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Primary Connecting Factors Considered by South African Courts to Determine the Applicable Law of International Contracts on the Sale of Goods

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ABSTRACT

Issues on choice of law are sometimes very complex, and the resulting outcome may be determinative of most litigations. This is especially true where the litigation concerns cross-border transactions involving states with diverse laws and di erent legal traditions. Thus, it is important for parties to be able to accurately predict the applicable law of their international sales contract in advance to enable them to plan the activities relating to their contracts with

certainty. The existence of uncertainty with regard to the applicable law in most legal systems (especially at common law) makes it difficult for contracting parties to plan or resolve disputes that may arise from their commercial contracts, either by themselves or by the court. This situation is an unpleasant one which presents an undesirable state of affairs to the business world.

At common law, although it is true that the legal certainty required with respect to the applicable law of international commercial contracts can be achieved by a choice of law clause, it should be noted that most of such contracts do not contain this clause. This article attempts to contribute to existing literature on choice of law for contract in South Africa and also provide solutions, based on the underlying principles of private international law of contract, that effectively address the uncertainty in this area of law. To achieve its task, the article examines the various connecting factors considered by the South African courts in determining the applicable law (also, the proper law or governing law) of international contracts in situations where the parties do not insert a choice of law clause in their international contracts for sale of goods. The factors considered in this regard include the place of conclusion of contract, domicile, habitual residence and place of performance. These factors, in most situations, serve as the primary connecting factors considered by the courts in arriving at an answer with regard to the objective proper law/applicable law of an international sale contract (and other international commercial contracts) in South Africa. Further, the article examines why it is important for South African courts, and common law courts in general, to even go through the exercise of determining the applicable law in matters of international commercial disputes and not simply rely on the lex fori in dealing with such litigations (since, a lex fori approach might be much easier).

The keywords: *international contracts on the sale of goods, international commercial contracts, private international law of contract, common law, applicable law of an international contract, lex causae, lex fori, lex loci contractus, lex domicilii, law of the habitual residence, lex loci solutionis.*

Introduction

Issues on choice of law are sometimes very complex, and the resulting outcome may be determinative of most litigations. This is especially true where the litigation concerns cross-border transactions involving states with diverse laws and different legal traditions. Thus, it is important for contracting parties to be able to predict the applicable law of their international contract accurately in advance to enable them to plan the activities

relating to their contracts with certainty. Although it is true that legal certainty in this area can be achieved by a choice of law clause, it should be noted that majority of international contracts do not contain this clause (Lin, 2012; Marshall, 2014).

Before delving into the substantive issues, it must first be acknowledged that it is imperative for any legal system aspiring to promote cross-border trade and investment activities within its boundaries to adopt choice of law rules characterised by a high degree of legal certainty[1] (Neels, 2017; Obiri-Korang, 2021; Neels & Fredericks, 2018; Giuliano & Lagarde, 1980; Symeonides, 2013). The main reason for this is to help keep both adjudication and compliance costs in international commercial litigations low (Giuliano & Lagarde, 1980; Obiri-Korang, 2021). Also, and most importantly, legal certainty with respect to determining the objective applicable law fosters "prelitigation predictability" and, thus, helps to reduce the incidence of litigation – as the parties may be able to easily predict the outcome of possible litigations – and compliance costs since the parties are already aware of the law that regulates their obligations (Obiri-Korang, 2021).

The existence of uncertainty with regard to the determination of the applicable law in most legal systems (especially at common law) make it difficult for contracting parties to plan or resolve disputes that may arise from their transnational contracts, either by themselves or by the court (D'Amato, 1983). This situation is an unpleasant one which presents an undesirable state of affairs to the business world.

Methodology

This article attempts to contribute to existing literature on choice of law for contract in South Africa and also provide solutions, based on the underlying principles of private international law of contract, that effectively address the

[1] This is notwithstanding the fact that the relevant connecting factors to be utilised must be one that is not arbitrarily chosen but based on sound principles of choice of law for contract.

uncertainty in this area of law. To achieve its task, the article examines the various connecting factors considered by the South African courts in determining the applicable law (also, the proper law or applicable law) of international contracts on the sale of goods in situations where the parties do not insert a choice of law clause in their contract. The factors considered in this regard include the place of conclusion of contract, domicile, habitual residence and place of performance. These factors, in most situations, serve as the primary connecting factors considered by the courts in arriving at an answer with regard to the objective proper law/applicable law of a contract. Further, the article examines why it is important for the South African courts (or any other court) to even go through the exercise of determining the applicable law in matters of international commercial disputes and not simply rely on the *lex fori* in dealing with such litigations (since, a *lex fori* approach might be much easier).

1. *Lex fori* and *lex causae* conundrum: the need for the determination of the proper law

While the focus of this article is to help determine the appropriate choice of law rule that should be applicable to international contracts on the sale of goods, it first seeks to examine why it is important for courts to go through this exercise of determining the applicable law to disputes resulting from such contracts and not simply rely on the *lex fori* in dealing with such commercial litigation. Thus, the article will first put forward justifications as to why it is important to go through a choice of law process to determine the appropriate law that should govern international trade contracts.

From an objective point of view, it is natural for one to contend that it is uncomplicated and, probably, much more advantageous for courts to apply their own laws to every dispute that comes before them and which they have jurisdiction to hear because it is comparatively easier for them to ascertain and, subsequently, apply their own law. This is because it is reasonable for one to perceive

that judges and other legal practitioners within a particular jurisdiction are more familiar with the laws operating within their jurisdiction than those of other places. Where courts apply their own law, the cost of applying this law will be substantially lower compared to the prevailing system of determining the applicable law – *lex causae* approach (where courts are obliged to determine the legal system whose substantive law applies to a contract) (O'Hara & Ribstein, 1999). Also, if courts always apply their own laws to disputes arising from international contracts, the resulting precedents from these cases will serve as a valuable source of information to both judges and litigants, as it does in pure domestic cases, to either help facilitate adjudication processes or reduce the rate and incidence of litigation and, thereby, eliminating the need to invest into foreign laws. Thus, a *lex fori* approach to all international contractual cases has the potential of reducing or eliminating the need for local investment into foreign laws because such laws will be less valuable to local businesspersons and courts as foreign precedent becomes less important in serving as a guide to the decision-making process of courts (O'Hara & Ribstein, 1999; Thiel, 2000).

Regardless of the supposed advantages of a *lex fori* approach to questions of choice of law in international contracts, it is imperative to note that the process of determining the applicable law of international contracts is an important one, the relevance of which cannot be underestimated. The importance of this *lex causae* approach is discussed below.

1.1. Prelitigation predictability

First, a *lex causae* approach to choice of law is necessary for the enhancement of predictability (Forsyth, 2012). This position is even more probable in a system where there exists specific choice of law rules which allows little or no discretion on the part of decision-makers. The predictability promoted by a *lex causae* approach allows contracting parties

to structure their transactions and other activities, which are related to their contract, in a manner that ensure efficient performance of their obligations (Obiri-Korang, 2021). However, some authors have argued that it is rather the *lex fori* approach that presents the benefit of predictability to contracting parties. Their argument is based on the view that a *lex fori* approach is simple and clear and is, therefore, more predictable (Ghei & Parisi, 2004; Thiel, 2000)[2]. Although the argument may appear persuasive, a closer examination of the *lex fori* approach reveals that this approach may enhance predictability only after a dispute has occurred and/or a suit has been brought by a party against the other and the forum becomes clear, hence post-litigation predictability. In fact, a *lex fori* approach to all international contracts would rather create a considerable level of uncertainty prior to litigation as a party may not know beforehand the forum where she will be sued – this may only be possible if there is a choice of forum clause. Thus, a *lex fori* rule will, therefore, leave contracting parties in the dark about the applicable law of their contracts, making it impossible for them to structure their transaction around the law that should regulate it.

