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The Territoriality of South Africa's Employment Legislation and the Jurisdiction of the Labour Court in Cross-Border Employment: A Comparative Analysis

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Declaration of originality

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I, Elisa Rinaldi, declare that this dissertation I submit for the degree Master of Law (LLM) is my original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.

I have not used work previously produced by another student or any other person to hand in as my own nor I have allowed anyone to copy my work with the intention of passing it off as his or her own work.

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Date:14th October 2021_____

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ABSTRACT

With a growth in cross-border employment following the continuous progression in globalisation, the territorial limitations existing in the adjudication of cross-border employment disputes is incongruent to the development of employment and the subsequent employment relationship. The question of adjudication rests predominantly on the spatial scope of South Africa's employment statutes. Accordingly, the research exposes the uncertainty employees, who work outside their places of residence, face when trying to utilise the Labour Court as a channel of legal relief. In doing so, the research reveals the often unsatisfactory and inconsistent judgments arising out of the Labour Court in disputes of this nature.

Reasons for this inconsistency lies in the approach the Labour Court has taken in determining the territorial reach of South Africa's employment statutes. Where the Labour Court has utilised methods of statutory interpretation and strictly imposed the presumption against extra-territoriality, the Court has established a practice that, viewed comparatively, contrasts too greatly from foreign methods that utilise private international law in their adjudication of international employment contracts. Important in this research is, thus, the endorsement of private international law principles and methods in place of the current interpretive methods still seen in Labour Court judgments.

In support of this approach, the research argues that private international law is the best method in ensuring legal certainty, predictability and results that are fair, just and fully realise the purpose behind employment rights; to balance out the inherent inequality in an employment relationship, a relationship made more precarious on a global scale.

LIST OF ABBREVIATIONS

BCEA-	Basic Conditions of Employment Act
CCMA-	Commission for Conciliation, Mediation and Arbitration
CJEU-	Court of Justice of the European Union
CJPTA-	Court Jurisdiction and Proceedings Transfer Act
EEA-	Employment Equity Act
ERA-	Employment Rights Act
EU-	European Union
FWA-	Fair Work Act
ILO-	International Labour Organisation
LAC-	Labour Appeal Court
LC-	Labour Court
LRA-	Labour Relations Act
PWD-	Posted Workers Directive
UK-	United Kingdom
US-	United States

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Chapter 1: Introduction

1.1 Background and motivation

Globalisation and shifts in employment marked by yet another industrial revolution has increased the mobility of labour.[1] Whilst employees such as airline pilots and the crewmen of ships are frequently working in different jurisdictions, there are those who may find themselves working overseas for differing durations.[2] Multinational companies often send their employees overseas for a fixed period. For instance, someone may be employed for a specified period at the London office of an entity incorporated in South Africa.[3] The growth of employment with international features uncovers the various private international law rules necessary for adjudicating a cross-border employment dispute.

The nature of a cross-border employment dispute raises several interesting and challenging issues. If not dealt with carefully, these issues are often conflated and misunderstood. Case law in South Africa has highlighted the lack of scholarly research surrounding private international law, particularly in the realm of labour law,[4] and it is here that the aim of this dissertation rests.[5] Jurisdiction in domestic employment cases is complicated enough due to the various rules that dictate whether a dispute should be brought first for conciliation, mediation or arbitration in the Commission for Conciliation, Mediation and Arbitration[6] or adjudication in the Labour Court.[7] A dispute with international features, as already alluded to, complicates things further. Added to this is that employment may take various forms. Already mentioned are those scenarios where an employee works in different jurisdictions as part of their job or

[1] The Fourth Industrial Revolution as coined by K Schweb *The fourth industrial revolution* (2016).
[2] L Merrett 'The extra-territorial reach of employment legislation' (2010) 20 *Industrial Law Journal* 355.
[3] *Monare v South African Tourism and Others* (2016) 37 ILJ 394 (LAC) para 7.
[4] A Bogg 'Labour law is a subset of employment law revisited' (2020) 43 *Dalhousie Law Journal* 6; there the terms 'employment' and 'labour' are given separate definitions. 'Employment' refers to the wide range of statutory entitlements that regulate the working conditions of individual employees whereas 'labour' is commonly used to describe the procedural structures that encompass collective bargaining relations. The former is commonly used under private law whereas the latter achieves more familiarity in public law. This dissertation draws attention primarily to the aspects concerning employment and the rights of individual employees. However, the term labour is used interchangeably where it describes the field of labour law in its totality. It should not be taken to mean any reference to the collective aspect that encompasses labour law.
[5] *Parry v Astral Operations Ltd* (2005) 26 ILJ 1479 (LC) para 30.
[6] Hereafter referred to as the CCMA.
[7] Labour Relations Act 66 of 1995 (LRA) sec 157.

where they are situated in a foreign office of a company incorporated in South Africa. However, there are endless scenarios. One might have been temporarily employed by a South African employment service to work for a company overseas for a fixed period.[8] Whilst it should not be overcomplicated, it is important to acknowledge the shifts in labour law that impact other disciplines. This is necessary in understanding the legal implications of employment disputes on an international scale.

Linked closely and yet completely distinct from the issue of jurisdiction is the matter of choice of law.[9] Courts are often faced with determining which law to apply in the absence of an agreed choice of law clause. However, while the concern usually rests in determining which law governs the employment contract, the uniqueness of the Labour Court as a specialised court blurs the application of choice of law. A South African Labour Court with jurisdiction can only enforce South African employment legislation.[10] They cannot apply the foreign law that parties might have chosen to govern their contract.[11] In attempting to establish jurisdiction, the Labour Court has, as a result of the inapplicability of foreign law, turned to questioning the territorial scope of the statutes that empower it with jurisdiction. Choice of law is, accordingly, often conflated with jurisdiction.

Reasoning lies in the precedent left by the Supreme Court in *Genrec Mei v ICISEMI*.[12] Since jurisdiction was dependent on the 1956 Labour Relations Act,[13] the Supreme Court determined jurisdiction by utilising methods of statutory interpretation to deduce the territorial scope of the Act. This resulted in the conclusion that the Industrial Court and Industrial Council could only establish jurisdiction where the employee's workplace was within the territorial borders of South Africa as the Act only empowered them with jurisdiction where disputes fell within its registered area and concerned a specific undertaking, industry, trade or occupation.[14] Nothing more was considered during the jurisdictional determination and certainly no principles of private

[8] *Mecs Africa v Commission for Conciliation Mediation and Arbitration* (2014) 35 ILJ 745 (LC).
[9] CF Forsyth *Private international law: the modern Roman-Dutch law including the jurisdiction of the High Courts* (2012) at 316.
[10] *Monare* (n 3) para 15.
[11] *Monare* (n 3) para 5.
[12] *Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry & others* (1995) 16 ILJ 51 (A).
[13] Act 28 of 1956.
[14] LRA 28 of 1956 sec 2(1).

international law were engaged, although the law of the place where work is conducted is clearly an application of the *lex loci solutionis*.[15]

Irrespective of the fact that the current employment statutes empowering the Labour Court underwent constitutional scrutiny and were enacted to achieve significantly different purposes; resulting in the various statutes, including the 1995 LRA, appearing vastly different to any relevant predecessors, the Supreme Court left a damning precedent that is still followed today. This judgment risks leaving many employees who work outside South Africa at the mercy of employers who, in trying to avoid South Africa's protective employment legislation, may, for instance, simply post their employees outside the country to a subsidiary.[16] In fact, the employees concerned in *Genrec* were left with no remedy as they worked for a South African company on an oil rig outside the geographical waters of South Africa, where no other court had jurisdiction.[17] Accordingly, it is submitted that relying on methods of statutory interpretation and subsequently rendering employment legislation strictly territorial is ineffective in protecting employees who work outside South Africa. Increasing the reach of employment legislation should be seen as a necessity in an ever growing globalised world. An employee's workplace is often fortuitous in regard to the employment relationship as a whole and should not be regarded as the sole factor providing the Labour Court with jurisdiction.

The contention raised here, however, is not that the territorial limitation of statutes should be entirely abandoned in favour of imposing statutory employment rights, granted by South African labour law, to every dispute brought before the Labour Court. Instead, an argument is made to establish the territorial scope through the application of the rules of private international law. Where these rules are not considered, as becomes evident in the analysis of various Labour Court judgments concerning international employment contracts, the outcome of the dispute is often unsatisfactory, leading to inconsistent judgments that neither satisfy legal certainty and predictability

[15] Forsyth (n 9) 213.
[16] K Calitz 'The jurisdiction of the Labour Court in international employment contracts in respect of workplaces outside South Africa' (2011) 32 *Obiter* 687.
[17] Calitz (n 16) 685.

nor reflect the purposes of the various employment statutes enacted within South Africa.[18]

Essentially, the research seeks to expose the erroneous position the Labour Court tenders through methods of statutory interpretation and criticise their strict reliance on the presumption against extra-territoriality – which places emphasis on the employee's workplace as the decisive factor in assuming jurisdiction.[19] What this means is that the Labour Court is currently ill-equipped to adjudicate over international employment contracts; where the circumstances of employment reflect the changes it has undergone in the era of globalisation and the advent of the Fourth Industrial Revolution, a relationship that surpasses territorial boundaries is established.[20] Analysing this to comparative sources, it becomes further evident that legal developments arising out of Labour Court judgments are slow and incongruent to developments found elsewhere.[21] This is counterproductive to the aims of harmonisation that seeks to reduce legal certainty and promote equality amongst legal systems for the betterment of the litigants involved as well as the economic benefit of states.[22]

Contemplation of foreign legal developments towards the territorial notions of employment further exposes the current interpretive method utilised by the Labour Court as ineffective. As will be seen, foreign sources that engage the adjudication of international employment contracts do so on the application of private international law, either exclusively or as supplementing methods of statutory interpretation.[23] In Europe, for instance, frameworks have been developed that ultimately assist in offering protection to employees as the weaker party under international employment contracts.[24] Accordingly, the Labour Court is failing to fulfil its Constitutional mandate

[18] See in general; *Mecs Africa* (n 8); *Astral Operations Ltd. v Parry* (2008) 29 ILJ 2668 (LAC) and *Schenker South Africa (Pty) Ltd v Robineau and Others* (2019) 40 ILJ 213 (LC).
[19] *Genrec* (n 12) para 3.
[20] Schweb (n 1) 12.
[21] K Calitz & C Garbers 'A comparative perspective on the application of domestic labour legislation in international employment disputes' (2013) 3 *Stellenbosch Law Review* 540.
[22] JL Neels & EA Fredericks 'An introduction to the African principles of commercial private international law' (2018) 2 *Stellenbosch Law Review* 347.
[23] Regulation (EU) no 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Recast Regulation); *Lawson v Serco* [2006] UKHL 3; [2006] 1 All ER, 823.
[24] As above.

in balancing the inequality inherent within an employment relationship – a relationship made further precarious when realised on an international scale.[25]

This is exacerbated further when considering the mandatory nature of South African labour law. Where a statute is considered mandatory, there is a necessity in having the statute apply to a particular dispute under certain circumstances.[26] While it is necessary to give a comprehensive understanding of the doctrine of mandatory rules, of which this dissertation aims to do, it should already be suggested that South Africa's labour law may be regarded as mandatory.[27] A mandatory rule may be understood briefly as being so crucial to the protection of a state's public interests it demands application to any situation falling within its scope.[28] Having regard for the Constitutional right to fair labour practices under section 23,[29] there is room to argue that the LRA, Basic Conditions of Employment Act[30] and Employment Equity Act[31] are mandatory as the purpose behind all three statutes is to give effect to section 23 and fulfil the Republic's international obligations.[32] It would be difficult to argue that the provisions that govern employment relations are not for the safeguarding of the Republic's public interests when the Constitution remains the foundation of public policy within South Africa.[33]

Yet where the place of employment is treated as a foregone conclusion to the assumption of jurisdiction, the territorial scope of any relevant statute is never actually considered. Choice of law is subsumed into the question of jurisdiction and the doctrine of mandatory rules, a facet of the choice of law enquiry, is almost entirely neglected. Accordingly, the Labour Court finds itself embroiled with the complexity of a cross-border dispute without giving due consideration to the methods, rules and principles established to deal with these complexities.

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[25] Calitz (n 16) 687.
[26] P Nygh *Autonomy in international contracts* (1999) 202.
[27] Calitz (n 16) 680.
[28] 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) Art 9.
[29] The Constitution of the Republic of South Africa, 1996 (the Constitution) sec 23.
[30] Basic Conditions of Employment Act 77 of 1997 (BCEA).
[31] Employment Equity Act 55 of 1995 (EEA).
[32] The purpose of each statute may be found under section 1 of the LRA and section 2 of both the BCEA and EEA.
[33] *Parry* (n 5) para 53.

1.2 Aim of research

Given the background to the research problem, it is apparent that the relationship between territoriality, jurisdiction and choice of law needs to be better understood. While the research is critical of the Labour Court's reliance on methods of statutory interpretation and the ensuing strict application of territoriality, it is appreciated that lack of academic research and commentrary concerning the interaction between labour law and private international law is largely to blame for the problem.[34] The statutes concerned here (those that implicate statutory rights and duties) do not make any suggestion as to how they should apply to disputes with foreign elements. Since statutory interpretation is intended to fill the gaps left by parliament as to the proper application of a statute, it is easy to conclude that South African labour law was never intended to apply to disputes with foreign elements. Without proper development and discourse surrounding the rules of private international law, there is little anticipation that a judge, on their own volition, will look to apply the principles and methods therein. Not unless the judge themselves has prior knowledge of the discipline. This is in further consideration of the fact that private international law as a discipline in and of itself comes with its own challenges – accordingly, proper application of those rules on an interdisciplinary basis requires further investigation. For instance, while an international employment contract may seemingly compel the application of those private international law rules concerning contracts, there is still a gap to be filled in the application of statutory rights that exists independently of a contract.[35] Labour disputes, in fact, often arise out of statutory claims.

