Johannesburg to entertain any idea of applying, for example, the forum's overriding mandatory rules on consumer protection or export ban to the contract. This is because, based on the idea of state sovereignty, the forum state may not legislate on actions taking place in a state other than itself. Thus, it will be unjustified for a state to legislate on the extent of contractual performance that may be allowed in another state. From the example, since the forum state, South Africa, has no link to the performance of the contract, it will be right for the parties to disregard its overriding mandatory rules during the performance of their contract.

Aside from the reason provided above, it should be mentioned that any support for the application of the overriding mandatory rules of a forum state, merely because it is the forum state, will encourage the old trick of forum shopping (Obiri-Korang, 2022). This is because parties may rely on this position and decide to sue their counterpart in states where they deem the overriding mandatory rules to be favourable to their cause. Thus, a support for the application of the overriding mandatory rules of the forum state introduces the element of chance into the system of choice of law. This has been so because a substantial number of international commercial contracts contain no choice of court agreement, making it impossible for the parties to accurately predict the forum whose mandatory rules may be applicable to their contract. "Fortuity" of this kind takes away the legal certainty required in cases of international contract (Obiri-Korang, 2022). Again, it should be noted that overriding mandatory rules are generally enacted by states to control behaviours that affect their society but not those which occur in other societies. Hence, the application of a forum's overriding mandatory rules merely because it is the forum hearing a case will amount to the forum legislating to control behaviours – performance of contract – occurring in another state. This position is not contrary to the position adopted by international

choice of law for contract instruments such as the Hague Principles on Choice of Law in International Commercial Contracts (Hague Principles)¹. In the Hague Principles, for example, Article 11 (1) provides that the provisions of the instrument “shall not prevent a court from applying [the] overriding mandatory provisions of the law of the forum which apply irrespective of [the applicable law]”². This provision should not be interpreted to mean that the court shall apply its state’s overriding mandatory provisions to an international contract irrespective of the relationship the contract might have with the forum state. Rather, it calls for the court to apply overriding mandatory rules of the forum “which applies”. Thus, a court may only apply the forum state’s mandatory provision if the forum has a legitimate interest in having its law apply to the contract and also if the said law was enacted to protect such an interest in the particular circumstance. This means, it will be inappropriate for a court to, for example, apply the forum’s consumer protection provision that come in the form of overriding mandatory rule to a contract that neither the parties nor their contract and/or its performance has nothing to do with the said forum.

Based on the arguments above, it seems that the only time that the overriding mandatory rules of the forum state may become relevant will be in situations where the forum state, aside being the forum, has some sort of relevant link to the performance or the subject matter of the contract (for example place of performance). Thus, in the rosewood example above, assuming that there was no choice of forum agreement and B sues A in a court in Ghana – place of performance – which had jurisdiction because A was present in Ghana at the time, then in that case it may seem justified for the forum – court in Ghana – to apply the overriding mandatory rules of Ghana to the case. This is because Ghana is the place where the contract was performed or should have been performed and may, therefore, have the necessary link required to have its overriding mandatory rules applied.

4. Overriding Mandatory Rules of the Applicable Law

Aside from the application of the overriding mandatory rules of the forum state, the other seemingly uncontroversial practice by courts is the application of the overriding mandatory rules of the state whose law serves as the applicable law of the contract (Van Bochove, 2014). This position is so regardless of whether the contracting parties chose the law of a neutral state – a state not linked to either the parties or the contract – as the applicable law of their contract or the applicable law was objectively determined by the court. Under South African private international law, the overriding mandatory rules of the *lex causae* (which may be either foreign law or South African law) is deemed applicable to international sales contract. Under appropriate circumstances, the law will be applied by the South African courts to declare an international sales contract that is illegal under the applicable law unenforceable (in spite of its validity under the law of the forum law) (Forsyth, 2012; Spiro, 1984; Edwards, 1993). Regardless of the general position, South African courts have not yet decided on whether the overriding mandatory rules of the *lex causae* is applicable in situations where the applicable law was selected by the parties through a choice of law clause. Further, the general statement that the overriding mandatory rules of the *lex causae*/applicable law are applicable in South African courts is supported by some caselaw. The support is, however,