From the above, it can be asserted that the important form of predictability or legal certainty useful to commercial persons (pre-litigation predictability) may only be possible under a *lex causae* approach to choice of law (which includes the situation where the forum enforces choice of law clauses) and that the argument put forward to justify the *lex fori* approach on the grounds of predictability is one that is untenable (Allen & O'Hara, 1999; O'Hara & Ribstein, 1999). Thus, by a *lex causae* approach contracting parties may have the chance to ascertain the applicable law of their contract well in advance, which

[2] For an extensive argument in favour of a *lex fori* approach, see Parisi, F., & O'Hara, E.A. Conflict of laws. In P. Newman (1998) (Ed.). *The New Palgrave Dictionary of Economics and the Law*. P. 387.

will allows them to adjust their behaviour to particular legal frameworks[3].

1.2. Forum-shopping

Another known disadvantage associated with a *lex fori* approach is that it encourages forum-shopping due to plaintiffs' propensity to seek substantive laws that will be favourable to their case (Mankowski, 2002; Parisi & O'Hara, 1998). Thus, in a system where the *lex fori* rule is applied without reservation, plaintiffs may use forum-shopping as a tool to skew litigation processes in their favour because it will allow them to choose a forum *ex-post* based on their own preferences (Mankowski, 2002; Parisi & O'Hara, 1998). This is likely to happen because the varying substantive laws of various legal systems tend to create disparities with regard to disputing parties' expected gains across jurisdictions. Thus, by a *lex fori* approach, plaintiffs may be able to select the substantive law that best supports their case through forum-shopping.

[3] It has, however, been asserted by some authors that it is a misconception to associate pre-litigation predictability to the *lex causae* approach to choice of law. (See, for example, O'Hara & Ribstein, 1999; Parisi & O'Hara, 1998). This is based on the argument that, under a *lex causae* approach, the applicable law of an international commercial contract is dependent on the private international law rules of the forum state. It is also asserted that because contracting parties may be able to predict the states where any future litigation is likely to take place: hence, the applicable law, it has been argued that the level of predictability between the two approaches are virtually the same. This is, however, a simplistic view to the problem with regards to the legal certainty and predictability of results. First, the task of determining the courts which may have jurisdiction over the relevant contract in itself may be an exercise in futility. This is because without choice of court agreements, an aggrieved party may, through forum shopping, sue his counterpart in states with a liberal approach to question of jurisdiction in private international law. Second, even in situations where parties are able to accurately predict the likely applicable laws, based on the private international law rules of all the forums which may have jurisdiction over any future dispute, it will be an expensive task to study the laws of all the potential legal systems whose law (including precedents) may be applicable.

A possible solution to the menace of forum-shopping due to a *lex fori* approach is the adoption of a *lex causae* approach to questions of choice of law. This approach obliges decision-makers to determine the applicable law of international contracts by considering certain factors important to the relevant contract or by applying laid down statutory rules. Such an approach – *lex causae* – provides little or no incentive for forum-shopping and, therefore, discourages plaintiffs from doing so[4].

1.3. Possible regulatory competition

The third (non-traditional) reason put forward in favour of a *lex causae* approach to choice of law is the argument advanced by some scholars that it encourages states' adoption of efficient substantive rules (O'Hara & Ribstein, 1999; Parisi & O'Hara, 1998). This argument is based on the premise that parties structure their contract and subsequent transactions in a manner that avoids inefficient or inappropriate laws. This practice is believed to have led to the situation where certain state laws, which might have otherwise applied, are wilfully overlooked or avoided by contracting parties. The rejection of certain state laws may, in turn, force states to internalise the cost of their (inferior) laws, thereby promoting competition among various jurisdictions for the adoption of more efficient substantive laws (Parisi & O'Hara, 1998; O'Hara & Ribstein, 1999). A typical example is the consistent selection of English law by commercial parties as the preferred applicable law of their maritime contracts because of the country's well-developed jurisprudence and popularity in the field of commerce (Nishitani, 2016)[5]. Thus, a *lex causae*

[4] However, whether or not the idea of forum shopping itself should be discouraged is another debate. It should, however, be noted that forum shopping is generally regarded as an obstacle to the smooth proper administration of justice procedure and is generally not encouraged.

[5] See, for example, the South African case of *Representatives of Lloyds v. Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) where the parties chose the English Marine Insurance Act of 1906 as the applicable law.

approach allows parties to avoid inappropriate and inefficient laws from regulating their contract by selecting a law that is different from the one that would have been applied.

1.4. Comparative regulatory advantage

A fourth reason which favours the application of a *lex causae* approach to choice of law is that it allows courts to uphold and give effect to foreign jurisdictions' comparative regulatory advantages (Posner, 1998; Hay, 1992; Solimine, 1989). This is to help preserve remedies due to aggrieved plaintiffs which would have been based on the putative proper law. The comparative regulatory advantage associated with the *lex causae* approach can be properly demonstrated in actions of tort. The argument is that choice of law rules should acknowledge lawmakers' capability of obtaining information about the rules that should govern particular cases. Under tort, for example, the idea of comparative regulatory advantage stipulates that the *lex loci delicti commissi* is the law most attuned with the conditions that affect its road safety – climate, terrain, and attitude of road users toward safety (O'Hara & Ribstein, 2000). In instances like this, the place where an accident occurs is considered to have the comparative regulatory advantage with respect to the creation of the most favourable incentives to provide for injured plaintiffs within that jurisdiction.

2. Introduction to South African choice of law rules in respect of international contracts on the sale of goods

To begin with, it is important to indicate that South Africa is neither a party to the United Nations Convention on Contracts for the International Sale of Goods of 1988 (CISG) nor any other international treaty that seeks to unify either the substantive law or the choice of law rules on international trade in goods.

Under South African private international law, parties to international contracts have the right, under the principle of party autonomy, to determine the applicable law (also known as the

proper law) of their contract (Kahn, 2003; Forsyth, 2012; Van Rooyen, 1972; Spiro, 1973). This right granted to contracting parties may be exercised either expressly or tacitly, leading to an express choice of law or a tacit choice law, respectively (Forsyth, 2012; Schoeman et al., 2013). Identifying an express choice of the applicable law in an international contract for the sale of goods simply requires one to look at the terms of the contract to see if the parties included a choice of law clause (Collins & Harris, 2022; Kahn, 2003; Forsyth, 2012). It is, however, a bit problematic when the parties do not expressly indicate their choice of the applicable law in the contract and the court has to infer or determine a tacit choice of law. Under tacit choice of law, it is said that the parties make "a true and a real choice of law which is not expressly made" but, however, a clear inference can be drawn from the terms of the contract that the parties did, in fact, make a choice of law except that they did not expressly indicate this choice in their contract (Neels & Fredericks, 2011; Mortensen, 2006).