Further complicating this is the nature of the Labour Court's jurisdiction as it is firmly held within statute.[36] Contemplation of foreign elements is difficult to reconcile in the instance a court's powers are bound by domestic legislation. However, it is argued that this should not result in the conclusion that private international law has no bearing on disputes brought before the Labour Court.

The aim, therefore, is to establish the correct application of jurisdiction and choice of law over statutory employment claims that have a foreign element. It attempts to do

[34] *Parry* (n 5) para 30.
[35] Calitz & Garbers (n 21) 540.
[36] LRA (n 7) sec 157.

so in a way that promotes justice, particularly by focusing on the vulnerable position employees find themselves in against their multinational employers. This dissertation is ultimately dedicated to establishing the proper methods in adjudicating over international employment contracts by discerning the territorial scope of South Africa's employment statutes through the application of the rules of private international law.

1.3 Research questions

The following questions structure the basis of this research and comprise of the pertinent issues that require addressing:

1.3.1. What is the jurisdiction of South African Labour Courts in international employment contracts?

1.3.2. What is the relevance of choice of law?

1.3.3. How can we justifiably limit party autonomy in the matter of choice of law?

1.3.4. How is jurisdiction assumed in foreign courts?

1.3.5. Why the need for reform in South Africa?

1.4 Limitations of research

While the Labour Court is not often the court of first instance in most employment disputes, the research herein is limited to an analysis of the Labour Court and the adjudication of international employment contracts. This may impact legal developments arising out of the CCMA, yet that is beyond the scope of this dissertation. Unlike the Labour Court, the CCMA is not a court of law.[37] Accordingly, application of the rules of private international law might invite an entirely different discussion to the analysis submitted here.

The difference lies predominantly in the status of the Labour Court. While jurisdiction is determined by statute, much like the CCMA, the Labour Court is established in terms

[37] *Madondo v Safety and Security Sectoral Bargaining Council and Others* (2015) 36 ILJ 2314 (LC) para 40.

of section 151 of the LRA that defines the Court as a superior court with status equal to that of the High Court.[38] Section 156 further determines that the LRA has jurisdiction "in all provinces of the Republic".[39] Section 157 of the LRA gives further detail and holds that the Labour Court has exclusive jurisdiction[40] over all matters which the LRA, and any other law, deems necessary to be determined by the Labour Court. It further has concurrent jurisdiction[41] with the High Court over employment matters that directly relate to a right entrenched in the Bill of Rights.[42] Accordingly, the High Court's jurisdiction is not completely ousted by the Labour Court as the High Court still has the power, for instance, to adjudicate over the breach of an employment contract but is limited in that it cannot determine the fairness of a dismissal.[43]

In unpacking this a number of things become clear. Firstly, it is indisputable that the Labour Court is a specialised court that can only adjudicate over matters determined by statute. The effect being that a Labour Court will not be able to determine that a foreign legal system is applicable to a dispute.[44] Secondly, the equal status of the Labour Court to that of the High Court means that the rules that govern international disputes in the High Court will be equally applicable in the Labour Court.[45] This means that the process that the High Court follows in establishing jurisdiction, characterising a dispute and determining the choice of law should be used by the Labour Court too.[46] Accordingly, the location of an employee's workplace should be seen as but one factor linking the dispute to a particular jurisdiction and even still, such factor should not be weighted so heavily in a time where the area in which you work may be purely incidental.

To emphasise, it should be noted that establishing jurisdiction, of which premise rests on the workplace of an employee, limits not only the Labour Court but the High Court too. The High Court becomes bound by this territorial limitation just as the Labour Court is. Subsequently, where the workplace is considered the determinate factor for

[38] LRA (n 7) sec 151(2).
[39] LRA (n 7) sec 156(1).
[40] LRA (n 7) sec 157(1).
[41] LRA (n 7) sec 157(2).
[42] The Constitution (n 29) chapter 2.
[43] Calitz (n 16) 682.
[44] As above.
[45] As above.
[46] Forsyth (n 9) 9.

establishing jurisdiction, the High Court will not have jurisdiction when that workplace is outside the borders of the Republic.[47] Regardless of the fact that the High Court has inherent powers and may adjudicate in terms of foreign law.

As the process of establishing jurisdiction in the High Court over an international dispute should be followed, so should the process in establishing choice of law. While the Labour Court is not entitled to apply foreign law, it does possess the ability to consider which law is the governing law of an employment contract.[48] The Labour Court should not be deterred by its adjudicatory limitation. In fact, there is a stark difference in the Court's jurisdiction, that is the power to adjudicate over a dispute with foreign elements, and its statutory limitations. The former is an issue to be determined by the rules governing jurisdiction and the latter is to be resolved by choice of law rules.[49]

A final limitation is made regarding the employment statutes examined within this research. When reference is made generally to the employment statutes enacted within South Africa, this is made with reference only to the BCEA, EEA and LRA unless specified otherwise. These statutes are prevalent in that they grant an employee (and their employer) rights and duties that are either to be incorporated within the contract of employment or exist independently of the contract, but are nonetheless essential to ensuring regulation of the employment relationship. Essentially, these statutes frame the bulk of the case law that will be presented throughout this dissertation.

1.5 Methodology

This research will be prepared on the basis of comparative methodology. The aim is to outline the shortcomings in the Labour Court's approach to international employment disputes. Having regard for the lack of development in the field of private international law within South Africa, particularly in regard to cross-border employment, a look into foreign approaches is necessary. This is utilised not only to criticise the position in South Africa but also to make recommendations and propose new solutions to the problem, solutions that may be adopted and adapted from foreign

[47] Calitz (n 16) 687.
[48] *Windybrow Theatre v Maphela and Others* (2015) 36 ILJ 1951 (LC) para 21.
[49] Merrett (n 2) 361.

sources. This research will not only show how principles of private international law are often conflated, misunderstood and contradicted but also urge the need to protect employees, considering the fragility of globalised employment. The following foreign sources are considered:

Firstly, European sources of private international law are vital for this analysis as they remain one of the more advanced bodies of this discipline. While case law arising out of Europe is considered extensively, the bulk of this comparative analysis arises out of the transnational frameworks that embody the private international law rules necessary in establishing jurisdiction and choice of law. This refers to both the Regulation on the Law Applicable to Contractual Obligations[50] and the Regulation on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters.[51]

Consideration is made, secondly, to common law approaches found in Canadian case law. This, predominantly, comprises of an analysis of the approach to assuming jurisdiction. Canadian common law sources involve an exploration into the limitations of prescriptive jurisdiction as courts have made significant breaks away from the use of statutory interpretation in favour of private international law approaches.[52] While there appears to be a similar conflation of jurisdiction and choice of law arising out of Canadian case law, these judgments supplement the argument, raised here, that statutory interpretation is ineffective in determining the territorial scope of a statute, regardless of whether this has an impact on jurisdiction or not. It, further, contemplates a test in establishing new connecting factors to disputes that may be considered *sui generis*, allowing us to broaden the methods found in adjudication of statutory claims on a cross-border basis.[53]

Lastly, Australia offers a perspective into the extra-territorial application of labour law through an analysis of the Fair Work Act.[54] The Act challenges the traditional notion

[50] See generally; Rome I (n 28).
[51] See generally; Brussels Recast Regulation (n 23).
[52] See for instance; *Morguard Investments Ltd. v De Savoye* (1990), 76 D.L.R. (4th) 256, [1990] 3 S.C.R. 1077 (S.C.C.); *Muscutt v Courcelles* (2002), 213 D.L.R. (4th) 577, 60 O.R. (3d) 20 (Ont. C.A.); *Club Resorts Ltd. v Van Breda* 2012 scc 17 (S.C.C.).
[53] *Van Breda* (n 49) para 91.
[54] Fair Work Act 2009 (Cwlth) s70 (FWA).

that employment should be domestically regulated and serves to regulate conduct of foreign employers and Australian-based employees where there exists a connection between the employment relationship and Australia.[55]

Case law generates the bulk of the analysis within the South African context, however, as mentioned, various international statutory regimes, conventions, journal articles and foreign judgements are also consulted. South African labour law is of considerable importance too and thus the research aims for an analysis of the various employment statutes, particularly the LRA, BCEA and EEA.

1.6 Structure of dissertation

Chapter 1 introduces the main research problem and gives a brief overview of the significance of territoriality in Labour Court judgments and the statutory interpretive method that is subsequently employed. Background of the leading precedent that produced such an approach is also given.

Chapter 2 unpacks the significance of territoriality, as it was understood from its inception to its consideration in a globalised state system. From this analysis arises a critique that territoriality should not be the guiding principle in jurisdictional determinations. This argument is made through an analysis of various Labour Court judgments that have misapplied private international law principles in their adjudication of international employment contracts. An approach to jurisdiction rooted in private international law is then supplemented.

Chapter 3 questions the relevance of choice of law. The statutory interpretive method is analysed and evaluated. The distinction between jurisdiction and choice of law through the territorial scope of statutes is made more distinct and the choice of law approach, as understood in private international law, is articulated.

Chapter 4 outlines and discusses the doctrine of mandatory rules as an avenue in which South African labour law may be considered to have extra-territorial application.

[55] FWA (n 54) sec 34.

This is in further contemplation of the limitation of party autonomy and the possibility of maintaining jurisdiction where the Labour Court is faced with a foreign law.

In Chapter 5 a comparative overview of jurisdiction and choice of law is given. Europe and Canada are considered for approaches concerning jurisdiction, while Australia concerns the territorial scope of statutes through an analysis of the extra-territorial application of the FWA.

Chapter 6 concludes the dissertation. In consideration of the complexities caused by the territorial scope of employment statutes, the rules pertaining to jurisdiction and choice of law, as they are applied in private international law are summarised. This summary makes the approach in adjudicating cross-border disputes, as advocated for in this dissertation, coherent and practical following a rather wide and abstract analysis of the problem.

Chapter 2: Territoriality and jurisdiction

2.1 Introduction

An employment dispute may take various forms.[1] An aggrieved party may either claim on the basis of contract, delict or under the various statutory rights imposed by parliament.[2] On a domestic level, these claims do not give rise to issues, such as choice of law or questions relating to jurisdiction. But when a dispute contains foreign elements, these issues become pertinent and need answering. Both parties, unless having pre-emptively expressed an intention, will be searching for the legal system that will be applicable and the forum they may approach in the case of a dispute.

Disputes that contain foreign elements are, or at least should be, dealt with according to private international law principles. In the High Court, a contractual dispute containing foreign elements usually necessitates questioning jurisdiction and the applicable law. The High Court, having inherent jurisdiction, would not be averse to applying foreign law as they would not need to forfeit jurisdiction in the instance that South African law does not find application. When an employee wishes to utilise legal channels to claim relief, however, they may not always utilise the High Court as the court of first instance.[3] Depending on the nature of the dispute, an employee must either approach the CCMA, or in some instances the Labour Court, at first instance.[4] In fact, employment disputes are rarely adjudicated in a court of law in the first instance. Legislation places an emphasis on the use of conciliation as the starting point for generally all claims.[5] Essentially emphasis is placed on an efficient, expedient and inexpensive resolution of disputes.[6]

The focus of this dissertation rests only in the Labour Court and a discussion of domestic case law arises only from Labour Court judgments. Accordingly, this

[1] U Grusic 'The territorial scope of employment legislation and choice of law" (2012) 75 *Modern Law Review* 722.
[2] As above.
[3] For instance, section 191(1)(a) of the Labour Relations Act 66 of 995 (LRA) holds that an employee claiming unfair dismissal may approach a Bargaining Council or the CCMA to hear the dispute. Only when the dismissal is automatically unfair, in terms of section 191(5)(b)(i), may an employee approach the Labour Court at first instance.
[4] As above.
[5] A van Niekerk et al *Law@work* (2018) 471.
[6] Van Niekerk (n 5) 472.

research is not concerned with either conciliation or arbitration and focuses solely on adjudication over international employment contracts. There is a growing need to consider the territorial application of the employment statutes within South Africa in light of the growth of international employment, with a particular concern for South African residents who choose to work abroad, often in neighbouring African countries.[7] Whatever the nature of the dispute, the territorial application of the various employment statutes come into question as the jurisdiction of the Labour Court is dependent on them.[8] Thus, when a dispute contains foreign elements, whether it be contractual, delictual or statutory, South African law must be applicable for the Labour Court to assume jurisdiction and give an effective judgment.

With the decisions of the Labour Court reflecting a desire to impute strictly territorial limits on South Africa's employment statutes, it is imperative to this analysis that territoriality is unpacked and made sense of. The approach taken by the Labour Court, while requiring greater analysis, may be summed up briefly as a focus on the territorial scope of South Africa's employment statutes, particularly the LRA,[9] and thereby questioning what parliament's intentions, regarding such scope, was intended to be.[10] Firmly rooting the decision on the basis of the presumption against extra-territoriality, the Labour Court has defined the territorial reach of the employment statutes within South Africa, and subsequently the jurisdiction of the Court, as purely confined to the geographical boundaries of the Republic.[11] This approach, however, has been applied, misapplied, redefined and even ignored in subsequent and more recent judgments, leading to the jurisdiction of the Labour Court over international employment contracts presenting as an anomaly.