¹ Hague Principles on Choice of Law in International Commercial Contracts of 2015 (Hague Principles); The Hague Principles is a soft-law instrument designed by experts of private international law under the aegis of the Hague Conference. The instrument was adopted to serve as a guide or even model law that states, international organisations with the power to enact law and other regional bodies may adopt through legislation.

² Art 11(1) of the Hague Principles on Choice of Law in International Commercial Contracts of 2015.

based on *obiter dicta* that were referring to English law¹. There are also some academics in South Africa that hold the principle acceptable in the country although there is no binding precedent on the subject in the courts (Forsyth, 2012; Edwards, 1993; Van Rooyen, 1972).

In assessing the relevance of the overriding mandatory rules of the applicable law state to an international contract, a distinction must be made between the applicable law chosen by the parties through a choice of law clause and the objectively determined applicable law. With respect to the former, since the chosen applicable law does not have to demonstrate any form of connection to the contract (Lorenzo, 2010), it will be difficult to provide justification for the application of the overriding mandatory rules of this state². In this situation, the application of the overriding mandatory rules of the applicable law state may only be justified by the will of contracting parties. Thus, since it is the parties that choose the applicable law, the overriding mandatory rules of such applicable law state will likely have no connection with the contract. This is not how overriding mandatory rules operates or should operate.

Generally, overriding mandatory rules are imposed by the legislature and its operation does not allow parties to determine whether or not it should be applicable to contracts. It will, therefore, be absurd for any court to allow the application of the overriding mandatory provisions of the applicable law state merely because it is the law of the state chosen by the parties to govern their contract.

Going back to the example involving the sale of rosewood furniture above and based on the argument just provided, it will be inappropriate for the High Court in Johannesburg to apply the overriding mandatory provisions of South Africa merely because the parties chose South African law as the applicable law of their contract. This is because South Africa has no significant relation with the contract, except that its law was chosen by the parties to govern their international sales contract. This conclusion is based on the underlying choice of law reasoning that the overriding mandatory rules of a state must have a close connection with a contract before it may become applicable to that contract. Thus, in the rosewood example, the connection required does not exist between the sale contract and the overriding mandatory provisions of South Africa.

It should be noted, however, that where the applicable law is objectively determined by the courts the situation may change. Here, the applicable law, as determined by the court, is much likely to have a close connection to the contract (Neuhaus, 1976). This is because courts generally rely on certain relevant factors that link an international contract to a state that has “real and substantial connection” to the contract and apply the law of this state as the objective proper law of the contract. In this regard, there may be sufficient justification for the courts to apply the overriding mandatory rules of the *lex causae* as this law mostly coincides with the *lex loci solutionis* (at least, at common law). Again, in the rosewood example above, if the parties had not made a choice of the applicable law and the case comes before the common law court of Ghana, for example, the courts may be able to apply overriding mandatory provisions which regulate transactions involving dealings in rosewood in Ghana even if the applicable law itself is determined to be the law of Ghana (upon the application of the “closest and most real connection” test) (Oppong, 2012; Obiri-Korang, 2017). In this case the application of the

¹ *Cargo Motor Corporation Ltd v To/alas Transport Ltd* 1972 (1) SA 186 (W) at 195 F-196 A; *Ocean Commodities Inc v Standard Bank o/SA Ltd* 1978 (2) SA 367 (W) 372 H - 374 A, F - H; *Herbst v Surti* 1991 (2) SA 75 (Z) at 78 G.