While the position in South Africa on effectuating both the express and tacit choice of the applicable law with respect to international contracts on the sale of goods is quite settled, albeit some identified challenges[6], it is more challenging for contracting parties (and, even, the courts) to accurately predict the applicable law of their international sale contract in situations where the parties do not choose this law. Regardless of the benefits associated with parties exercising their autonomy to choose the applicable legal system (especially, in instances where there is an express choice of law), contracting parties do not always

[6] In the 2010 decision in *Representatives of Lloyds v. Classic Sailing Adventures (Pty) Ltd*, the South African Supreme Court of Appeal seemed to be willing to give effect to contracting parties' choice of English law as the applicable law of their contract only insofar as the provisions of the said law (English Marine Insurance Act of 1906) were not conflicting with the otherwise South African legislation on the subject (*Representatives of Lloyds v. Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA)).

exercise this right. However, in stances where the parties to an international commercial contract neither expressly nor tacitly select the applicable law, this law (known as the objective proper law) is determined by the court (Forsyth, 2012; Collins & Harris, 2022). In South Africa, the objective proper law is determined by applying the "closest and most real connection" rule. Thus, here, like many other common law jurisdictions around the world, the objective proper law is the law (legal system) with which the contract has the has the "closest and most real connection" (Forsyth, 2012; Fredericks & Neels, 2003)[7].

In the past, the courts in South Africa applied either the law of the place of contracting (*lex loci contractus*) or the law of the place where the contract was performed (*lex loci solutionis*) as the objective proper law of an international contract for the sale of goods (Edwards, 1984; Kahn, 1990)[8]. However, and as discussed below, applying the *lex loci contractus* merely because it is the law of the place where the contract was concluded may not be appropriate as the place of contracting may be fortuitous and have no substantial link to the contract (Forsyth, 2012; Schoeman et al., 2013). Further, in certain circumstances, it may be difficult to determine the place where a contract was concluded[9]. With respect to the *loci solutionis* rule, it has also been argued that although the place of performance will seldom be fortuitous, relying on this rule may lead to the difficulty of determining the objective proper law in situations where the contract requires performance in multiple places (Forsyth, 2012).

Today, and as has already been indicated above, the courts in South Africa have moved away from both the *loci contractus* and *loci solutionis* rules, due to its unsuitability in modern times, in

[7] *Improvair (Cape) (Pty) Ltd. v. Establissements Neu* 1983 (2) SA 138 (C) at 146H–147A; *Laconian Maritime Enterprises Ltd. v. Agromar Lineas Ltd.* 1986 (3) SA 509 (D) at 526D–H.

[8] See also *Standard Bank of South Africa Ltd. v. Efroiken and Newman* 1924 AD 171 at 185ff.

[9] or example, an international sale contract concluded on the internet.

favour of the "closest and most real connection" rule (Schoeman et al., 2013)[10]. The "closest and most real connection" rule was adopted by the English courts after the judgement in *Bonython v. Commonwealth of Australia*[11]. This approach has since been adopted by common law courts around the world, including countries like Ghana[12], Australia[13], and Canada[14], where the rule has even been extended to matters regarding the establishment of jurisdiction[15]. In the United Kingdom, itself, where the rule emanated from, the country has since the early 1990s abandoned this common law rule in order to give effect to the European Union Convention on the Law Applicable to Contractual Obligations of 1980 (the Rome Convention) and the subsequent European Union Regulation on the Law Applicable to Contractual Obligations of 2008 (the Rome I Regulation) through the enactment of the Contracts (Applicable Law) Act

[10] The subjective approach was subsequently endorsed in *Guggenheim v. Rosenbaum* and it is yet to be expressly rejected by the South African Supreme Court of Appeal (*Guggenheim v. Rosenbaum (2)* 1961 (4) SA 21 (W)). This is so regardless of the inability of the court to determine the actual subjective intention of contracting parties in respect of the choice of the applicable law, especially in situations where the parties did not, in fact, apply their minds to the issue. And, since the connecting factors considered by the courts in order to impute or infer an intention to the parties work in an objective manner to localise the international contract, one may ask if the court does, in fact, "impute" an intention to the contracting parties or it only utilises the term to justify its manner of operation (See, Edwards, 1984, for further criticism of the subjective approach). In the end, it can be argued that it does not make sense for the court to impute an intention to the parties if the parties had neither expressly nor tacitly chosen the applicable law of their international contract.

[11] 1951 AC 201.

[12] *Godka Group of Companies v. PS International Ltd.* 1999-2000 1 GLR 409; *Société Générale de Compensation v. Ackerman* 1972 1 GLR 413.

[13] *Akai Pty Ltd v The People's Insurance Co* (1996) 188 CLR 418.

[14] *Lilydale Cooperative Limited v Meyn Canada Inc* 2015 ONCA 281.

[15] In Canada, the "closest and most real connection" rule is also applied by the courts to determine whether it has jurisdiction to hear a matter with foreign elements (*Tolofson v. Jensen* 1994 3 RCS 1022).

of 1990 of the UK (Khanderia, 2020). After Brexit[16], both the Rome Convention and the Rome I Regulation automatically became unapplicable in the UK. And, in order for the country to largely retain and apply the choice of law rules under the Rome I Regulation (and the Rome II Regulation[17] which concerns tortious/delictual matters), the country has adopted the provisions of the Rome I Regulation in the UK through a new legislation, the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations of 2019[18].

In South Africa, the application for the closest and most real connection rule to international contracts on the sale of goods has received approval from academics for being "jurisprudentially more sound" in the determination of the objective proper law (Schoeman et al., 2013). In order for the South African courts (and other common law courts) to determine the legal system that has the "closest and most real connection" with an international contract, the court may consider a number of factors known as connecting factors. Chief among these factors are the place of conclusion of contract, domicile, habitual residence and place of performance.

It should, however, be noted that before the adoption of the "closest and most real connection" rule in South Africa, the court in an earlier case, *Standard Bank of South Africa Ltd. v. Efroiken and Newman*[19], concerning an international contract for the sale of goods adopted an initial subjective approach (also known as the presumed intention theory) to matters on choice of law. Under the so-called subjective approach, the court operates on the presumption that the contracting parties intended the law of a

[16] Brexit is the term given to the United Kingdom's withdrawal from the European Union which officially occurred at 23:00 GMT on 31 January 2020.

[17] European Union Regulation on the Law Applicable to Non-Contractual Obligations of 2008.

[18] The Secretary of State of the United Kingdom made these Regulations with respect to the powers conferred on her by section 8(1) of (and, also, paragraph 21(b) of Schedule 7) the European Union (Withdrawal) Act of 2018.

[19] 1924 AD 171.

particular legal system to apply to their contract (Edwards, 1984). Here, the court strives to determine what the intention of the parties would have been had they considered the issue of the applicable law (Schoeman et al., 2013; Khanderia, 2020; Edwards, 1984). For the court to impute or infer an intention to the parties under the subjective approach, the court considers all factors relevant to the particular case. And like the major connecting factors considered under the "closest and most real connection" rule, the main factors considered under the subjective approach are also the place of conclusion of contract, domicile, habitual residence and place of performance (Edwards, 1984). Thus, regardless of which approach considered by the South African court, the primary connecting factors considered by the courts seem to be the same.