Accordingly, from its historical conception to its importance in jurisdictional theory today, this chapter will outline and critique territoriality and its use in today's globalised world. In doing so, this chapter will further present the challenges produced by a strict application of territorial principles, focusing on the various judgments concerning the

[7] B Latham 'SA's border closures leave workers stranded, risks lives and jobs https://www.biznews.com/briefs/2021/01/14/sa-border-closures (accessed 15th January 2021).
[8] LRA (n 3) sec 157.
[9] As above.
[10] *Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry & others* (1995) 16 ILJ 51 (A) para 8-10.
[11] As above.

territoriality of South Africa's employment statutes. In its place, an approach centred on private international law principles will be outlined.

2.2 Territoriality

Conceptually, territoriality is traditionally understood as being an aspect of a state's regulatory power.[12] A legal construct, territoriality arose from notions centring on statehood and sovereignty.[13] With territory being an essential aspect of statehood, the ability to exercise sovereign power within such territory is an essential characteristic defining that state. Accordingly, territoriality serves as a basis for this power and control.[14] Ushering in the era of globalisation, however, scholars across a number of disciplines started analysing territorial concepts and those akin to same. International relation scholars, for instance, challenged the Westphalian model[15] as the basis for understanding territory and sovereignty, arguing that it does not truly reflect the extent of state power.[16] In legal analysis, however, territoriality becomes relevant in jurisdictional theory as it emphasises jurisdiction as being an aspect of state power.[17] In essence, a traditional understanding of territoriality may be summed up as "the attempt by an individual or group to affect, influence or control people, phenomena and relationships by delimiting and asserting control over a geographical area".[18]

Evidently then, territoriality encompasses and serves as an explanation of the relationship between territory, sovereignty and jurisdiction.[19] Jurisdiction should then be understood here as prescriptive jurisdiction, that being parliament's power to promulgate legislation that regulates people and conduct within a defined territory.[20] A discussion of the different jurisdictional concepts is paramount; however, for now, it suffices to only discuss prescriptive jurisdiction in light of defining and understanding territoriality and the reasons that gave rise to and sustained this legal construct.

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[12] HL Buxbaum 'Territory, territoriality and the resolution of jurisdictional conflicts' (2009) 57 *The American Journal of Comparative Law* 631.
[13] As above.
[14] K Florey 'Resituating territoriality (2019) 27 *George Mason Law Review* 145.
[15] Buxbaum (n 12) 668.
[16] Buxbaum (n 12) 633.
[17] FA Mann 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil Des Cours* 30.
[18] RD Sack *Human territoriality: its theory and history* (1986) 19.
[19] Buxbaum (n 12) 632.
[20] As above.

As mentioned, territoriality served as a basis upon which sovereign states could legitimately exercise authority and govern events that occurred within their borders.[21] However, while it has been seemingly defined here, territoriality is a construct without precise definition and, due to the overlaps with several other territorial concepts, it is often fraught with ambiguity.[22] As a result, territoriality has been mistakenly assumed to have remained consistent through time.[23] Yet, considering what was first a gradual move towards globalisation, which has and is continuing to increase in speed and magnitude, it is unlikely that this concept could have retained its original meaning. If territoriality has traditionally been understood as framing state power over people within a defined territory, it would have since been abrogated simply through the existence of the ever-increasing movement of people across borders. As such, states have had to consider how to approach the conduct of people who are outside its territory, but the effects of which are felt within the regulating state.[24] A traditional understanding of territoriality as a concept, which limits legal consequences to conduct within a defined territory, would not reflect the realities of today's globalised world.

Emphasis should be placed on the point made above by way of two examples. Since traditional understandings of territoriality denote a particular geographical area within which state power may be exercised, it fails to justify intrusions of one state on the sovereignty of another. Imperial domination in itself, arguably, destroys the legitimacy of traditional notions of territoriality and, since South Africa's history is marked by periods of imperialism and colonialism, it is certainly something to consider. But to make the point clear, the example of the United States of America's territorial control over Guantanamo Bay, an area which falls within the geographical territory of Cuba, exemplifies that territoriality is defined and driven not by geography, but rather by state interests.[25] The second example arises directly from private international law. Territoriality is unlikely, again, to explain in its traditional sense, how the Brussels Recast Regulation may legitimately bind non-member states to the jurisdiction of a

[21] Buxbaum (n 12) 636.
[22] Floray (n 14) 142.
[23] As above.
[24] Buxbaum (n 11) 636.
[25] R Johnston 'Territory and territoriality in a globalizing world' (2003) 70 *EKISTICS* 66.

court situated in the European Union (EU).[26] Territoriality is, thus, being shaped to fit and respond to changing context.[27] Certainly, then, the approach by the Labour Court does not reflect international commercial practice. It would be unreasonable to consider that an Italian citizen, employed by a South African company to work in one of its subsidiaries in Malawi, will be more likely to subject such company to the jurisdiction of Italian courts than a South African citizen, employed under the same circumstances, would have in attempting to subject the South African company to the jurisdiction of the South African Labour Court.[28]

Considering this, it serves to question what the reasoning for keeping to such a seemingly outdated concept is. In light of the approach the Labour Court has taken to navigate through this construct, an approach that is arguably too strict, it remains important to question why the Labour Court would rely on the traditional limitations of a concept that has not retained its traditional meaning. One such reasoning lies in the fact that territoriality has been assumed to ascertain certainty and order within the legal field.[29] In the context of jurisdictional theory and analysis, territoriality has been regarded as a guiding principle for resolving conflicts and providing definitive answers to disputes.[30] However, as mentioned, the concern is no longer with legitimising state power, but rather the scope of regulation.[31] The question is no longer whether a state may legitimately exercise control over its people, but rather whether legislation can be utilised to govern conduct that occurred outside the regulating state.[32] Should the LRA apply to employment outside of South Africa? These are questions now necessitated by this territoriality principle which, it is argued here, is no longer able to provide definitive answers in its traditional sense.

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[26] Regulation (EU) no 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Recast Regulation) Art 21(1)(a).
[27] Johnston (n 25) 66.
[28] Article 6(1) and 6(2) of the Brussels Recast Regulations (n 26) hold that a defendant not domiciled in a member state of the European Union may be subjected to the domestic jurisdictional rules of a member state making the above example probable. See also, Symeonides S 'The Brussels I Regulation and third countries' 2018 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3231715 (accessed 16 April 2021).
[29] Florey (n 14) 143.
[30] T Ginsburg 'Comment on: a new jurisprudential framework for jurisdiction' (2015) 109 *AJIL UNBOUND* 86.
[31] Florey (n 14) 143.
[32] As above.

Of course, territoriality has served as a basis for other legal principles. In fact, under international law (both public and private) territoriality reflects many of the same commitments with the principle of comity.[33] These commitments have guided courts for centuries by giving them space to define the reach of a state's substantive laws and jurisdictional rules whilst urging them to refrain from issuing judgments that would amount to an unjustifiable interference into the sovereignty of another state.[34] Much like territoriality, comity is understood as a concept that brings structure and certainty to a part of the law (international law) that is often defined by a lack of a centralised and integrated system.[35] A concern in jurisdictional theory is how issues may be solved, particularly on an international basis where there is no centralised structure with definitive rules and guidelines. Problems, such as forum shopping, duplication of proceedings and parallel judgments, are not solved through readily available rules, but rather through the commitment to and recognition of established principles such as territoriality and comity.[36]

Interesting, however, is the interplay between territoriality and comity in private international law. While territoriality and comity are seemingly established on the same values, the two concepts exist independently of one another and, since the ever-growing number of transnational transactions, comity actually serves as a "doctrine intended to mitigate the ill-effects of strict territoriality".[37] Like territoriality, however, comity does not exist within a definitive framework and has been described as "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other".[38]

When the research problem was outlined in Chapter One, a resolve was made to convincingly argue that an approach to jurisdiction should be one that favours private

[33]DE Childress 'Comity as conflict: resituating international comity as conflict of laws' (2010) 44 *University of California Law Review* 14; like territoriality, a precise definition of comity remains elusive but in private international law it serves as a theoretical foundation that encourages courts to consider the application of foreign legislation or restrict domestic regulation and encroachment out of respect for foreign sovereignty.
[34] T Schultz & N Ridi 'Comity and international courts and tribunals' (2017) 50 *Cornell International Law Journal* 579.
[35] As above.
[36] As above.
[37] Schultz & Ridi (n 34) 582.
[38] As above.

international law principles and not a strict application of territoriality. While many reasons are to be put forward it is already submitted here that territoriality is a concept that, when looked into through the lens of private international law, is outdated. Comity serves as an existing and arguably better private international law principle which, *inter alia,* seeks to determine when one state may extend its laws onto another or when foreign law may be applicable within another state.[39] In fact, historically the purpose of such a principle was to mediate the conflict between sovereigns and their laws.[40] While it may be argued that territoriality is traditionally upheld through the presumption against the extra-territorial reach of statutes,[41] private international law has guided such a presumption by both preserving the rule and establishing exceptions to the rule[42] while still maintaining and respecting sovereign interests. Ultimately, with the growing number of cross-border transactions and litigation it would be unrealistic to decide that one state's laws can never find application elsewhere, especially when party autonomy dictates that parties are free to choose the law that is to apply to their contract, coupled with the fact that it is becoming readily acceptable to choose a foreign law that does not otherwise have any connections to the contract.[43]

This is not to say that states should be free to encroach on the sovereignty of another at parliaments' or courts' discretion but, as will become clear, an approach that is firmly within the already established rules and principles of private international law should balance the need to adjudicate over disputes with foreign elements and respect for the sovereignty of other states.

Of course, the principle of comity does not come without its criticisms. For instance, it has been held that such a principle gives courts too much discretion over affairs which,

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[39] Shultz & Ridi (n 34) 584.
[40] Childress (n 33) 11.
[41] K Calitz 'The jurisdiction of the Labour Court in international employment contracts in respect of workplaces outside South Africa' (2011) 32 *Obiter* 696.
[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 (Rome I) Art 8 lists a number of conflict rules that determine which law will be applicable to individual employment contracts. The first conflict rule upholds the presumption and that the law applicable in the absence of choice is the place where the employee habitually works. However, a number of exceptions are listed. It is inclusive, for instance, of the place where the business is situated or the law of the country which the contract is more closely connected to.
[43] CF Forsyth *Private international law: the modern Roman-Dutch law including the jurisdiction of the High Courts* (2012) at 327.

as per the separation of powers, courts should not have a hand in.[44] The political affairs of states is one example and, while this is not to touch on public international law, there is a recognition that adjudication on the manner of an employee's dismissal, for instance, may have real implications for a state's labour market.[45] Territoriality, then, counters this by taking away discretion in favour of a presumption (and umbrella principle) that statutes do not have extra-territorial reach. However, in light of globalisation and frequent transnational litigation, is it not arguably better to be guided by principles which, at the very least, attempt to navigate the relationship between sovereigns and their laws (a truer reflection of today's globalised world), rather than outright denying their application to disputes with foreign elements.

It is not only comity that should encourage the Labour Court to liberate itself from a narrow application of territoriality, but it is further necessitated by the fact, as was briefly touched on above, that territoriality has since moved past this narrow, traditional meaning. Accordingly, there are already a number of approaches to jurisdictional theory that go beyond strict territorial limitations. Early critiques of sovereignty by scholars across multiple disciplines have brought to question the geographical focus of territoriality, arguing that it fails to consider the true extent of government power, especially in a globalised world.[46] Academics in the United States have even formulated different models for assuming jurisdictional authority.[47] The so-called cosmopolitan approach defines territory not by fixed boundaries, but as "articulated moments in networks of social relations and understandings".[48] Conceptually, jurisdiction questions conduct and interactions that are in a state of flux; they are not relations that should be considered as fixed in time and space.[49] What is evident, then, is that jurisdictional theory is moving past the idea of territory as delimitations of this form of regulatory power.[50] Touching again briefly on comity, jurisdictional analysis in cross-border litigation is then not focused as much on territory but rather on;

[44] Childress (n 33) 15.
[45] Grusic (n 1) 745.
[46] Buxbaum (n 12) 633.
[47] PS Berman 'The globalization of jurisdiction' (2002) 151 *University of Pennsylvania Law Review* 322.
[48] As above.
[49] Buxbaum (n 12) 634.
[50] As above.

> the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[51]

This is certainly an outlook that favours justice while recognising the need to respect the authority of other states – a balance that such a strict application of territoriality fails to make.