² Note, however, that if the parties do not select a neutral law as the applicable law of their contract then the decision as to whether the overriding mandatory provision of the applicable law state apply may depend entirely on the connection which the performance or the subject of the contract may have with the state and the specific facts of the case.

mandatory rules of the *lex causae*, which will coincides with the *lex fori*, may be justifiable based on the connection that the *lex causae* – Ghana law – has with the contract.

5. The Overriding Mandatory Rules of the Place of Performance and Other Relevant Third State

Aside from the application of the overriding mandatory rules of the forum state and that of the applicable law state, the overriding mandatory rules of place of performance (*loci solutionis*) and other relevant third states, especially those with significant connection to an international sales contract, needs to be considered. In South Africa, there are only a few cases that addresses the subject. In *Cargo Motor Corporation Ltd v Tofalos Transport Ltd*, for example, the court provided support for the application of the overriding mandatory rules of the *loci solutionis*. In this case, the South African court relied on English precedent and held that “the [c]ourts of that country will not enforce a contract if the locus solutionis is in a foreign country, and if that contract or its performance would be illegal under the laws of that foreign country”. It was further stated by the court that “...[the application of the overriding mandatory rules of the loci solutionis], as a matter of principle and of common sense should be equally valid in the system of private international law applied by [the South African] courts, where direct judicial authority on unenforceability does not seem to be plentiful”. Thus, by relying on English law (also, common law), the South African court held that an international contract was valid and therefore enforceable in South Africa, which was the place of performance. The court held so even though the overriding mandatory rules of a third state, which one of the parties claimed had to be applied because he carried on business there and was also a national of that country, deemed the contract unenforceable. Another support for the recognition and application of the overriding mandatory provisions of the *loci solutionis* in South Africa can be found in *Herbst v Surti*, where the court referenced obiter dicta from English cases that supported the position.

From the above, one can state that South African private international law considers the overriding mandatory rules of the place of performance as relevant to international sales contracts. Thus, the South African courts will not enforce an international sales contract that, for example, are contrary to the overriding mandatory rules of the place of performance. This position is appropriate. Thus, if the applicable law chosen by contracting parties is supposed to perform interpretative and supplementary functions (Lorenzo, 2010), then the overriding mandatory provisions of the legal system closely connected to the contract will effectively perform the restrictive function. From this point of view, the role of overriding mandatory rules should not be viewed as a restriction to party autonomy, predictability or even legal certainty. This is because contracting parties may well be aware that there may be overriding mandatory rules regulating the performance of certain types of commercial contracts within particular states. For example, one can impute knowledge of export requirements rules or even consumer protection rules on parties obliged by their contract to export goods or deliver goods to a consumer within a particular state. This position is reasonable and appropriate in terms of private international law logic so far as it is agreed that the overriding mandatory rules of the relevant state must prove a close connection to the international sales contract. This connection generally does not exist either in a neutral applicable law chosen by the parties or in the *lex fori* in situations where the chosen law or the forum state has no connection to the contract.

Regardless of arguments put forward by certain scholars in favour of the application of the overriding mandatory rules of the *lex causae* state (and even, that of the forum state)

(Bochove, 2014), it is important to understand that there are enough grounds to refute this position, especially, in cases where the applicable law was, as indicated above, selected by the parties through a choice of law clause in their contract. In fact, there is good enough reason for a general rule in favour of the overriding mandatory rules of *loci solutionis* and certain relevant third states instead. For instance, it is reasonable for one to argue in favour of the application of the overriding mandatory rules of the origin of a cultural good or that of the place of performance at the expense of the overriding mandatory rules of the forum in cases where the forum state does not coincide with any of two states. In this instance, it will be strange to apply the mandatory rules of either the *lex causae* (Neuhaus, 1976) or that of the *lex fori*. This reasoning has had support in the Rome I Regulation which in article 9(3) provides for the application of the overriding mandatory rules of the place where the contractual obligation is to be performed. This is so even though the same provision also allows the application of the overriding mandatory rules of the forum which, as has been argued earlier, is not supported by this article. Similarly, article 7 of the Rome Convention allows for the application of the overriding mandatory rules of the place of performance, however, the provision does not limit this to a specific place of performance, but rather, allow the application of the overriding mandatory rules of any state that is closely connected to the contract on an issue-by-issue basis (Bonomi, 1999).