3. Examining the rules of choice of law for the determination of the objective proper law

3.1. Introduction

When examining choice of law rules for contracts, it is important to bear in mind that these rules may be relevant to contracting parties in two contexts. The first is that it is importance to the resolution of conflicts that have already occurred. Here, these rules are applied by the courts (or other conflict resolution bodies) to resolve issues concerning the applicable law. Second, parties may also resort to choice of law rules with the hope of avoiding conflicts[20]. Thus, parties may rely on choice of law rules to determine the applicable law of their contracts by themselves and this will help them to know the level of performance expected of them so as to avoid future litigation. Regardless of the interest of parties (or judges and any other third parties) or the purpose for which one appeals to choice of law rules for contract, all relevant participants demand a stable,

[20] Note that uniformity and predictability, based on commercial convenience, are the most important considerations in making the choice of the applicable law by parties.

concrete set of rules to help them in their decision making (O'Hara & Ribstein 2000; Hakki, 2003).

In cases concerning international contracts for the sale of goods, a reliable choice of law approach that is relevant would be one that embraces conflict-resolving values such as simplicity, predictability and legal certainty. Aside these, other relevant substantive values that should characterise choice of law rules meant for the promotion of commerce are uniformity, fairness, and the protection of weaker parties[21]. Again, the relevant choice of law approach must, in addition to the above, satisfy the criteria of effectiveness, clarity and commercial convenience[22]. These qualities can help to promote commercial and investment activities within jurisdictions. For example, a survey by the International Chamber of Commerce (ICC) in 2003 revealed that a lot of companies are discouraged from entering into an international commercial contract and other investment activities within a country if they are uncertain about their liability exposure within the particular country[23]. Also, the ICC findings indicate how the ideas of legal certainty and predictability of results may affect economic growth within a particular region. Thus, for businesses to continue to grow and expand their operations and relationships across borders there is the need for the adoption of a clear and predictable set of choice of law rules in the area of contract.

In this section, the article seeks to evaluate the main connecting factors utilised by the South African courts to determine the objective applicable law of contracts (in situations where parties

[21] The ICC is the world's largest business organization with more than 8,000 member companies in more than 140 countries. The survey results are available at www.icwbo.org/law/jurisdiction.

[22] See sections 4A-507 comment 3 of the Uniform Commercial Code of the United States.

[23] The ICC is the world's largest business organization with more than 8,000 member companies in more than 140 countries. The survey results are available at www.icwbo.org/law/jurisdiction.

do not select the applicable law by themselves) to identify those factors that are appropriate for providing uniformity of results and predictability, based on commercial convenience. This will be achieved by examining the major connecting factors and how they are applied by the courts in arriving at a decision on the applicable law for international contracts for the sale of goods.

3.2. Examining the leading connecting factors considered by the South African courts

In determining the applicable law of an international contract for the sale of goods, the courts of the various legal systems and, most importantly, different legal traditions around the world adopt different approaches in arriving at an answer. In this regard, courts of different states adopt different choice of law rules (which may either be statutory rules or precedence from case law, depending on the specific country) by selecting a connecting factor or assigning varied levels of importance to different connecting factors to be considered in making a decision on the applicable law. In South Africa, the applicable law of an international contract for the sale of goods is the law with which the contract has its "closest and most real connection"[24]. This rule requires that the court examines the various connecting factors of the contract to determine the said applicable law[25]. Although the applicable choice of law rule requires all South African courts

[24] *Improvair (Cape) (Pty) Ltd. v. Establissements Neu* 1983 (2) SA 138 (C) at 146H–147A; *Laconian Maritime Enterprises Ltd. v. Agromar Lineas Ltd.* 1986 (3) SA 509 (D) at 526D–H; See para 4 above for the discussion on the subjective approach to issues of choice of law for contract. It is important to indicate that although the "closest and most real connection" rule seems to be the current rule applicable in South Africa, the subjective approach which was applied in the early days have not yet been overruled by the Supreme Court of Appeal; It is also important to note that regardless of the approach adopted by the court in determining the applicable law of an international contract for the sale of goods, the connecting factors considered by the court remain the same.

[25] *Bonython v Commonwealth of Australia* 1951 AC 201; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* 1984 AC 50 HL.

to examine the connecting factors in a balanced manner, there seems to be a lack of legal certainty and predictability of results in this area of law as it is possible to have different courts in the country to arrive at different answers regarding applicable law for a particular international sale contract (even when these courts are faced with the same or similar set of facts). In fact, the issue of uncertainty regarding the applicable law of a contract may even be encountered when the same set of facts are presented before two different judges of the same court at separate times (Obiri-Korang, 2020). This is especially true under a common law system that relies on judicial precedence because judges, through their discretion, may place different weights on the connecting factors they consider in determining the applicable law of international contracts for the sale of goods.

As already mentioned in the preceding section, when dealing with questions of choice of law in situations where there is no express choice by the parties, there are numerous factors that the courts consider to be relevant in the determination of the applicable law. With regard to international sales contract, the major connecting factors considered by the South African courts include (but are not limited to) the place of contracting, place of performance, place of residence (including the place of incorporation of a business or the principal place of a business organisation)[26], and the place of domicile (Schoeman et al., 2013; Forsyth, 2012; Edwards, 1984)[27]. Other factors considered, to a lesser extent, include whether the contract is linked with any other contract that contains a choice of law clause, the currency used in the contract, the language used etc (Schoeman et al., 2013; Forsyth, 2012; Edwards, 1984). Among these factors, the law of the place of contracting (*lex loci contractus*) (Nussbaum, 1942) and that of the place of performance (*lex loci solutionis*)

[26] See, for example, *Standard Bank of South Africa Ltd. v. Efroiken and Newman* 1924 AD 171.

[27] *Improvair (Cape) (Pty) Ltd v. Establissements Neu* 1983 2 SA 138 (C).

(Obiri-Korang, 2021) have been suggested as the laws that may legitimately serve as the applicable law of international contracts. Regardless of this suggestion, these two have their own limitations. With regard to the *lex loci contractus* rule, the most popular argument against it is based on the fact that the *loci contractus* may be entirely fortuitous[28]. Similarly, persuasive arguments have been advanced against the *lex loci solutionis* rule with respect to international contracts for the sale of goods with the most popular one questioning its effective application in situations where there is more than one place of performance (Fernández, 2019).

3.2.1. The *lex loci contractus* rule

The *lex loci contractus* rule provides that in a contractual relationship where there are foreign elements, any dispute that arises over the rights and obligations of the parties concerned should be determined by the law of the place where the contract was made (Pitel & Rafferty, 2010; Nicholson, 1982). The state "where the contract was made" has been interpreted to mean the state where the last act required for the formation of a legally binding contract was made (Pitel & Rafferty, 2010). Regardless of the simple nature of this *lex loci contractus* rule, it has generated controversy and been considerably criticised by various authors. Firstly, putting this rule into practice requires artificial rules like the "postal rule" to determine the *loci contractus*[29]. Secondly, the *loci contractus* rule cannot be applied to all contracts. For example, it cannot be applied to situations where the contract of sale of goods is made on the international seas (Pitel & Rafferty, 2010).

Further, today's age of electronic communication presents new challenges with regard to the determination of the *loci contractus* (Schoeman et al., 2013). Thus, supposing two parties

[28] See Lord Diplock in *Amin Rasheed Shipping Corp. v Kuwait Insurance Co* 1984 AC 50 (HL) 62.

[29] According to the postal rule acceptance is deemed to have occurred at the place where the offeree mailed it: Duwuona-Hammond *The Contract Law of Ghana* (2011) 43.

with no in-person negotiations conclude a contract via the exchange of emails, how does one determine the place where the acceptance, relevant for the conclusion of a binding contract, was received by the promisor? Will the place of acceptance be at the location of the relevant internet server, which received the electronic transaction, or where the promisor-addressee fortuitously happens to be when she opened and read her email? In fact, fortuity plays such a major role in the application of the *lex loci contractus* rule that it becomes difficult for parties to actually prepare ahead, taking into account the law which will govern their contract (Pitel & Rafferty, 2010).