While today territory is a given fact that identifies particular conduct by a defined group of people, territoriality is a legal construct associated with particular objectives and protected interests.[52] Accordingly, such construct, as was briefly exemplified above, may also change to reflect the objectives and protected interests of a state at any given time. Important to note is, thus, this: territoriality as a legal construct reflects a state's given interest at any particular time, it should not be understood in monolithic terms and oversimplified to constitute a singular concept with one meaning.[53] It exists within the social fabric of a particular society, meaning that the territorial boundaries of a particular law may very well be defined according to the interests of parliament at any given time. It is for this reason we may see statutes being enacted with a particular territorial clause, either describing its extra-territorial reach or limiting its reach.[54]

Accordingly, it is with this in mind that the author submits that the Labour Court should be free to determine the territorial reach of a statute in question by rejecting traditional notions of territoriality in favour of principles that are better suited. Certainly, interests of the South African state have significantly changed over time. These interests may be reflected in the statutes themselves and upon first glance[55] it becomes obvious that

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[51] *Hilton v Guyot* 159 U.S. 113, 164 (1895).
[52] Buxbaum (n 12) 635.
[53] As above.
[54] Section 47 of the Electronic Communications and Transactions Act 25 of 2002 holds that the protection offered to consumers by virtue of Chapter 7 will apply irrespective of the applicable law.
[55] The LRA (n 3), Basic Conditions of Employment Act 77 of 1997 (BCEA) and Employment Equity Act 55 of 1995 (EEA) all reflect the same purpose, in section 1, to be to "advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are - (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution; [and] (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation…"

the vested interests, which the Labour Court should be seeking to protect, are the various rights that parties are afforded by the Constitution and by the international instruments that South Africa is signatory to and has committed itself to implementing.[56]

It should by now be evident that the approach to territoriality is not one that is supported by parliament's intention, as submitted by the courts themselves, but rather it has been established by focusing solely on the traditional understanding of territoriality, putting emphasis on the presumption against extra-territoriality and rejecting jurisdiction on that basis. But territoriality does not imply an intention onto parliament. While it may be argued that territoriality is supported by parliament through the common law presumption against extra-territoriality, there are equally supported common law principles of private international law that not only uphold similar claims as territoriality but are also better equipped to solve disputes with foreign elements.

2.3 The Territorial Nature of Employment

Before delving into the various Labour Court judgments that have given rise to an outdated approach to territoriality, it is necessary to consider the nature of labour law. The nature of employment has been conceived as localised and domestically regulated.[57] There are several reasons for this but the most prominent lies in the fact that labour laws span over both public and private domains.[58] Having a public law component the state is given the responsibility of ensuring regulation and enforcement of working conditions, ensuring compliance with the standards as set by parliament.[59] Accordingly, the nature of employment is one that hits at the heart of a state's socio-economic and even political background that fundamentally shapes employment policies such as working hours and minimum wage.[60] It becomes harder to justify an intrusion of one state's labour laws onto another's whose political, economic and social background might be vastly different. In his article, *De-Territorializing Labor Law*,

[56] As above.
[57] MA Cherry 'Regulatory options for conflicts of law and jurisdictional issues in the on-demand economy' (2019) *International Labour Organisation Conditions of Work Series and Employment Series* 3.
[58] *Parry v Astral Operations Ltd* (2005) 26 ILJ 1479 para 48.
[59] *Parry* (n 58) para 49.
[60] Cherry (n 57) 5.

Mundlak explains that territoriality is a fundamental norm of labour law, premised on the assumption that labour law is defined by a particular community requiring community-based decision making.[61] Ultimately employees are people who participate in a particular economy, pay taxes to a particular government and who more often than not rely on such government and economy to sustain them after retirement. All these factors give judges and legislators alike every reason to implement territorial limits on employment legislation.

However, Mundlak raises an important point; that territoriality seeks to exclude those whom it does not aim to benefit.[62] By this he explains how employment can ascertain and foster a sense of citizenship that justifies the exclusion of people outside of that domain.[63] Through the use of migrant workers as an example, Mundlak makes it clear that territoriality seeks to ignore the social implications that migrants face when moving across borders.[64] While protection is granted when within the territory, labour norms cannot (due to this territorial norm) extend beyond this to offer protection to vulnerable migrant workers as they attempt to move across borders, often having to pay exorbitant agency fees in the process.[65] This is coupled with the fact that often permits are only granted on the basis of work having been secured. A political exploration into these issues, however, is beyond the scope of this paper. Nonetheless, it is made clear that territoriality causes a myriad of problems and fosters, guarantees and sustains equality for some to the detriment of others.

It is not only the injustice caused by territoriality that must see an end, but, practically speaking, such norm cannot compare to the significant changes that employment has undergone. The International Labour Organisation[66] has noted the increasing challenges arising out of traditional notions of domestic regulation, which are often ill-equipped to ensure compliance on a globalised scale.[67] Focusing on the gig-economy, the ILO highlights the growth of online platforms that hire employees from anywhere

[61] G Mudlak 'De-territorializing labor law' (2009) 3 *Law and Ethics of Human Rights* 191.
[62] Mundlak (n 61)195.
[63] As above.
[64] As above.
[65] Mundlak (n 61) 196.
[66] Hereafter referred to as the ILO.
[67] Cherry (n 57) 3.

in the world to work remotely on casual jobs that are offered by the platform.[68] With the focus on territorial application of employment standards, it becomes difficult to ensure these growing multinational corporations, such as Remotasks, an online crowdwork platform that offers transcribing, data collection and other tasks that can be done for money, comply with a certain set of employment standards.[69] The question is, which jurisdiction's laws will find application and what substantive rights can the workers rely on? The workers themselves may come from a number of different jurisdictions, different from the platform itself, and both the workers and the platform may hail from a jurisdiction entirely different from the jurisdiction of the company or individual requiring the tasks to be done.[70] With a number of legal systems possibly in operation the issue of minimum wage and working hours, as examples, may differ drastically, making enforcement and compliance with a certain employment standard near impossible.[71] It further risks a multiplicity of litigants, with the outcome of disputes differing vastly from each other, often creating conflicting judgments.[72]

What is more, the proliferation of companies, such as Remotasks, contradicts the notion that employment is territorial in kind and requires domestic regulation. Accordingly, it is evident that lawmakers and judges needs to begin moving away from the territorial application of labour law as ultimately, when looking at the impact of employment, it having a bearing on global markets and influencing multiple economies at once, territory becomes significantly less important.[73] That is not to say that territory becomes obsolete in the search for the best possible resolution of conflicts, however it is but one consideration and should not be treated as the sole factor in conflicts over international employment contracts.

2.4 Territoriality in the Labour Court

Since having unpacked territoriality and understanding the role it assumes in jurisdictional theory and labour law, it should be obvious that the stance that the Labour Court has taken in navigating this concept is outdated, archaic and serves little

[68] Cherry (n 57) 1.
[69] Cherry (n 57) 3.
[70] As above.
[71] As above.
[72] Cherry (n 57) 2.
[73] Mundlak (n 61) 213.

purpose. However, while a broad overview has been given, it is still necessary to delve into how territoriality is applied by the Labour Court. This necessitates looking into the various judgments over international employment contracts. The judgments chosen are ones that have attempted to engage with territoriality. They have not all applied the principle in the same way, nor have they interpreted and applied past judgments regarding territoriality in the same way. This makes for an interesting analysis; however, what should already emerge is the considerable uncertainty that plagues the Labour Court when faced with an international employment contract.

Accordingly, this remains an area of law in South Africa that is riddled with legal uncertainty. Coupled with this is the unpredictability of jurisdictional outcomes as it is difficult at this point in time to say with certainty what the outcome will be and whether the Labour Court will strictly observe territoriality or be open to utilising principles of private international law. It should also be acknowledged, however, that while the focus herein is solely on the Labour Court it is not without the recognition that the uncertainty surrounding the adjudication of international employment contracts is one that not only plagues the Labour Court but also labour practitioners. What advice would a labour practitioner be able to give a client who works overseas for a South African employer? This is now the irony we are faced with – the application of a legal principle that is assumed to ensure certainty and finality of proceedings having only caused considerable uncertainty in this area of law.

Furthermore, while it remains the basis of this dissertation to expose territoriality as an ineffective principle that the Labour Court has relied too heavily on, there is appreciation for the fact that lack of scholarly writing on this topic,[74] particularly lack of understanding of private international law and how it may apply, is a substantial reason why there is a tendency to focus on traditional functions of territoriality. It is with this in mind that the analysis of the various cases will be made. While exposing the irregularities and unfairness caused by a strict application of territoriality, the intention is to begin already supplementing this with the application of the various private international law principles that are relevant to the adjudication of disputes with foreign elements. These are principles that are commonly applied in superior courts. As such,

[74] Parry (n 58) para 30.

it is the position herein that these principles may equally apply in the Labour Court. However, in trying to make such an argument it is then necessary to outline the various jurisdictional principles which are already entrenched in the Labour Court. Since the Labour Court is a creature of statute, it is possible that judges will be bound by the parameters that the statute determines jurisdiction may be assumed on. Put differently, subject-matter jurisdiction may be of considerable importance in determining whether private international principles may actually find proper application in the Labour Court. Accordingly, this contextual delineation will be the focus for the remainder of the chapter.

2.4.1 *Genrec Mei v ICISEMI*

This judgment, although concerning the Industrial Councils, set the tone for the strict application of territoriality often seen in Labour Court judgments today. The dispute was over the alleged unfair dismissal of employees employed to work on the platform of an oil rig that was then considered to be outside the territorial waters of the Republic of South Africa.[75] The employees were working for the appellant, Genrec Mei, who had its principle place of business in Durban.[76] They were then seconded to Casing Joint Venture (Pty) Ltd by virtue of a partnership contract between Casing and Genrec Mei.[77] There was an already existing employment contract concluded between the employees and the appellant; however, the partnership agreement gave rise to a second contract, concluded in Durban, of limited duration.[78] This contract held that the employees, still under the employment of Genrec Mei, were to be seconded to Casing to start working on the oil rig.[79]

The appellant, under the impression that the LRA applied, continued deducting amounts from the employees' wages in order to make the necessary contributions to the Council as per the Act.[80] At this point a disagreement arose as the employees argued that the LRA was not applicable to the second contract, and neither did the

[75] *Genrec* (n 10) para 4.
[76] *Genrec* (n 10) para 2.
[77] As above.
[78] *Genrec* (n 10) para 3.
[79] As above.
[80] *Genrec* (n 10) para 4.

first employment contract apply as they were working outside of the Republic.[81] The appellant duly repaid them but, when seeking a refund from the Council for the contribution they had made on behalf of their employees, the Council refused and demanded the appellant continue with its contributions.[82] Later, the employees were dismissed before their second contract had come to an end; yet, ironically, what then ensued was a claim, by the employees, based on their unfair dismissal according to the LRA.[83]

The question the Industrial Council was faced with, which then made its way to the Supreme Court, was whether the 1956 LRA,[84] or its amendment in 1991, applied to the employees working on the oil rig.[85] The 1991 Amendment Act allowed for extra-territorial application, but the Supreme Court concluded that the amendment had no retrospective effect.[86] The Court, thus, took to interpreting the 1956 Act to answer the question. It considered the various provisions of the Act to determine if there was an intention that it should apply extra-territorially.

The first section considered important was section 2(1), which held that the Act would find application in every undertaking, industry, trade or occupation.[87] What then emerged, however, was not an investigation into the application of the Act but rather the jurisdiction of the Industrial Council. The Court further looked into various provisions that determined that the Industrial Council could only entertain a dispute if it occurred within its registered area and if it fell within a specific undertaking[88] that the council was registered under.[89] What may be assumed then is that the Supreme Court understood the Act to apply only within the Republic where the various Industrial Councils held jurisdiction. Accordingly, the employer's undertaking needed to be within

[81] *Genrec* (n 10) para 3.
[82] *Genrec* (n 10) para 5.
[83] As above.
[84] Act 28 of 1956.
[85] *Genrec* (n 10) para 6.
[86] *Genrec* (n 10) para 19.
[87] LRA (n 84) sec 2(1).
[88] An undertaking, as defined in *Genrec* (n 10) at para 8 and subsequent case law, may be understood synonymously as the employee's workplace – this being the place where they perform the majority of their services for the employer's business.
[89] *Genrec* (n 10) para 8-10.

the Republic for the Act to apply and for the Industrial Council and Industrial Courts to have jurisdiction over the dispute.[90]

This is a common mistake seen in almost all Labour Court judgments adjudicating over international employment contracts. The question of whether an Act applies is not a matter of jurisdiction. The question is answered where the Act itself determines its territorial reach or where it falls within the law applicable to the contract as either chosen by the parties or implicit within the nature of the contract itself. The understanding by the Supreme Court is, furthermore, contradicted by the 1991 amendment. If the 1991 amendment were found to have retrospective effect, section 2(1) would then determine that the Act applies to the platform of the oil rig.[91] The jurisdiction of the Industrial Councils would, however, still be limited to a certain area – an area which the Supreme Court in *Genrec* held was determined not by the locus of the dispute but by the area of the employer's undertaking. By the Court's logic then, the Act would apply by virtue of section 2(1), but the Council would not have jurisdiction as the undertaking was deemed to be in the area of the oil rig, an area that no Industrial Council had jurisdiction over.[92] Territoriality, then, has no business determining jurisdiction, since the Act has already determined the Court's jurisdictional reach.

What is more, the interpretation of the employer's undertaking was, arguably, unwarranted for being too strict. Having assumed a territorial limitation in terms of the 1956 Act by virtue of the territorial jurisdiction of the Industrial Councils, the Supreme Court neglected to consider the fact that the employees were seconded to Casing and that at all material times were employed by Genrec Mei, whose undertaking was in Durban. It is clear from the judgment that the Court placed sole emphasis on the place where the employees were working as there was no real analysis of the relationship that was created by the partnership agreement. The Court, in fact, committed another contradiction by holding that the employees would cease to be employees of the appellant once the work on the oil rig was concluded. Yet, this is in direct contrast to

[90] Calitz (n 41) 685.
[91] *Genrec* (n 10) para 8. The court reiterated section 2(1); "This Act shall apply to every undertaking, industry, trade or occupation, including an undertaking, industry, trade or occupation performing work in, on or above the continental shelf referred to in section 7 of the Territorial Waters Act and in so far as the continental shelf concerned is deemed to be part of the Republic."
[92] Calitz (n 41) 685.

the second contract that held that the employees were to remain employed by Genrec Mei while they were seconded to work on the oil rig, something which the Court acknowledged early on in the judgment.[93] The Court also gave no indication as to why the first contract, which was deemed the main agreement, would fall away.