Based on the inherent interest of states in having their overriding mandatory rules apply to all situations where it should be applicable, it is the position of this article that courts or the legislature of states adopt a choice of law rule that recognises state sovereignty by ensuring that the mandatory provisions of every state are enforced regardless of the otherwise applicable law. This is especially true in situations where the performance of the contract, or part thereof, occurs in the state that enacted the relevant overriding mandatory rule. Thus, this position will ensure that states' interests are protected through the enforcement of their laws which come in the form of overriding mandatory provisions (for example, export regulations enacted to prevent the trade in certain specified protected goods must be guaranteed) and, thereby have their political, economic or social interests protected.

Again, it should be noted that overriding mandatory rules of places where performance occur are important because such rules are generally enacted to prevent unlawful performances. In fact, disregarding the overriding mandatory rules of the place of performance, where applicable, for any other set of mandatory rules may likely amount to the courts abetting the commission of unlawful behaviours by parties. Here, the important issue is determining what may constitute "unlawfulness" of performance. In the narrow sense, this may suggest criminal behaviour on the part of the parties and may attract criminal consequences. In an extreme and a wider sense, however, unlawfulness of performance may be interpreted to regulate behaviours that may lead to the contract being declared void (Freitag, 2004). This last interpretation may seem excessive and, possibly, unjustified as it may serve as a limitation to the natural sphere of the application of the main applicable law of the contract. The excessive nature of the forgoing interpretation has led to a more desirable one that includes civil unlawfulness (Hellner, 2009). This desirable interpretation is preferred by this article as it focuses on civil litigation between parties interested in having their contracts enforced, abrogated or being paid damages that stem from their contracts.

From the forgoing, the country whose relevant overriding mandatory provision should be considered for application in the "rosewood" example above is that of Ghana. This is because, Ghana is the jurisdiction with the most significant relationship to the transaction as this is the place where the relevant performance central to the contract took (or should have taken) place.

Further, although it is the position of this article that the overriding mandatory rules of the place of performance may have legitimate grounds to demand application (Forner, 2009), it is appropriate to ask at this stage whether it is better to demand for a generic reference to any law connected to the performance or only those laws closely connected to the contract. For example, a party may rely on the law of the state where an insurance company is incorporated to demand for the nullification of an insurance contract, regardless of the place of performance, in situations where the service provider – the insurance company – does not have the authorisation to legally conclude such contract in accordance with the law of their place of establishment or residence (Bonomi, 1999). This law can be easily characterised as an overriding mandatory rule in the sense of article 9 of the Rome I Regulation. Another example may be drawn from laws that prohibit the export cultural goods of the *lex originis*. Thus, when the courts are faced with a case in which the *lex originis*, through its overriding mandatory rules, prohibit the export of a cultural good that is the subject of the contract, regardless of the applicable law of the contract it will be required that the court applies the overriding mandatory provision of the place of origin even though this transaction is lawful according to the applicable law, the *lex fori* and the laws of the place of delivery (Harris, 2009).

Regardless of the support for the application of the overriding mandatory rules of the *lex loci solutionis*, there may be challenges in applying this to some types of contracts. For instance, where the obligation to be performed by a party is a negative obligation – obligations not to do something – such as a duty of confidentiality, it will be difficult to determine the place of performance, hence, the *lex loci solutionis*. However, it should be noted that the mandatory rules of the relevant marketplace may be considered in this kind of cases, especially in situations where such confidentiality clauses may lead to an excessive restriction to trade and other commercial practices.