Take the scenario where a Ghanaian trader (buyer) and a South African businessman (seller), both of whom were on a safari at the Nairobi National Park, contract in Nairobi (Kenya) for the sale of wool by the South African to the Ghanaian which is to be delivered (FOB) at the harbour in Cape Town (South Africa). Here, although Kenyan law has no close or real connection with the transaction, it would become the applicable law of the sale contract if the *lex loci contractus* rule applies. This will be the result if any dispute arising from this transaction comes before a court in Guinea-Bissau (assuming it has jurisdiction) since the parties have no common habitual residence. Thus, in applying the Civil Code of Guinea-Bissau of 1973, the court will apply the *lex loci contractus* rule[30] as the parties neither chose the law to apply to their contract nor have a common habitual residence. It must be mentioned here that the role that the element of chance plays in the determination of the applicable law in this scenario – where the applicable law of an international contract for the sale of goods lacks any form of close or real connection with the parties or their contract – is what led to the gradual removal of the *lex loci contractus* rule in South Africa (Schoeman et al., 2013).

[30] According to articles 14-65 of the Bissau-Guinean Civil Code of 1973, if the parties do not choose the applicable law then the law of the common habitual residence of the contracting parties governs their international contracts and in situations where the parties do not have a common residence, then the *lex loci contractus* applies.

Flowing from the above, it is discernible that a strict application of a *lex loci contractus* rule may provide contracting parties with the needed certainty required to plan their activities with respect to their contractual rights and obligations. However, the level of certainty may be lower, as the determination of the place where an international contract for the sale of goods was actually concluded can sometimes be tricky (for example, accepting a contract while on board an aircraft travelling across Sub-Saharan Africa). Also, the fact that a strict application of this rule may lead to the application of the law of a state that has little or nothing to do with the contract may seem problematic. Finally, and flowing from the preceding reasoning, it should be mentioned that the *lex loci contractus* rule, in most instances, only creates post-contractual certainty or certainty only immediately before a contract is concluded. This is because the *loci contractus* of most modern contracts may only be determined with certainty only after the contract has actually been concluded as the location of the modern business person keeps changing from time to time, leaving the applicable law (in this case, the *lex loci contractus*) to chance.

3.2.2. The *lex loci domicilii* and the habitual residence rule

Domicile has, for a long time, been a notable connecting factor under South African (and at common law, in general) private international law and has served as a link between individuals and particular legal systems in cases with foreign elements (Forsyth, 2012). In law, every individual has a domicile at a given point in time. However, it should be noted that while a person is entitled to only one place of domicile at a time, she may be resident at one or more places at the same time (Forsyth, 2012; Collins & Harris, 2022)[31]. The uniqueness of domicile with reference to every individual has made it possible for the courts to rely on "domicile"

[31] At common law, the rule is that an adult can change her domicile by leaving the previous one in order to permanently reside elsewhere. This new domicile is known as a domicile of choice. Also, one can abandon her domicile of choice if she finds herself a new domicile of choice or if the domicile of origin revives (Stone, 1995).

as a factor relevant for choice of law purposes. Under private international law, the determination of the applicable law generally depends on a relationship between a person, a thing or a conduct, on one hand, and a particular geographical location or a state on the other hand (Hay et al., 2010). This relation is what is normally referred to as connecting factor (Zhang, 2018; Szászy, 1966). Again, in private international law, the law that a person is subjected to base on her affiliation (such as domicile) is her personal law. This law is mostly applied to personal issues affecting individuals such as marriage, inheritance, civil capacity, and other matrimonial causes and personal statuses (Mousourakis, 2012). The idea is found on the general principle that the "personal law" of individuals follows them and helps in the determination of their legal interests (Zhang, 2018). Thus, peoples' personal law governs them wherever they may find themselves (Szászy, 1966; Zhang, 2018; Forsyth, 2012). Below is an overview and examination of the justifications put forward for the adoption of domicile as the relevant factor for the determination of individuals' personal law.

Historically, the application of the *lex loci domicilii* rule for purposes of determining the applicable law at common law has been relevant in matters concerning the status of persons. As a matter of fact, the use of "domicile" as the geographical link between a person and the law to which she is a subject can be traced to the statutist theory developed and advanced by Medieval Italian jurists (Nadelmann, 1969; Zhan, 2018). Under the theory, developed in the Twelve Century to assist in the determination of the applicable law (Paul, 2008), statutes were classified into real statutes, personal statutes and mixed statutes (Torremans, Grušić, Heinze, 2017). Real statutes were applied to property interests (which were territorially based) (Cavers, 1965). Personal statutes were applied to issues that involved the determination of the statuses of a person (this law followed a person to wherever she may find herself) (Cavers, 1965). Mixed statutes governed other matters, including those acts done within a particular territory (which may involve contracts) (Torremans et al., 2017). Under this system, the *lex*

loci domicilii rule was relevant to matters concerning the status of persons as such matters were determined by the personal law of the relevant party, which is invariably the law of her domicile (Cavers, 1965). This position has not changed much today as domicile is still utilised as the primary connecting factor in determining the applicable law in matters affecting the status of individuals such as marriage, adoption and divorce.

It must be mentioned that although the use of domicile may not have sound theoretical basis in the area of contract, the "domicile" of contracting parties is considered as one of connecting factors by South African courts to determine the applicable law of international contract for the sale of goods (Schoeman et al., 2013; Khanderia, 2020; Edwards, 1984)[32]. However, domicile has not, in the long history of private international law, been utilised or promoted as a connecting factor for the determination of the applicable law on matters outside those which affect a person's status. This position, *prima facie*, seems to disqualify any notion of applying the *lex loci domicilii* rule to commercial or contractual matters. Thus, although the application of "domicile" as the connecting factor for determining the applicable law of an international contract may seem appropriate for purposes of promoting legal certainty and predictability, its utilisation lacks theoretical basis and may even be detrimental to the contracting parties.

While it may be justifiable to apply the personal law of an individual to issues affecting her status, this may not be so if the issue concerned is of commercial nature (which tend to be executed in a territory or territories and, hence, affect the interest of that territory or territories). Here, the appropriate factor to consider may, for example, be the place where the performance was effected or is to be effected.

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[32] *Standard Bank of South Africa Ltd. v. Efroiken and Newman* 1924 AD 171; *Improvair (Cape) (Pty) Ltd. v. Establissements Neu* 1983 (2) SA 138 (C) at 146H–147A; *Laconian Maritime Enterprises Ltd. v. Agromar Lineas Ltd.* 1986 (3) SA 509 (D) at 526D–H.

3.2.3. Habitual residence

One cannot discuss the importance of the "habitual residence" rule to choice of law without mentioning its link to the domicile rule. The history and development of the use of habitual residence as a relevant factor of choice of law is intertwined with that of domicile. The concept (habitual residence) can be traced to the Nineteenth Century when the use of domicile as a connecting factor for choice of law purposes became unpopular in continental Europe (Nadelmann, 1969). This was due to the emergence of the concept of nationality which had its theoretical foundation in the works of the Italian jurist, Mancini (Nadelmann, 1969). Mancini regarded the "nationality" of a person as the main basis of international law. According to him and his supporters, the law of a particular nation should be applicable to all of its citizens, no matter where they may find themselves (Beale, 1916; Zhan, 2018). This rule, like the domicile rule at the time, only applied to matters concerning the status of persons such as capacity, succession, and family relations (Nadelmann, 1969).