In essence, this judgment confusingly and incorrectly engaged with territoriality. In attempting to give life to the presumption against extra-territoriality, the Court used a method of statutory interpretation by engaging with the Act and trying to deduce from the various provisions an intention by parliament as to the Act's territorial reach. However, such an approach may be criticised for, firstly, ascribing what could very well have been a feigned and artificial intention to parliament.[94] Suggesting that the territorial limitations of the Industrial Council indicate an intention that the Act itself reserves those same limitations as to its application is, possibly, a stretch with the more likely conclusion being that parliament gave no thought to the Act's territorial application.[95] Secondly, this approach, when looked at through the lens of private international law, fails to consider the possibility of foreign litigation.[96] If the employees had wanted to bring a claim for unfair dismissal, in terms of the LRA, in a German court, the court would be guided by private international law principles as to the applicability of the LRA and not by the Act itself.[97] Therefore, relying purely on interpreting the Act in line with the principles of territoriality, the Supreme Court, and accordingly now the Labour Court, encourages forum shopping and risks duplication of proceedings as the possibility of the German court reaching a different outcome is high.[98] Territoriality is not able to serve the purpose it once did.

Not only does this approach taken in Genrec Mei cause a myriad of issues when considering transnational litigation, it, furthermore, does not make sense to apply the same territorial limitations to the 1995 LRA vis-à-vis jurisdiction. Accordingly, in further

[93] *Genrec* (n 10) para 3.
[94] AV Dicey, JHC Morris & L Collins *Dicey Morris & Collins on the conflict of laws* (2014) at 1-036 – 1-064.
[95] M Hook "The "statuist trap" and subject-matter jurisdiction' 2017 13 *Journal of Private International Law* 45.
[96] M Keyes 'Statutes, choice of law and the role of forum choice' (2008) 4 *Journal of Private International Law* 26.
[97] Referring to the Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) (The Rome Convention).
[98] Hook (n 95) 40.

contemplation that this judgment set the precedent for the strict approach to territoriality that the Labour Court often relies on today, it is worth comparing the status of the Industrial Council to that of the Labour Court. Firstly, section 7 of the 1995 LRA[99] holds that a registered Industrial Council will be deemed to be a Bargaining Council after the commencement of the 1995 Act.[100] What may be presumed is that the powers of the Labour Court, including its jurisdiction, were ultimately intended to be different from those of the Industrial Council. A bargaining council is not a court of law.[101] It is creature of statute and as such cannot determine its own jurisdiction.[102] This is important to note as it is obvious from the judgment that the issue of whether the Act applied quickly became an issue of whether the Council could entertain the dispute. Secondly, it is necessary to consider the fact that the jurisdiction of the Labour Court as per the 1995 LRA and the jurisdiction of the Industrial Council as per the 1956 Act are vastly altered. The Labour Court is considered a superior court with jurisdiction all over the Republic, unlike that of the Industrial Council, which was not a court of law and which only had jurisdiction according to a particular area and undertaking. The Industrial Court, to affirm the point intended on being made, likewise became what we know today as the CCMA – another statutory body and not a court of law.[103]

The point being made is thus this: the Labour Court should never have relied so heavily on the Supreme Court's judgment in *Genrec* when considering the territorial application of the 1995 LRA nor should the assertion made in *Genrec* as to the territorial reach of the 1956 Act have had such a bearing on the territorial reach of the 1995 Act when the provisions that the court in *Genrec* considered, provisions that referred to the jurisdiction of the Industrial Councils, were vastly different to the provisions governing the jurisdiction of the Labour Court in the 1995 Act. At the very least, the Labour Court should have engaged with the 1995 Act before concluding that the Act applies only to undertakings in South Africa as per the judgment in *Genrec*.

[99] LRA (n 3) sec 7.
[100] As above.
[101] *Madondo v Safety and Security Sectoral Bargaining Council and Others* (2015) 36 ILJ 2314 (LC) para 40.
[102] As above.
[103] As above.

2.4.2 *Astral Operations v Parry*

While the focus in *Genrec* was the Industrial Council and the Industrial Court, the cases that now follow are Labour Court and Labour Appeal Court judgments. The analysis thus turns to how territoriality should not be the guiding principle in the adjudication of international employment contracts by first analysing the judgment that unequivocally agreed with the court in *Genrec.*

Briefly, the dispute in *Astral Operations* concerned an alleged breach of contract, a claim for the payment of severance pay as determined by the BCEA and remuneration for the alleged unfair dismissal of Mr Parry, the employee.[104] Parry, a South African citizen, was employed by Astral Operations (Pty) Ltd, a South African company, to work as a general manager in one of the company's subsidiaries in Malawi.[105] He was, however, further responsible for operations taking place in Zimbabwe and Zambia and made to account monthly to the board of directors in South Africa for these operations.[106] As it happens, the Malawian operation was coming to an end and Parry's job was made redundant.[107] He was advised that a position was being considered for him back in South Africa but this never came to fruition.[108] Accordingly, Parry was repatriated to South Africa and later dismissed, leading to the claims mentioned above.[109] The employment contract was unfortunately silent on the issue of applicable law.

The Labour Court supported Parry's claim that they had jurisdiction to hear the matter, but this was then appealed. The appeal was upheld due to an unfortunate judgment by the Labour Appeal Court. The decision to reject jurisdiction was made purely on the basis of an unquestioned application of the judgment in *Genrec* which, for reasons that have been outlined above, is inappropriate. It is further inappropriate when considering the legal issue at hand in both *Genrec* and *Astral Operations.* The question concerning the Supreme Court in *Genrec* was whether the 1956 or the 1991 LRA was applicable to the dispute. The question in *Astral Operations* was whether the

[104] *Astral Operations Ltd. v Parry* (2008) 29 ILJ 2668 (LAC) para 2-3.
[105] *Parry* (n 58) para 4.
[106] As above.
[107] *Parry* (n 58) para 5.
[108] *Parry* (n 58) para 7.
[109] *Parry* (n 58) para 9.

Labour Court had jurisdiction. The latter question of when the Labour Court will have jurisdiction must be answered in terms of the principles of jurisdiction, which predominantly include subject-matter jurisdiction and are entrenched within the LRA. In fact, to look into the applicability of the Act, through the implementation of an outdated precedent, in answering whether the court has jurisdiction is to completely ignore the provisions outlining the Labour Court's jurisdiction within the various employment statutes, particularly the LRA.

Ultimately, the reasoning for such judgment arises out of a blanket application of the principle of territoriality, as supported by *Genrec*, without questioning its relevancy or purpose. It is also assumed as a catch-all principle when in fact it is but one principle underlying jurisdiction.[110] The court took the territorial principle in *Genrec,* that jurisdiction is dependent on the workplace of the employee (or employer's undertaking as defined in *Genrec*) being in South Africa, and, finding that Parry physically worked outside of South Africa, concluded that it had no jurisdiction.[111] The court further strengthened this argument by holding that the court also did not have jurisdiction because the BCEA did not find application over employees who worked outside of South Africa.[112]

Had the court taken an approach that focuses on the application of private international law rules and principles, they would have likely been able to assume jurisdiction. That is not to say that the aim of the Labour Court should be to ensure jurisdiction is assumed in as many conflicts with foreign elements as possible, but it is rather in recognition of the fact that the correct approach would be one that reflects the realities of today's globalised world. This means being sensitive to the precarious position that employees working abroad may often find themselves in and considering an approach that offers protection rather than frustrating it. This is not an altruistic commitment but rather an obligation as set by South Africa's employment statutes, which are firmly rooted in the country's constitutional values.[113] For instance, in Parry's case, as a South African citizen he, after being repatriated to South Africa, should have had every

[110] Hook (n 95) 444.
[111] *Astral Operations* (n 104) para 20.
[112] *Astral Operations* (n 104) para 21.
[113] The Constitution of the Republic of South Africa, 1996 (the Constitution) sec 23.

right to invoke his constitutional right to fair labour practices, as implemented and guaranteed by South Africa's employment statutes, as long as there were sufficient connections between the Republic and his employment contract.[114] The Labour Court's reluctance to assume jurisdiction in cases such as these, influenced solely by the presumption against the extra-territorial application of statutes, does not justify a limitation of these rights as afforded to employees, at least not a justification as envisioned by section 36 of the Constitution, nor any provision within the employment statutes themselves.[115]

Ultimately, employees of this kind are working outside their places of residence for multinational companies who, in most instances, hand out standardised employment contracts that have already been drafted in their favour. This is exemplified by the facts in *Astral Operations*. Here the employment contract specified that the retrenchment procedure would follow the "legally required consultation process".[116] No mention of the legal system that this clause alluded to was made; however, the respondent contended that the retrenchment procedure was to only take place if the LRA was applicable.[117] Essentially, Astral Operations (Pty) Ltd made a commitment to follow a retrenchment procedure if South African law was applicable and argued that it was not applicable when it came down to payment of severance pay following possible retrenchment. It was, furthermore, held in the pre-trial minutes that the contract made no reference to the employment relationship being governed by any law other than South African law.[118] Firstly, this may very well give the employee an expectation that South African law would be applicable and, secondly, through the application of private international law there is certainly room to argue that there was an implied choice of South African law. This should not be the basis on which the Labour Court assumes jurisdiction, however it certainly challenges the argument made by the Labour Appeal Court in *Astral Operations.*

[114] C Roodt 'Jurisdiction of the South African Labour Court: employer identity and party autonomy' (2003) 15 *Mercantile Law Journal* 146.
[115] The Constitution (n 113) sec 36.
[116] *Astral Operations* (n 104) para 2
[117] As above.
[118] As above.

Ironically, even an approach that does not rest on private international law will eventually lead to an enquiry into various connecting factors in order to question whether or not the employee's workplace is in South Africa.[119] Ultimately, the focus of the employee's workplace as the factor determining jurisdiction is the application of the *locus solutionis.* Already we have an approach firmly rooted in private international law practice; the difference rests in the fact that emphasis on territory will stop the investigation once the *locus solutionis* is found to be either in South Africa or elsewhere. But if emphasis is placed on private international law methods, then the investigation widens, and it forces the court to question the substance of the *locus solutionis* rather than its form as all factors, and not only the physical place of the employee's workplace, need to be considered. It, furthermore, allows the court to question the appropriateness of the *locus solutionis* as the determining connecting factor. Is the workplace of the employee not fortuitous to the employment relationship as a whole? This is an important question when we begin to investigate the nature of the employment relationship. Where is an expatriate employee's workplace, who works in multiple jurisdictions, determined by its employer? A narrow application of the *locus solutionis*, whether through an approach centred on territoriality or on private international law, will not be able to account for a pilot, working for the currently inactive South African Airways (Pty) Ltd, who flies to and from South Africa. In such an instance, a court would have to look beyond the workplace and begin questioning the domicile of the employee or the employer or the place where the company that employs the employee is incorporated. What is, thus, evident is that a strict application of the *locus solutionis* risks allowing an employer to abuse its position by placing employees in subsidiaries outside the reach of South Africa's employment statutes as per the territorial approach taken by the Labour Court.[120]

Accordingly, when determining jurisdiction, choice of law must be put aside for a moment. The court must begin to inquire into the grounds, understood as *ratio jurisdictionis*, upon which the assumption of jurisdiction by the Labour Court is justified. Thus, a look into jurisdiction over disputes with foreign elements begins with the necessary analysis of various connecting factors. If this approach had been followed,

[119] Grusic (n 1) 742.
[120] Calitz (n 41) 687.

the judgment in *Astral Operations* would be vastly different; there would have been no question that the Labour Court could have assumed jurisdiction. The employee, Parry, was a South African citizen, employed by a South African company being paid in South African Rands. The contract was concluded in South Africa and supposedly breached there too.[121] Parry was repatriated to South Africa when the Malawian operation was coming to an end and, in fact, finished work on its closure in South Africa.[122] It could, thus, be concluded that at all material times Parry remained domiciled in South Africa. He was made to report to the South African head office of Astral Operations (Pty) Ltd monthly and was at all times subject to the company's resource policies which made reference to the BCEA and LRA.[123] These factors weigh significantly in favour of connecting the dispute to South Africa. The Labour Appeal Court failed to take these into account as all factors considered were solely within the scrutiny of territoriality. Accordingly, the importance for Zondo JP was the fact that Parry had relocated to Malawi, all of his duties were to be performed for the Malawian operation and that he had entered into an employment contract specifically to begin working there.[124] All of these factors, even coupled with the fact that Parry paid PAYE taxes in Malawi, do not outweigh the factors pointing towards South African jurisdiction. Nor does the *locus solutionis,* when looked at holistically in light of the employment relationship as a whole, indicate that the Malawian operation was entirely divorced from its South African counterpart.