Conclusions

In matters concerning international sales contracts, overriding mandatory rules are generally applied by the court to protect the political, social or economic interests of a relevant state, including the protection of the interests of weaker parties. This is achieved either through the insertion of a choice of law provision in a relevant substantive law enacted to protect targeted persons or by a provision in the choice of law rules operating within a jurisdiction. In this article it has been established that choice of law rules should exclude the application of the overriding mandatory rules of forum states and that of the applicable law state as these states may not have the necessary connection required for their application to a contract. Thus, a general adoption of a *lex fori* or *lex causae* approach to the application of overriding mandatory rules by the South African courts is discouraged as this will not necessarily lead to the legitimate application of such provisions. As a matter of fact, it has been demonstrated in this article that the application of the overriding mandatory provisions of a state merely because it is the forum or it is the state whose law governs the merits of the contract is contrary to the general principles underpinning the application of such rules – overriding mandatory rules – under choice of law theory. The article, after a careful examination of the necessary connection required by states to legitimately claim the application of their overriding mandatory provisions, concludes that the legislature and the courts of South Africa adopts the application of overriding mandatory provisions of the place of performance as a general rule. Also, in situations where there are multiple places of performance, the article proposes that the overriding mandatory provisions of the place or places where performance was or were defective, or where the relevant performance resulting in the cause of action should have occurred should be applied.

In order to put forward an appropriate choice of law rule with regard to the application of overriding mandatory rules, the article examined the general principle underpinning the application of overriding mandatory provisions under choice of law and determined that courts should adopt an approach that allows for the legitimate application of all laws that have the necessary link to either the performance or the subject matter of the contract. In this regard, it was observed that the overriding mandatory rules of the place or places of performance should be considered as primary candidate in all international contracts¹.

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¹ It is imperative to point out that the rule being advocated in this article does not apply to the consideration of public policy by the courts in private international cases, as this concept is mostly confused with the concept of overriding mandatory rules.

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Обірі-Коранг П. Імперативні норми, що застосовуються до договорів міжнародної купівлі-продажу товарів: досвід Південної Африки. – Стаття.

У міжнародному приватному праві закон, що регулює права та обов'язки договірних сторін, може (або об'єктивно, або за вибором сторін), у деяких випадках, бути обмежений засадами публічного порядку або іншими імперативними нормами. У зв'язку з цим, публічний порядок та імперативні норми трьох місць – держави суду, застосовного права (якщо воно відрізняється від *lex fori*) і права місця виконання (або третьої держави, що має відповідний зв'язок з договором) – вважаються важливими як з погляду юристів, так і з погляду вчених. Однак ця стаття обмежується питаннями, що стосуються правил вибору права щодо імперативних норм (але не засад публічного порядку). У цій статті оцінюються різні норми міжнародного приватного права, які використовуються південноафриканськими судами для визначення того, які імперативні норми мають застосовуватися до міжнародних договорів купівлі-продажу товарів. Мета статті полягає у тому, щоб прийняти загальну норму міжнародного приватного права, яка ефективно вирішуватиме труднощі у визначенні держави, імперативні норми якої мають переважну силу та можуть на законних підставах претендувати на застосування щодо певних питань у міжнародних договорах купівлі-продажу. З цією метою у статті розглядається загальне застосування імперативних норм країни суду та застосовного права держави (*lex causae*), щоб визначити, чи можуть ці закони правомірно застосовуватися до контрактів, як це практикують деякі суди. Далі у статті розглядається застосування імперативних норм місця виконання договору (*locus solutionis*) або інших відповідних третіх держав і демонструється, що саме імперативні норми "відповідної держави" можуть на законних підставах скасовувати застосування певних положень відповідного права міжнародного договору.

Ключові слова: міжнародне приватне право, міжнародні договори купівлі-продажу товарів, імперативні норми, застосовне договірне право, застереження про публічний порядок, *lex loci solutionis*, *lex fori*.