Mancini's doctrine soon became the new standard in continental Europe and, consequently, became the "golden standard of private international law" in that part of the world (De Winter, 1969). Subsequently, most European states (as well as some non-European states, majority of whom were former colonies of relevant European states) adopted "nationality" as the main connecting factor considered for the determination of the applicable law (as well as jurisdiction) and codified same (De Winter, 1969). Like domicile, nationality was utilised in cases concerning the status of an individual. This development led to a divide between common law states (as they kept on applying domicile) and civil law states with regards to the connecting factor considered by their respective courts to determine an individual's personal law. This divide can be attributed to the keenness of the common law courts to stick to "domicile" as an important factor for choice of law. For example, in England, the courts did not relent on the application of the *lex loci domicilii* rule as they continued to determine individuals' rights and the legal effect of their act by reference to the law of the country

where they had their homes – this may be different from the country where one resides or where one is a citizen (Dicey, 1879). On the other hand, in the French Civil Code of 1893, for example, the laws that relate to the capacity and status of a person were deemed binding on all French nationals regardless of where they found themselves in the world (Lorenzen, 1928). This position was based on the notion that the best or appropriate law to regulate a person is the law of the community of which she is a member (De Winter, 1969). However, it is important to point out that while domicile was utilised as a factor in the determination of both the applicable law and jurisdiction at common law, nationality only applied to the determination of the applicable law in the civilian jurisdictions.

Regardless of the reasons put forward for abandoning domicile for nationality, the application of the nationality doctrine led to some challenges making its application unsuitable for the determination of the applicable law in the long run[33]. This led to the birth of the habitual residence doctrine which is currently the most popular choice of law connecting factor in Europe.

The use of habitual residence, as a connecting factor for choice of law purposes as well as for the determination of jurisdiction, represents a new trend in the development of private

[33] The first problem associated with application of the nationality doctrine is its ineffectiveness in situation where a person had no state – stateless person(s) – or where an individual's nationality cannot be identified (Cavers, 1965, p. 476). This created the need for an alternative doctrine which will be effective in this kind of situation. For example, in France the law of domicile was considered as the alternative and, therefore, served to be the personal law of stateless persons (De Winter 1969, p. 382). Also, Art. 12 of the United Nations Convention Relating to the Status of Stateless Persons of 1954 adopted domicile instead of nationality so as to overcome the vulnerability that affects stateless persons' and to help resolve the practical problems which they encounter in their lives; The second problem associated with the application of the nationality doctrine is with respect to persons with dual citizenship. Here, difficulty arises when determining the national law of such persons – such persons with dual citizenship may be deemed "as a national by each of the states whose nationality he possesses" or the determination may have to be made by considering other factors such as the person's principal residence and the place where the person is most closely related (Articles 3 and 5, respectively, of the Convention on Certain Questions Relating to the Conflict of Nationality Laws of 1930).

international law (McLeod, 2006). The successful adoption and wide utilisation of this new connecting factor has been attributed to the efforts of the Hague Conference on Private International Law (Hague Conference)[34]. This was achieved by the Hague Conference under its mission of "progressive unification" of private international law rules[35]. Through its unification process, meant to promote legal harmony in civil and commercial matters, the Hague Conference has adopted and promoted the use of "habitual residence" as a major connecting factor in private international law and this has led to the adoption of this fairly new connecting factor in most legal systems (especially, in Europe) (Perez-Vera, 1980).

Like domicile and nationality, habitual residence was initially adopted for use to determine the personal law of an individual. This can be observed in the extensive adoption and application of the habitual residence rule in most civil law states in this area of law. Eventually, habitual residence replaced nationality as the major connecting factor for purposes of choice of law. In fact, utilising this as the main connecting factor for the determination of personal law was also based on the sound argument that individual's personal law follows them wherever they may find themselves, to help determine their legal interests (Zhan, 2018). By relying on the rationale for utilising domicile or nationality as the prime factor for determining the applicable law in matters concerning people's statuses, the Hague Conference adopted habitual residence as a connecting factor. Thus, the Hague Conference initially adopted and used the habitual residence rule – the law of the place of habitual residence – to determine personal law in its initial international conventions that bordered on matters of family law, such as child custody, guardianship, marital status

[34] Hague Conference on Private International Law "A world organization, HCCH" https://www.hcch.net

[35] Hague Conference on Private International Law "A world organization, HCCH" https://www.hcch.net

and other similar issues (Nadelmann, 1969). Today, the application of habitual residence has been expanded from matters of family law to new areas such as contract and tort. This may be observed in the EU through the Rome I Regulation and Rome II Regulation which have adopted habitual residence as the primary connecting factor for the determination of the applicable law in international contractual and tortious matters respectively (Manko, 2013).

Before considering whether or not "habitual residence" should be utilised as the primary connecting factor for determining the applicable law of international contracts, it is imperative to point out that this factor was only adopted by the Hague Conference to replace "domicile". Like domicile, habitual residence was initially utilised in matters concerning personal statuses[36]. For example, it may sound unfair for a court in France to apply French law in a divorce case which involves a couple (who are habitually resident and domiciled in South Africa) on a two-week vacation from South Africa to France. This is so because French law has little or nothing to do with the status of the couple and may, therefore, not be appropriate to regulate their union that only have implications on them and other persons in Burkina Faso. In this kind of situation, the appropriate law to apply is South African law – law of the place where they are habitually resident – since that is the place where the consequence of their new status may have an effect.

Although other factors may be considered appropriate as connecting factors in cases of contract for the sale of goods (or commercial contracts, in general), the same cannot be said about habitual residence, domicile or nationality in this area of law. In fact, these factors – habitual residence, domicile and nationality – have no basis for application in contractual matters

[36] This position was adopted because the individual was regarded as the most important element in this kind of cases. Thus, the substantive issues for the court to determine in such matters were those whose results affect people and their relations with others which may have little or no implication on, for example, their location at a particular point in time.

as they have no link to either parties' contract or obligations arising from it. Thus, unless parties' contract to have the law of the place of habitual residence (or domicile or nationality) of, at least, one of them as the applicable law of their transaction, there is no basis to apply this law to a contract[37]. The only advantage which habitual residence, domicile or nationality may present as a connecting factor to choice of law for contract is predictability and legal certainty, which is not unique to these factors.

Currently, however, the use of habitual residence has gained popularity among some states[38], especially, in the area of family law. In England, apart from statutes adopted by the English parliament, case law has played a role in the adoption of habitual residence over domicile in certain matters. For example, in *Re J (A Minor) (Abduction: Custody Rights)*[39], the House of Lords adopted habitual residence as the relevant factor in a child abduction case. In South Africa, literature on choice of law for contractual matters seem to suggest that "habitual residence" is one of the connecting factors that is to be considered by the courts in determining the applicable law under the "closest and most real connection" rule (Schoeman et al., 2013; Forsyth, 2012).

Regardless of the extensive acceptance of habitual residence in, mainly, non-contractual matters, it is inappropriate to apply this rule to contracts as indicated above[40]. With respect to commercial contracts, the factor to be considered must be one that has sound theoretical and practical underpinning in choice of law literature.

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[37] This is true unless the place of habitual residences happens to coincide with, for example, the place of performance.