Another aspect of jurisdiction when dealing with cross-border conflicts is the doctrine of effectiveness. While it is considered a jurisprudential principle and not a pre-requisite for jurisdiction,[125] it certainly questions the use of territoriality as the guiding principle for jurisdiction over international employment contracts. This doctrine determines that the court with jurisdiction should not only have the power to adjudicate, determine and dispose of a matter[126] but it should also be in the position to give a

[121] *Parry* (n 58) para 74.
[122] *Parry* (n 58) para 9.
[123] *Parry* (n 58) para 76.
[124] *Astral Operations* (n 104) para 20.
[125] Forsyth (n 43) 170.
[126] *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) at 256G-H; *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A) at 424; and *Spendiff NO v Kolektor (Pty) Ltd* 1992 (2) SA 537 (A) at 551C.

meaningful judgment.[127] In *Astral Operations* this is satisfied by the fact that Astral Operations (Pty) Ltd was incorporated in South Africa and was listed on the Johannesburg stock exchange.[128] Had Parry been successful in claiming the amount of severance pay allegedly owed to him, he would be able to secure payment through the attachment of property owned by his employer as such property was situated in the Republic. Having no jurisdiction in South Africa, Parry is left to utilise the courts in Malawi. Had his case been successful, the result would have been that he would still have to approach the South African court system, to have the judgment made an order of court and enforced. Why? Because his employer was incorporated in South Africa and this is likely where payment would be made.

Of course, both territoriality and the doctrine of effectiveness are principles underlying jurisdiction and neither are absolute, nor should they be treated as such.[129] Therefore, the interpretation of both under private international law implies and favours certain connecting factors without making an absolute determination on jurisdiction. Territoriality unequivocally favours the place of work (*locus solutionis*), while the doctrine of effectiveness favours the place of incorporation or domicile of the parties (*locus domicilii*) and the place where property is situated (*situs*). While the *locus solutionis* ensures absolute certainty by ensuring that the place where you work will be the place of jurisdiction, and even choice of law if we follow the understanding of the Labour Court in *Astral Operations,* the resulting effects are nonsensical, biased (usually in favour of the employer) and unreasonable as illustrated through the example above.

It has also become clear that the Labour Appeal Court in *Astral Operations* conflated jurisdiction and choice of law.[130] Unfortunately, this is a common occurrence in even the latest judgments over international employment contracts. What this also means is that even judgments that do not purport to follow such a strict application of

[127] Forsyth (n 43) 170.
[128] *Parry* (n58) para 75.
[129] Forsyth (n 43) 170.
[130] *Astral Operations* (n 104) para 22.

territoriality are left misapplying private international law principles. This can be seen in both *Kleinhans v Parmalat South Africa*[131] and *Robineau v Schenker.*[132]

2.4.3 *Kleinhans v Parmalat South Africa*

In another cross-border employment dispute, the court in *Kleinhans* proved to be far more progressive than *Genrec* and showed to be ahead of its time having occurred prior to *Astral Operations.* After reiteration of the facts, Pillay J characterised the dispute as being of an international nature and correctly sought to approach it from the perspective of private international law.[133] The applicant was employed by Parmalat South Africa (PSA) in 1990. In January 2000 he entered into a contract in which he was to be seconded to Parmalat Mozambique (PM) for a period of three years. There was the question of who Kleinhans actual employer was; however, the Court, after analysing misleading and seemingly contradictory facts, concluded that PSA was the employer and not PM.[134] The claim being heard was one of breach of contract for the alleged unfair dismissal which, Kleinhans argued, was due to the deterioration of his relationship with his general manager after his wife had laid a complaint of sexual harassment against him.[135]

The judgment correctly started by investigating the connecting factors that connected South Africa to the employment contract.[136] In fact, the court correctly described what the determination of jurisdiction involved and, quoting *Serfontein v Balmoral Central Contracts SA (Pty) Ltd,* held that it consisted of the "weighing up of those features of the employment contract which fell outside the jurisdiction …against those which link the relationship to the South African territory".[137] Furthermore, it was held that the test was qualitative rather than quantitative.[138] Accordingly, the judgment started off on the right foot. The approach was firmly within the scope of private international law and the Court correctly applied the principle of significant connection. The judge even went

[131] *Kleinhans v Parmalat SA (Pty) Ltd* (2002) 23 ILJ 1418 (LC).
[132] *Robineau v Schenker SA (Pty) Ltd & Others* (2020) 41 ILJ 1648 (LAC).
[133] *Kleinhans* (n 131) para 13.
[134] *Kleinhans* (n 131) para 46.
[135] *Kleinhans* (n 131) para 8.
[136] *Kleinhans* (n 131) para 14.
[137] *Serfontein v Balmoral Central Contracts SA (Pty) Ltd* (2000) 21 ILJ 1019 (CCMA).
[138] *Kleinhans* (n 131) para 21.

so far as to discuss common law connecting factors and held that the *locus solutionis* is but one factor to take into consideration.[139]

What common law connecting factors do is add certainty to the determination of jurisdiction. Whereas simply listing seemingly arbitrary factors, such as the fact that payment is made in Rands to a South African bank account,[140] the common law has established and defined the grounds upon which a court may justifiably assume power over the parties to the dispute.[141] For instance, domicile as a common law connecting factor generates a strong argument that South Africa is the place of jurisdiction. When this is coupled with the fact that an employee's salary is being paid into a South African bank account the argument that South Africa is the place of jurisdiction is only strengthened. This is why the test is qualitative and not quantitative.

The importance of ensuring that jurisdiction is assumed on equitable grounds rests on the concern that, as a dispute involving foreign elements, due consideration must be given to the possibility that enforcement of such judgment might take place in another jurisdiction. Recognition and enforcement of a foreign judgment is, *inter alia*, dependent on the forum court having international competence; in other words, the forum court must have jurisdiction according to the general principles underlying jurisdiction within the legal system that the judgment is being enforced in and not necessarily only have established jurisdiction in terms of its own legal rules.[142] Accordingly, avoiding an ineffective judgment, resulting from a forum court lacking international competence, would require an approach to jurisdiction that is sensitive to the international nature of these claims. Such an approach is arguably established within private international law. It would, more critically, be regrettable to have a court in a foreign jurisdiction decline enforcement of a Labour Court judgment on the grounds that jurisdiction was not assumed on justifiable and recognisable grounds; ultimately that the forum court had not established jurisdiction in terms of the rules governing jurisdiction of the enforcing court.[143] This would cause real undue hardship, wasted expense and time to the party looking to enforce the judgment.

[139] *Kleinhans* (n 131) para 85.
[140] *Kleinhans* (n 131) para 2.
[141] Forsyth (n 43) 175.
[142] Forsyth (n 43) 420.
[143] Forsyth (n 43) 417.

That said, it is encouraging to see that the Court took account of the common law connecting factors that assist in determining which jurisdiction the contract is more closely connected to while simultaneously going through the pain of ascertaining how much weight to accord to them. It is also reassuring to see that the *locus solutionis* was not considered to be the sole or predominant factor in determining jurisdiction and that due consideration was given to the domicile of the parties.[144] Ultimately, the presence of the parties within the jurisdiction of a court is an important and weighty factor for assuming jurisdiction in general and there seems to be no reason, arising out of case law or statute, that the Labour Court should abandon such general principles here in favour of the place of work. Interestingly, however, Frederick disagrees and maintains;

> although the approach preferred by the judge leaves much room for individual reasonableness and fairness, it cannot be supported due to the resulting severe lack of certainty. It is suggested that the *locus solutionis* must at least be held to be the most important factor to be taken into account.[145]

This position is explored in greater detail in Chapter Three, however, it may be questioned whether legal certainty is truly compromised in the application of an approach that best serves the reality of newer, globalised, forms of work.

That said, where the *Kleinhans* judgment goes astray is in the conclusion that by making a choice of South African law the parties had also chosen South Africa to be the place of jurisdiction.[146] This is a complete conflation of these two principles which, while having similar tests and connecting factors, are deserving of separate but equal analysis and treatment.[147] This conclusion is also problematic in many other respects that may be seen in the judgment itself. The parties to the employment contract had not expressly chosen the law to govern their contract but the court concluded that an implicit choice had been made by reason of the conditions of service having

[144] *Kleinhans* (n 131) para102.
[145] EA Fredericks 'The proper law of the international contract of employment: interpreting the *Kleinhans* decision' (2006) 18 *South African Mercantile Law Journal* 80.
[146] *Kleinhans* (n 131) para 25.
[147] Roodt (n 114) 139.

incorporated South African law.[148] While this may be a fair conclusion, it may not always be so easily determined in a dispute with different facts. For instance, where a court has to impute an intention on choice of law, because no express or implicit choice has been made, the court is effectively conferring jurisdiction onto itself through the use of connecting factors that may hold little weight in terms of jurisdiction.[149]

Where choice of law determines which law the contract is to be governed by when no express or implicit choice is made, jurisdiction is determined through connecting factors which weigh in heavily depending on already established jurisdictional principles. This is particularly significant when considering the jurisdiction of the Labour Court as it is firmly outlined in statute and, as such, is rooted in subject-matter jurisdiction. No one can confer subject-matter jurisdiction onto a court that does not have it.[150] Even if the parties had chosen the governing law and rightly exercised party autonomy in doing so, is it appropriate to extend such party autonomy so as to confer jurisdiction on to the Labour Court? This is especially pertinent when considering that you cannot confer jurisdiction onto the Labour Court through agreement or submission.[151]

Evidently, a common theme running through these cases is that the applicability of the employment statutes is the determining factor for jurisdiction. It is wrong because jurisdiction and choice of law entrench different rights and duties. It is erroneous to consider that the same factors that empower the Labour Court with jurisdiction could be reflected equally to enforce an employer to abide by the duties as laid out in the BCEA, for instance. It is also incorrect for the simple reason that such a conclusion leads to the misapplication of private international law. It risks the forum favouring its own jurisdiction and its own legislation as a finding of one automatically assumes the other. When the enquiry into jurisdiction is subsumed into choice of law, the court neglects to consider whether it can embark on a meaningful judgment or whether South Africa is the appropriate forum to hear the dispute.[152] When choice of law is

[148] *Kleinhans* (n 131) para 25.
[149] Roodt (n 114)139.
[150] Hook (n 95) 447.
[151] LRA (n 3) sec 157.
[152] While the question of whether *forum non conveniens* applies in South Africa is not settled (see Forsyth (n 43) 185) it is submitted here that, likewise to the judgment in *Estate Agents v Lek* 1979 (3) SA 1048 (A), it is a valid consideration to make in the determination of jurisdiction.

subsumed into the jurisdictional enquiry, then a court may easily neglect to consider the parties autonomy in making such choice as seen in *Robineau v Schenker* or fail to consider the application of mandatory rules that may offer more protection to an employee who, as the weaker party to the contract, warrants such protection.[153]

2.4.4 *Robineau v Schenker*

This was an appeal from a Labour Court judgment that rejected jurisdiction on the basis of the choice of law having been expressly Mozambique law.[154] The facts involve a French citizen, Ms Robineau, who was employed by Schenker SA to work on an operation that the company was running in Mozambique. Two employment contracts were drafted, one for South Africa and one for Mozambique, both of which held that the law of Mozambique was to govern the contract. Ms Robineau was later dismissed and approached the CCMA, claiming unfair dismissal.[155] With jurisdiction being in issue, however, the dispute made its way to the Labour Appeal Court (LAC). The main contention for the Labour Court, and later the Labour Appeal Court, was the question of the extra-territorial jurisdiction of the CCMA and, by extension, the Labour Court. The LAC did not differentiate between the jurisdictional powers of the Labour Court and the CCMA but, while there may be room to argue against this error, the jurisdiction of the CCMA is beyond the scope of this paper. The analysis of this case rests firmly on the jurisdiction of the Labour Court.

With that said, the Labour Court had taken a strange approach in attempting to answer the jurisdictional issue; they made their judgment on the basis that Mozambican law governed the contract. Because an express choice regarding the governing law had been made, the Court held that private international law played no role in the adjudication of the employment contract and that there was no need to apply the test set out in *Astral Operations* and *Genrec*.[156] The CCMA could not make any pronouncement on foreign law and so the enquiry ended there. While this is true, the Court should have nonetheless engaged in the jurisdictional enquiry and set choice of law aside for the time being. In doing so, the court may have found strength in certain

[153] Recital 23 of Rome I (n 42).
[154] *Schenker South Africa (Pty) Ltd v Robineau and Others* (2019) 40 ILJ 213 (LC) 25.
[155] *Schenker* (n 154) para 22.
[156] As above.

factors that connected the employment contract to South Africa, such as that the employer was incorporated in South Africa under South African law.[157]

In fact, this was the ground which the LAC relied on. Safe to say, the Labour Court judgment was overturned on appeal and jurisdiction was assumed. The approach taken was not necessarily one set within private international law, but it certainly made the territorial approach taken in *Genrec* and *Astral Operations* much wider. Agreeing with the court in *Monare v SA Tourism*,[158] the LAC held that to enquire into the location of an employee's workplace was to question substance rather than form.[159] This is a far better analysis of the *locus solutionis* and, upon application of the facts, the Court held that looking at the substance of the employment relationship, it cannot be said that the Mozambican operation was removed from the South African undertaking.[160] Again, even without directly applying private international law principles, the Court listed a number of factors that indicated that the Mozambican operation was connected to South Africa and, more specifically, the South African undertaking operated by Schenker SA. For instance, the Court emphasised the fact that the computing operating system at the Mozambican operation was linked to the system in South Africa and that all the assets, even the ones in Mozambique, were owned by Schenker SA.[161]

What this shows, is that even when one tries to reject the application of private international law and the processes thereof, you will inevitably find yourself questioning the proximity of the contract to a jurisdiction in which the employee can be said to have his workplace. The inquiry into a significant connection is, accordingly, unavoidable.