[38] At law, the idea of habitual residence is considered to be different from domicile even though both are related in terms of residence (Nadelmann, 1969).

[39] *Re J (A Minor)* 1990 2 AC 562 570.

[40] This position should, however, not be the case in contracts of adhesion such as consumer contracts, employments contracts and similar types of contracts where the place of "habitual" residence may be of critical importance.

3.2.4. *Lex loci solutionis* rule

The next connecting factor considered for purposes of choice of law in private international law of contract literature is the place of performance *(loci solutionis)*. This connecting factor, like the *locus contractus*, has been one of the main factors considered by the South African courts in determining the applicable law of international contracts for the sale of goods (Schoeman et al., 2013; Forsyth, 2012; Edwards, 1984)[41]. Since the place of performance has sufficient link to international contracts, the application of the law of this place efficiently addresses the shortcomings identified with the factors already considered – place of contract, domicile, nationality and habitual residence. Adopting the *lex loci solutionis* rule provides a solution to the *ius strictum* and *ius aequum* debate (Neuhaus, 1963), at least, in the field of contract. This is because the rule allows for a high degree of legal certainty with respect to the applicable law while, at the same time, providing equity or justice – in the sense that it is the law of the state with sufficient interest in the performance of a contract that is being applied. Thus, aside certainty and predictability of the law, the application of the *lex loci solutionis*, establishes a link between commercial contracts, and the social and economic environment in which such contracts are to be performed (Giuliano & Lagarde, 1980). Unlike matters concerning the statuses of persons, in which the effect of such matters on third parties are taken into account, in international contracts it is the place where the obligations are performed (or are to be performed) which is significantly affected by the transaction, hence, the call for the adoption of the *loci solutionis* rules.

Regardless of the above justification for adopting the *lex loci solutionis* in cases of contract, there are also some concerns raised about the proper application of this rule. The first deals with the situation where the parties agree to have their respective

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

obligations take place in different states. For example, when the parties to a sale contract agree that the seller delivers the goods in South Africa and the buyer pays for the goods in Ghana. The second challenge occurs when the place of performance is deemed to be unknown. This may occur is situations where there exists a binding contract between the parties in an instance where they have agreed on everything except the place of performance – this may have been left to a party to unilaterally determine at a later date. For example, it will be challenging to apply the *lex loci solutionis* rule in situations where the port of delivery for a cargo is, by the relevant contract, supposed to be determined only after the vessel is at sea. The third and final concern raised against the application of the *lex loci solutionis* rule relates to the determination of the applicable law in situations where there are multiple places of performance with respect to a contract. An example of this can be observed in situations where the terms of an international contract for the sale of goods stipulates that the seller delivers goods in three different states. Here too, it will be difficult for one to determine the applicable law since there is more than one place of performance.

As already mentioned, the application of the *lex loci solutionis* rule is naturally suitable for contractual matters. However, adopting this rule may only be appropriate if the concerns raised above are effectively addressed. With respect to the first concern or challenge identified – the situation where the parties' respective contractual obligations are agreed to take place in different states – one may look to the Rome I[42] for inspiration. Under the Rome I, performance refers to the obligation which is characteristic of the contract (hereinafter, characteristic performance) (Giuliano & Lagarde, 1980). Here, characteristic performance has been defined to mean "the performance for which [the] payment is due" – non-monetary performance

[42] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations.

(Giuliano & Lagarde, 1980). This definition is based on the idea that performance must refer to the function which the legal relation, created by a contract, fulfils in the economic and social life of the relevant state (Giuliano & Lagarde, 1980). Thus, the concept (EU solution) essentially creates a link between a commercial contract, and the social and economic environment of which it is going to be part. This solution is sound and supported by this study.

Specifically, under the Rome I, performance deemed characteristic of an international contract for the sale of goods is the "delivery of the goods", and that for a service contract is the "provision of the service". This is because it is these performances (non-monetary performance) that constitute "the centre of gravity" as well as the socio-economic function of commercial transactions (Giuliano & Lagarde, 1980). This approach provides a simple, but sound and effective solution to dealing with the challenge as to which performance needs to be considered in the application of the *lex loci solutionis* rule. Thus, by this approach, all monetary payments are not considered to be performance with regards to a contract.

The second concern – where the place of performance is unknown – seems to be more of a theoretical problem than a practical one. This is because it is more unlikely for parties to enter into an international contract without deciding, either expressly or impliedly, on where the obligation, central to the contract, is expected to be performed. Since the possibility of this happening seems low, the concern raised here is unlikely to bother investors and other businesspersons. However, in the very few occasions where parties may choose to agree on every aspect of their contract but the place of performance, questions regarding choice of law may only become relevant to the courts, but not the parties. This is because such a question may become relevant only after dispute has arisen between the parties. Thus, there may be no need for pre-litigation certainty with respect to

the applicable law in this type of cases, because the situation was caused by the parties themselves who knowingly deferred the decision as to where their contract is to be performance. In rare situations like this, the court may be allowed to determine the *loci solutionis* by relying on extrinsic evidence such as previous business dealings as well as other contracts existing between the parties themselves or the parties and other third parties.

Also, in dealing with the third challenge – the determination of the applicable law in situations where there are multiple places of performance – which may arise as a result of the application of the *lex loci solutionis* rule, one may have to consider how this challenge has been addressed by the EU in the Rome I. Here, regard must be given to the economic criteria adopted under the EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation)[43] as it presents a viable option to address the challenge of identifying the applicable law in situations where there are multiple places of performance. Thus, the applicable law of an international contract should be determined by the law of the place of "substantial" performance as determined in by the European Court of Justice in *Color Drack GmbH v Lexx International Vertriebs GmbH*[44]. This rule can be utilised to address both situations where there is only one place of performance as well as where there are multiple places of performance. The solution – law of the place of substantial performance – effectively addresses the challenge of multiple places of performance whilst maintaining the primary connecting factor – place of performance. This approach, besides following the tenets of choice of law, will ensure legal certainty, predictability of results and, invariably, reduce the incidence of forum shopping as well.

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[43] See, Case C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH* 2005 ECR I - 3727.

[44] See, Case C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH* 2005 ECR I - 3727.

However, in situations where there are multiple and separate agreements contained in a contract (or instrument) and where the performance of the various agreements are independent of each other, the applicable law may be determined by dividing the agreements and then applying the law of the place where the performance leading to the dispute is/was to occur.[45] Thus, in situations where the relevant question that requires an answer arises from an agreement which is to be performed in a place other than where the rest of the contractual obligations is to be performed, the court could apply the law of the specific place where the particular performance is/was to take place.

With all the relevant concerns against the use of the *lex loci solutionis* addressed, there seems to be no reason why South African courts could not apply this rule as a "stand-alone" rule for determining the applicable law of international contracts for the sale of goods. Thus, instead of considering the place of performance as merely one of the connecting factors to international contracts in general, the South African courts could abandon the "closest and most real connection" test (as well as the subjective approach) and adopt the *lex loci solutionis* as the applicable law of international contracts for sale of goods (as well as service contracts). Compared to the current solution(s) in South Africa, the *loci solutionis* rule is a simple one and also takes away the uncertainty associated with the regime(s) in place for determining the objective proper law as it will become much easier for courts and contracting parties to accurately predict the applicable law. This position is not alien under South African law as the *lex loci solutionis* rule was once considered as the "sole indicator" of the proper law in the absence of choice in the country (Schoeman et al., 2013;

[45] It is practical for this position to also apply to article 4(1)(a) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I).