As the judgment was not rooted in private international law, however, what occurred next is almost foreseeable. When turning to the issue of the express choice of the law of Mozambique, the court took to imputing the law of the forum instead.[162] It did not

[157] *Robineau* (n 132) para 51.
[158] *Monare v South African Tourism and Others* (2016) 37 ILJ 394 (LAC).
[159] *Robineau* (n 132) para 49.
[160] *Robineau* (n 132) para 54.
[161] *Robineau* (n 132) para 52.
[162] *Robineau* (n 132) para 53.

analyse such choice as falling within the realm of private international law but, instead, used the existence of a South African statutory provision in three of the contracts' clauses as a factor indicating that the employment relationship was connected to Schenker SA.[163] It simultaneously held that the evidence, which was undisputed, showed that the choice of Mozambican law, which appeared in an addendum to the contract, was only made for the purposes of obtaining a work permit for Ms Robineau.[164] While this may be undisputed, the court should have nonetheless given a more meaningful analysis regarding choice of law.

Although the evidence was undisputed, the fact that there is mention of more than one legal system in a contract does not necessarily suggest that one of those legal systems was included under false pretences. It is entirely possible to have more than one legal system governing different portions of the contract.[165] Party autonomy allows for such.[166] While it is evident that the parties had abandoned the application of foreign law, it would have been interesting to see how the Court would have dealt with the problem if the parties had disputed the evidence that indicated that the law of Mozambique was only imported for purposes of obtaining a work permit, since choice of law principles were far from the Court's mind. Given that choice of law was subsumed into the jurisdictional enquiry, the court would have likely abandoned jurisdiction on the grounds of it being unable to make a ruling on foreign law.[167] By doing so, the court overlooks multiple avenues under private international law that may justifiably set aside an express choice of law.[168] One cannot question the mandatory nature of South Africa's labour laws without giving the choice of law process its day in court.

From these case analyses one can see how territoriality muddles our understanding of jurisdiction when presented with an international employment contract. The question of whether an Act finds application to the dispute quickly becomes a question of jurisdiction or vice versa. By doing so, the Labour Court can be seen to overlook

[163] As above.
[164] As above.
[165] Forsyth (n 43) 317.
[166] As above.
[167] *Mukaddam v Prioneer Foods (Pty) Ltd and Others* (2013) 10 BCLR 1135 (CC).
[168] The investigation into the mandatory nature of South Africa's labour laws will be explored in Chapter Four.

general jurisdictional principles, which still underlie and supplement the courts' statutory jurisdiction. Jurisdiction is then rejected in instances where there is ample reason for it to be assumed. It places sovereignty, and even comity, above the interests of litigants who may experience further costs and undue hardship trying to litigate in a jurisdiction that is foreign to them. This is especially true for South African expatriates. But most of all, it fails to consider the simple fact that contracts are not entered into in a legal vacuum. While parties contract on the basis of labour law, they open themselves up for the implications of private international law by introducing foreign elements. The same goes for statutes. While the question of whether South Africa's employment statutes have extra-territorial effect have been confusingly implicated in the question of whether the Labour Court has jurisdiction, the fact that the statutes remain silent on their extra-territorial reach should not lead to the conclusion that private international law has no force over international employment contracts. Like contracts, statutes do not exist in a legal vacuum and if they remain silent as to their extra-territorial reach, it must be presumed that parliament enacted the Acts subject to the principles of private international law.[169] If the focus until now has been to question parliament's intention as to the territoriality of the LRA, for instance, then the conclusion that parliament intended no extra-territorial reach must be able to answer the question why parliament would have intended to abolish established processes of jurisdiction and choice of law.[170]

While the cases chosen here are ones which illustrate the often confusing conclusion to Labour Court judgments when navigating an international employment contract without the application of private international law, there do exist judgments which have correctly applied private international law principles. The court a quo in *Astral operations v Parry* is one example. But when we have cases as recent as 2020 still misapplying principles of jurisdiction and choice of law, and almost overtly ignoring a whole division of the law (private international law), it is evident the problem, caused by years of applying strict interpretations of territoriality, still persists. It adds considerable uncertainty as the outcome of litigation will depend on whether the judge has a sufficient understanding of private international law. Employees and employers

[169] Hook (n 95) 440.
[170] As above.

should have their expectations met as to the jurisdiction and law which they would assume operate according to the nature of their employment relationship and the connections it has to a particular jurisdiction and legal system.

2.5 The jurisdiction of the Labour Court

Up till now it has merely been assumed that private international law principles underlying jurisdiction may easily be applied in the Labour Court. To this point, the question is, can the Labour Court, being a creature of statute, determine jurisdiction on the basis of the common law? The answer is rather straightforward. The jurisdiction of the Labour Court has been discussed *ad infinitum* and will likely continue this way as courts attempt to analyse the rather vague description of the jurisdictional powers located in the LRA.

Section 151 of the LRA labels the Labour Court as a superior court with status equal to that of the High Court.[171] To this end, the Constitution holds that a superior court has inherent power to regulate its own processes and develop the common law with regards to procedure.[172] Importantly, to develop the common law to be in line with the interests of justice.[173] In *Windybrow Theatre v Maphela* the court held that these inherent powers govern and are related to "matters within jurisdiction and the regulation of court processes".[174] These are inherent powers that the Labour Court possesses, the Court further held.[175] It is also entrenched in section 151 that the Labour Court has inherent powers with relation to its jurisdiction.[176] Accordingly, the question has already been answered: the Labour Court does have the power to determine its own jurisdiction through the use of common law processes and even develop these processes. Private international law, which is rooted in the common law, may thus be utilised by Labour Court judges to determine jurisdiction over an international employment contract. Not only may they do this but they must as, section 173 of the Constitution holds, the interests of justice demand so.

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[171] LRA (n 3) sec 151.
[172] The Constitution (n 113) sec 173.
[173] As above.
[174] *Windybrow Theatre v Maphela and Others* (2015) 36 ILJ 1951 (LC) para 21.
[175] As above.
[176] LRA (n 3) sec 151(2).

2.6 Conclusion

The jurisdictional principles entrenched in the Labour Court are certainly special. Entrenched is personal jurisdiction, the court's power to adjudicate over the parties,[177] subject-matter jurisdiction, the court's ability to adjudicate over claims of a specific nature,[178] and prescriptive jurisdiction, that not being entirely devoted to court processes but rather the power of parliament to prescribe laws within a particular territory.[179] While these are three separate principles, it is no strange occurrence that subject-matter jurisdiction and prescriptive jurisdiction coincide in the Labour Court.[180] The Labour Court's subject-matter jurisdiction is outlined in statute. Section 157 of the LRA provides that the Labour Court has "… jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court".[181] Any other law is made with reference to the statutes which specifically make mention of the jurisdiction of the Labour Court – section 77 of the BCEA is one example.[182] It should not be understood to mean any law whatsoever. The interpretation of the Labour Court's subject-matter jurisdiction is, thus, clearly rooted in employment.

Territoriality has, however, blurred the lines between these three forms of jurisdiction. Since subject-matter jurisdiction and prescriptive jurisdiction are so closely linked, the Court has sought to determine their adjudicatory powers on the basis of the applicability of statute to foreign disputes. But the applicability of an Act does not determine subject-matter jurisdiction, nor does it give rise to personal jurisdiction. Yet, the courts have insisted on following this approach – interpreting statutes to determine their territorial reach and assigning consequences of such reach to jurisdiction. This has led to often confusing, unjust and incorrect judgments, as has been shown in this chapter.

So, what of these forms of jurisdiction and private international law? Firstly, prescriptive jurisdiction should be firmly placed in the choice of law process. As such,

[177] Hook (n 95) 446.
[178] Hook (n 95) 445.
[179] Hook (n 95) 446.
[180] As above.
[181] LRA (n 3) sec 157.
[182] BCEA (n 55) sec 77(1).

the relevance and analysis of the choice of law process will be explored in the next chapter. Secondly, the question of adjudication should start first with questioning the subject-matter of the claim.[183] Is this a dispute that the LRA envisioned the Labour Court should adjudicate over? If this is affirmative, the next enquiry becomes one of personal jurisdiction. Personal jurisdiction may then be assumed through the use of connecting factors that link the employment relationship to South Africa. Ultimately, even in a domestic setting, personal jurisdiction is dependent on the existence of factors that link the dispute to the court.[184] In the Labour Court, jurisdiction may be assumed simply on the basis that the parties are resident or domiciled in South Africa, since the court has jurisdiction throughout the Republic,[185] that there is an identifiable employment relationship and the claim is one that the Labour Court was intended to adjudicate over.[186] As mentioned, establishing a significant connection cannot be avoided.

Territoriality has, subsequently, shifted the focus exclusively to the court's prescriptive jurisdiction. Of course, the Labour Court does not have jurisdiction independent of the Act,[187] yet, since none of the employment statutes in South Africa determine their own territorial reach, it is necessary to look beyond the Act itself, to the processes of private international law, to answer the question. By doing so it becomes evident, as has been outlined in this chapter, that jurisdiction is determined independently from the application of statute. To strictly apply territoriality is to ignore the basic principles of jurisdiction, of which the presumption against extra-territoriality does not override, or at least should not considering its outdated purpose. To favour an approach centred in territoriality is to favour sovereignty and the interests of states and statehood over the interests of justice. It is not only ironic, considering statehood demands the protection of its own citizens, but it further fails to meet the Constitutional imperative as set out in section 173 of the Constitution.

Inclusive in the interests of justice is access to courts and so, while the aim here is to advocate and argue on the basis of private international law, the motivation for doing

[183] Hook (n 95) 460.
[184] Roodt (n 114) 144.
[185] LRA (n 3) sec 156.
[186] Roodt (n 114) 142.
[187] As above.

so is underpinned by the interests of vulnerable employees who should have a number of legal avenues at their disposal. That said, it is high time the Labour Court abandons this approach as it is not a justifiable restraint on an employee's, or even an employer's, access to court, nor is it a fair limitation on the ability of these parties to have their Constitutional or statutory rights realised.

Chapter 3: The relevance of choice of law

3.1 Introduction

Private international law may be said to involve three main pillars – jurisdiction, choice of law and the recognition and enforcement of foreign judgments. Chapter Two focused on jurisdiction and the application of territoriality in the assumption of jurisdiction over international employment contracts in the Labour Court. The analysis therein criticised territoriality as a guiding principle that the Labour Court has often relied on in their jurisdictional determination. What arose out of this analysis is that often times, the Labour Court determines jurisdiction on the basis of the applicability of a statute. The two might maintain a close relationship, and the Labour Court may be bound by the application of the remedies entrenched within these statutes, but a correct investigation into the applicability of a statute over disputes that contain foreign elements is to look into the methods and practices involving choice of law.

Territoriality has blurred the distinction between the jurisdictional (and likewise territorial) reach of a court and the territorial scope of a statute. While a court cannot extend its jurisdictional powers to disputes that do not fall within its reach, the determination of jurisdiction, as argued in Chapter Two, should be determined by the usual principles that underpin jurisdiction, supplemented at times by factors that establish the connections necessary to justify application of those domestic principles. The presumption against extra-territoriality should, however, only direct the applicability of a statute as determined by the choice of law process. This presumption may, however, be easily rebutted by the methods underlying choice of law in private international law, where it is evident South African law is applicable to the dispute. Accordingly, the question of how the Labour Court should determine the spatial scope of South Africa's employment statutes will be the focus of this chapter. This begins with analyzing the method of statutory interpretation that is currently relied on by the Labour Court and rejecting its strict and exclusive use in favour of the methods prescribed by private international law.

3.2 Statutory Interpretive Approach

As discussed in Chapter Two, the approach taken by the Labour Court in assuming jurisdiction arose from precedent that focused on the application of statute and its territorial scope. This approach adheres to the presumption against extra-territoriality and indicates a solution to the assumption that "parliament could not have intended to legislate for the whole world".[1] Yet, the presumption against extra-territoriality, while already criticized as a presumption that may easily be rebutted, can further be criticised for its futility in the enquiry of a statute's territorial scope.[2] Other than determining that a statute cannot possibly apply to every conceivable circumstance falling under its subject-matter, the presumption alone does not supply the court with a formula for the determination of a statute's spatial application.[3] It is in attempting to supplement a formula to approach this seemingly allusive question that statutory interpretation was made use of.

The use of methods of statutory interpretation to distill an applicable law in disputes with foreign elements is problematic in instances where statutes remain silent as to their territorial scope and further offer no clue to what parliament's intention on the matter is.[4] Attempting to establish parliament's intention under these circumstances has been described by Dicey, Morris and Collins as "an artificial method, and perhaps a dangerous one".[5] The dangers, however, are based upon the assumption that courts are likely to be inclined, albeit subconsciously, to apply their own legislation.[6] Yet, as illustrated in Chapter Two, this does not occur in Labour Court judgments. Interestingly, statutory interpretation has actually led to the inapplicability of South Africa's employment statutes to disputes where an employee works anywhere outside of South Africa. Accordingly, the dangers of this method do not appear to present themselves here.

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[1] *Lawson v Serco* [2006] UKHL 3; [2006] 1 All ER, 823 para 6.
[2] S Dutson 'The territorial application of statutes' (1996) 22 *Monash University Law Review* 87-88.
[3] As above.
[4] M Hook 'The "statuist trap" and subject-matter jurisdiction' (2017) 13 *Journal of Private International Law* 437.
[5] M Keyes 'Statutes, choice of law and the role of forum choice' (2008) 4 *Journal of Private International Law* 18; AV Dicey, JHC Morris & L Collins *Dicey Morris & Collins on the conflict of laws* (2014) at 17.
[6] As above.