Edwards, 1984).[46] In summary, it is suggested that South Africa adopts the law of the place of "performance" or "substantial performance" as the proper law of international contracts for the sale of goods. Performance in this regard should be deemed to be non-monetary performance, which is in accordance with the position adopted by the EU on matters of choice of law in civil contractual matters (Giuliano & Lagarde, 1980).

3.2.5. Other connecting factors

Apart from the connecting factors discussed above, there are other factors that are considered, to a lesser extent, by the South African courts (and the common law, in general) in the determination of the applicable law to international contracts for the sale of goods (Schoeman et al., 2013). Thus, although these factors are generally not considered by the courts, they have played significant roles in providing answers to questions of choice of law in some specific type of cases. These factors include the currency used in the contract, the language used in the drafting of the contract, a choice of forum clause, whether the contract is linked to another contract that contains a choice of law provision, the place where any security is to be taken or enforced, or even demurrage (Girsberger et al., 2021; Schoeman et al., 2013; Forsyth, 2012). However, it is important to point out that these factors are only utilised in limited cases and are generally applied alongside other factors such as those discussed above. Also, these factors are mostly important where the court seeks to determine whether the parties impliedly selected the applicable law of their contract and so may not be very relevant when considering rules relating to the imposition of a governing legal system in the absence of choice.

[46] This position was based on Roman-Dutch authority (see, Edwards, 1984; Kahn, 1990). See, also, *Standard Bank of South Africa Ltd. v. Efroiken and Newman* 1924 AD 171 at 185ff.

Conclusions

This article examines the common factors considered by South African courts to determine the applicable law of international contracts for the sale of goods. In this regard, it aims at adopting appropriate choice of law rules that should be applied by the courts in situations where contracting parties do not select the applicable law. To achieve this, the article reviewed the rules relating to the *lex loci contractus*, *lex loci domicilii*, place of habitual residence and *lex loci solutionis* to determine the appropriateness in applying each of them to international contracts for the sale of goods. This was done while bearing in mind the need for legal certainty and predictability of results which are crucial to all commercial transactions. After considering the appropriateness (both theoretically and factually) of the factors considered in the application of each rule, the article concluded that the *lex loci solutionis* should be adopted by South African courts as the primary choice of law for contract rule because the place of performance has sufficient interest in international commercial contracts and that the rule is, also, in conformity with choice of law literature. This position was adopted after factors such as place of contract, domicile and habitual residence were examined and dismissed.

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Обірі-Коранг П. Основні прив'язки, що враховуються південноафриканськими судами при визначенні застосовного права до міжнародних договорів купівлі-продажу товарів. – Стаття.

Питання вибору права іноді бувають дуже складними і остаточний результат їх вирішення може мати ключове значення у більшості судових

проваджень. Це особливо отримує прояв у судових процесах, що стосуються транскордонних угод за участю держав з різними законами та різними правовими традиціями. Таким чином, для сторін важливо заздалегідь точно передбачити застосовне право до їх договору міжнародної купівлі-продажу, щоб мати змогу з упевненістю планувати діяльність, пов'язану з його виконанням. Невизначеність щодо застосовного права у більшості правових систем (особливо у системі загального права) ускладнює для договірних сторін таке планування та вирішення спорів, які можуть виникнути з комерційних контрактів, самостійно або через суд. Для ділового світу це небажана та неприємна ситуація.

Слід зазначити, що у загальному праві, незважаючи на те, що правова визначеність, яка є необхідною щодо застосовного права міжнародних комерційних договорів, може бути досягнута за допомогою застереження про вибір права, більшість таких договорів цього застереження не містять. У цій статті здійснено спробу зробити внесок до існуючої системи досліджень вибору права для договорів у Південній Африці, а також запропонувати рішення, що ґрунтуються на основоположних принципах міжнародного приватного права, які ефективно усувають таку невизначеність. Для досягнення поставленої мети у статті досліджуються різні прив'язки, що враховуються південноафриканськими судами при визначенні застосовного права (також належного або регулюючого права) міжнародних договорів у ситуаціях, коли сторони не включають застереження про вибір права до міжнародних договорів купівлі-продажу товарів. Розглянуті прив'язки охоплюють місце укладання договору, місце проживання, місце звичайного проживання і місце виконання. Саме вони у більшості випадків є основними прив'язками, які суди ураховують при ухваленні рішення щодо об'єктивно належного/застосовного права за договором міжнародної купівлі-продажу (та інших міжнародних комерційних договорів) у Південній Африці. Крім того, у статті розглядається, чому для південноафриканських судів і судів загального права у цілому важливо пройти процедуру визначення застосовного права у питаннях міжнародних комерційних спорів, а не покладатися лише на *lex fori* (оскільки підхід *lex fori* може бути набагато простіше).

Ключові слова: міжнародні договори купівлі-продажу товарів, міжнародні комерційні договори, міжнародне договірне приватне право, загальне право, застосовне до права міжнародних договорів, *lex causae*, *lex fori*, *lex loci contractus*, *lex domicilii*, право звичайного місця проживання, *lex loci solutionis*.

Обири-Коранг П. Основные привязки, учитываемые южноафриканскими судами при определении применимого права к международным договорам купли-продажи товаров. – Статья.

Вопросы выбора права иногда бывают очень сложными, и конечный результат их решения может иметь определяющее значение для большинства судебных процессов. Это особенным образом проявляется в судебных процессах, касающихся трансграничных сделок с участием государств с разными законами и разными правовыми традициями. Таким образом, для сторон важно заранее точно предусмотреть применимое право к их договору международной купли-продажи, чтобы иметь возможность с уверенностью планировать деятельность, связанную с его исполнением. Неопределенность в отношении применимого права в большинстве правовых систем (особенно в системе общего права) затрудняет для договаривающихся сторон такое планирование и разрешение споров, которые могут возникнуть из коммерческих контрактов, самостоятельно или через суд. Для делового мира это нежелательная и неприятная ситуация.

Следует отметить, что в общем праве, несмотря на то, что правовая определенность, необходимая в отношении применимого права международных коммерческих договоров, может быть достигнута посредством оговорки о выборе права, большинство таких договоров этой оговорки не содержат. В этой статье делается попытка внести свой вклад в существующую систему исследований выбора права для договоров в Южной Африке, а также предложить решения, основанные на основополагающих принципах международного частного права, которые эффективно устраняют такую неопределенность. Для достижения поставленной цели в статье исследуются различные привязки, учитываемые южноафриканскими судами при определении применимого права (также надлежащего права или регулирующего права) международных договоров в ситуациях, когда стороны не включают оговорку о выборе права в международные договоры купли-продажи товаров. Рассмотренные привязки включают место заключения договора, местожительство, место обычного проживания и место исполнения. Это в большинстве случаев основные привязки, учитываемые судами при вынесении решения относительно объективного надлежащего/применимого права по договору международной купли-продажи (и других международных коммерческих договоров) в Южной Африке. Кроме того, в статье рассматривается, почему для южноафриканских судов и судов общего права в целом важно пройти процедуру определения применимого права в вопросах международных коммерческих споров, а не полагаться только на *lex fori* (поскольку подход *lex fori* может быть намного проще).

Ключевые слова: международные договоры купли-продажи товаров, международные коммерческие договоры, международное договорное частное право, общее право, применимое к праву международных договоров, *lex causae*, *lex fori*, *lex loci contractus*, *lex domicilii*, право обычного проживания, *lex loci solutionis*.