Rather, the method utilised by the Labour Court reflects the purposive approach that requires courts to investigate whom parliament is presumed to have been legislating for.[7] From this courts deduce that "parliament must be taken to have only been legislating for persons within its territory, unless the contrary is expressed or is necessarily implicit".[8] As articulated, this favours a strict adherence to the values underlying territoriality and state sovereignty. Nonetheless, it remains important to bear in mind that territorial notions, while impractical in jurisdictional determinations, have a varied bearing on the applicability of statutes. It is arguable that to bind a foreign employer to the unfair dismissal rules of a particular forum is inappropriate where an employee enjoys the benefits and security offered in another forum.[9] Yet, with that said, the inference here is not that statutes should not be bound by territorial limitations, but that the limitations should be founded upon the correct methods that in turn consider and reflect appropriate substantive factors. The suggestion here is that the correct approach rests in private international law and, more specifically, choice of law.

It has been maintained that where a court engages with statutory interpretation to assist them in adjudicating over a dispute with foreign elements, they fail to take into account extrinsic factors that become important in cross-border disputes.[10] These include factors such as, the need for certainty and predictability of outcomes and international harmony and uniformity – factors that have already been considered in the formulation of the rules of private international law.[11] In doing so, the court risks producing an unfair result.[12]

In light of territoriality, it has been further argued that the rules of private international law already satisfy the principle of comity, and are therefore able to establish legislative intent.[13] Where parliament has not made any express indications as to what the intended scope of a statute might be, they must be presumed to have legislated

[7] Dutson (n 2) 78.
[8] As above.
[9] L Merrett 'New approaches to territoriality in employment law' (2015) 44 *Industrial Law Journal* 71.
[10] Dutson (n 2) 80.
[11] As above.
[12] K Calitz & C Garbers 'A comparative perspective on the application of domestic labour legislation in international employment disputes' (2013) 3 *Stellenbosch Law Review* 552.
[13] Dutson (n 2) 83.

subject to private international law.[14] The justification being that, parliament would not have intended to disregard an entire body of law without expressly indicating such intention.[15] Similar to how a contract is not drafted in a legal vacuum, so too are Acts of parliament formulated and enacted within the context of an already existing body of law.[16] An important consideration should, furthermore, be made for the fact that a statutory cause of action, arising out of a private right created through a civil contract is for almost all intent and purposes equivalent to a common law cause of action and should, thus, be regulated by the same body of rules.[17] To take the point further, in both Anglo-common law and civil law systems, foreign legislation is treated as applicable where the law is part of the governing law of a contract or cause of action.[18] The application of foreign law is dependent on the process of private international law.[19] Accordingly, a court that utilises private international law to regulate the application of foreign law, but not domestic law, is "indifferent to foreign reaction to his measures"[20] thereby "negatively affect[ing] international legal co-operation".[21]

3.3 The Role of Statutes

A statute may also occupy a different role depending on the provisions that have been enacted.[22] Parliament may have put its mind to issues of conflict of laws and enacted a provision with a multilateral or unilateral choice of law rule that specifies the application of a particular legal system.[23] They might go further and specify that a provision or entire statute has mandatory application and must apply irrespective of the chosen law.[24] Some may even contain self-limiting provisions, specifying that they are applicable only when the governing law is the law of the forum that enacted such statute.[25] Most, however, like that of South Africa's employment statutes, remain silent as to their spatial application. It makes sense to utilise methods of statutory

[14] Hook (n 4) 437.
[15] Hook (n 4) 440.
[16] FAR Bennion *Understanding common law legislation: drafting and interpretation* (2009) 25.
[17] Dutson (n 2) 70.
[18] CF Forsyth *Private international law: the modern Roman-Dutch law including the jurisdiction of the High Courts* (2012) 6.
[19] Keyes (n 5) 16.
[20] As above.
[21] As above.
[22] Hook (n 4) 438.
[23] As above.
[24] As above.
[25] Hook (n 4) 439.

interpretation where parliament has left legislative gaps – such is the role of courts to supplement these gaps.[26] However, these statutes should rather be read against the common law rules of private international law and not as against the literal meaning of the general wording that most silent statutes employ. A deeper analysis into the method of statutory interpretation finds that interpretation of general provisions without consideration of private international law poses several challenges.

3.4 General Statutory Provisions

These are provisions that do not contain any indication as to the circumstances in which they are to apply.[27] They seemingly apply to every conceivable circumstance that falls within its subject matter.[28] An example is found within section 185 of the LRA that confers the right not to be unfairly dismissed to "every employee…".[29] On face value, this provision seems to apply to every employee as against every employer. Yet, this could hardly be considered parliament's intention.[30] Contrasting this are specifically limited provisions that identify and stipulate their scope of application by either making use of a multilateral or unilateral conflict rule that specifies the legal system that is to apply, or it indicates that the forum statute is applicable by utilising provisions that are self-limiting.[31]

When approached with the applicability of a statute a court will first look at whether the statute has an explicit provision specifying its territorial scope.[32] South Africa's employment statutes do not make use of conflict rules or self-limiting provisions and so no territorial provisions exist. Accordingly, when the court in *Genrec*[33] first took to interpreting the 1956 LRA the result was to interpret the general meaning behind section 2(1) that held the Act to apply to every undertaking, trade or occupation. However, this is undeniably a subject-matter limitation and not a limitation on the Act's territorial scope. Nonetheless, the court held that this provision must be interpreted to

[26] Hook (n 4) 440.
[27] Keyes (n 5) 2.
[28] As above.
[29] Section 185 of the LRA.
[30] LT Braunig 'Statutory interpretation in a choice of law context' (2005) 80 *New York University Law Review* 1055.
[31] Keyes (n 5) 3
[32] Braunig (n 30) 1051.
[33] *Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry & others* (1995) 16 ILJ 51 (A).

mean that the Act only applied within the boundaries of the South African Republic, as endorsed by the presumption against extra-territoriality. We now know that the Labour Court, in *Astral Operations*, misapplied the precedent left by *Genrec* as they failed to interpret the 1995 LRA that was significantly different to its predecessor. Either way, the Labour Court inadvertently agreed with the methods utilised in *Genrec*, relying on the statutory interpretation of the LRA. This resulted in similar consequences for other employment statutes.[34]

Had the Labour Court attempted to interpret the 1995 LRA, however, they would have met a similar unsatisfactory result. With no territorial provision existing within the Act, the court could have only turned to the legislative history of the statute in order to discern parliament's intention.[35] This would have offered little assistance as the enactment of the 1995 LRA sought to bring fundamental changes to the field of labour law in wake of the advent of democracy in South Africa, making the current Act significantly different from its predecessors. Accordingly, statutory interpretation, when used in an attempt to accord a statute with a territorial limitation where the statute itself does not include one, results in inadequate outcomes. A general statute should rather be held to have been enacted in accordance with the rules of private international law as, has been held;

> [A] rule of substantive law… is generally expressed in universal terms and seems to have no dimension in space, for according to its wording it applies to all contracts wherever made. But its dimension in space, ie its sphere of authority, is the very thing that is fixed by private international law.[36]

3.5 Statutory rights

An analysis of the statutory interpretive approach is not complete, however, without consideration of the contrast between contracts of employment and freestanding legislative employment rights. While it might seem obvious that private international should guide the adjudication of cross-border employment disputes, problems arise

[34] *Astral Operations Ltd. v Parry* (2008) 29 ILJ 2668 (LAC) 21; section 77 of the Basic Conditions of Employment Act 77 of 1997 (BCEA) was held to not apply.
[35] Braunig (n 30) 1055.
[36] P Torremans; JJ Fawcett & U Grusic *Cheshire, North & Fawcett private international law* (2017) 6.

where statutory rights exist independently from the employment contract.[37] In this regard, one may make a distinction between the rights and conditions embodied in the BCEA[38] that, as the Act articulates, are to be regarded as a term within the employment contract with, for instance, the right against unfair dismissal that is a right which exists independently of the occurrence or nonoccurrence of an employment contract. Determination of the spatial scope of the latter does not sit comfortably within the private international law rules that govern contracts and choice of law.

The distinction between the application of contractual rights and statutory rights was the focus of the seminal case of *Lawson v Serco*[39] in Great Britain where the House of Lords held that the territorial scope of statutory rights was to be determined by different considerations to contractual rights.[40] With contractual rights it might be reasonable, the House of Lords held, to conclude that parliament intended them to apply when the governing law was English law.[41] Through a method of statutory interpretation, statutory rights were then held to apply when the claimant had a sufficient connection to the forum.[42] Accordingly, as may already be presumed, the interpretative approach seemingly pre-empts the private international law approach through the principle of close connection.[43]

3.5.1 *Lawson v Serco*

This case emanated from three joined appeals that concerned the territorial scope of section 94(1) of the Employment Rights Act,[44] which confers the right not to be unfairly dismissed.[45] Lord Hoffman, who gave the most substantive judgment, began correctly by holding that, in line with the rules of private international law, the question to be asked was whether a connection existed between the Act and the employment relationship. However, instead of embarking on private international law rules, Lord Hoffman referred to the principle against extra-territoriality and established three

[37] Calitz & Garbers (n 12) 540.
[38] BCEA (n 34) sec 4.
[39] *Serco* (n 1).
[40] U Grusic 'The territorial scope of employment legislation and choice of law" (2012) 75 *Modern Law Review* 733.
[41] As above.
[42] As above.
[43] Calitz & Garbers (n 12) 541.
[44] Employment Rights Act 1996 c 18 (ERA).
[45] ERA (n 44) sec 94.

categories of cases where an employee may be said to fall within the scope of the ERA. Accordingly, the foreign elements of the case had no bearing on whether the Act applied.[46]

a) Employees working in Great Britain

The first case is very simple and refers to the standard position of an employee who works within Great Britain, seeing as Acts of Parliament are always intended to apply to persons within its territory.[47] The House of Lords further explained that the question of whether the employee worked in Great Britain must be queried at the time of their dismissal, since circumstances may change between the time the contract is made to the time the employee is dismissed.[48] The court in both *Genrec* and *Astral Operations* affirmed the territorial scope of statutory employment rights to be based on geographical limits and, as with Lord Hoffman's first category, reliant on the employee working within those limits.[49] It is, therefore, interesting to see how both courts took to interpreting the presumption against extra-territoriality. Where the House of Lords in *Serco* took a wider approach in recognising scenarios where an employee, who does not physically work in Great Britain, might nonetheless utilise the ERA, the Labour Court may be faulted for being unduly strict.

b) Peripatetic employees

This categories of employees may be said to include those that work in multiple jurisdictions at any given time, for instance; pilots, crews of ships and international sales staff.[50] The investigation under this category turned to where the employees were said to be based.[51] An employee's base may be said to be the place where, after having considered all factors of the employment relationship, they spend most of their time ordinarily working.[52] In the *Serco* trilogy, the facts of one of the appeals included a Mr Croft, a pilot, who the House of Lords concluded to be based in Heathrow, London, since that was the place where his flying commenced and ended and the

[46] L Merrett 'The extra-territorial reach of employment legislation' (2010) 20 *Industrial Law Journal* 366.
[47] As above.
[48] *Serco* (n 1) para 30.
[49] *Astral Operations* (n 34) para 17.
[50] Merrett (n 46) 367.
[51] As above.
[52] *Todd v British Midland Airways* [1978] ICR 959.

United Kingdom (UK) was where he was living at the time.[53] The interpretation of the territorial scope of the ERA was, therefore, not cemented on a strict geographical foundation such as that found within the judgment in *Astral Operations*.

b) Expatriate employees

According to Lord Hoffman, expatriate employees were the most difficult category.[54] These included employees who worked outside of Great Britain but were connected to the forum by either, working for a British enclave or for a British employer for the purposes of carrying on a business situated in Great Britain.[55] Under this category, Lord Hoffman held that it was not enough that an employee worked for a British employer, a stronger connection to the forum was necessary and, while he gave only those examples mentioned above, he stated that others might possibly exist.[56] He did not, however, make any indication as to how long an employee needs to stay within the forum for them to fall within the scope of the ERA.[57] Presumably, the duration of an employee's stay will not determine whether they will be protected by the Act, rather the determination will be made on the connections that qualify an employee as working in Great Britain.[58]

The LAC judgment in *Monare v SA Tourism*[59] followed a similar reasoning to Lord Hoffman in the application of statutory employment rights to what may be considered expatriate employees. Mr Monare was employed by SA Tourism as the Finance and Administrations Manager in their London office.[60] Upon being dismissed, Monare approached the CCMA and eventually the dispute reached the LAC. The Labour Court, following the precedent left by *Astral Operations*, concluded that the LRA did not apply and both the CCMA and the Labour Court did not have jurisdiction as Mr Monare physically worked outside of the Republic.[61] However, the LAC took a wider approach and held that the crux of the issue was not based on where the employee

[53] Merrett (n 46) 367.
[54] Merrett (n 46) 368.
[55] *Serco* (n 1) para 37.
[56] *Serco* (n 1) para 40.
[57] Merrett (n 46) 370.
[58] As above.
[59] *Monare v South African Tourism and Others* (2016) 37 ILJ 394 (LAC).
[60] *Monare* (n 59) para 2.
[61] *South African Tourism v Monare and Others* (2014) 35 ILJ 2280 (LC) para 11.

physically worked, but rather whether the London office could be considered as being entirely separated or divorced from the undertaking in South Africa.[62] Having considered the Tourism Act[63] - that provides for the opening of offices anywhere in order to effectively exercise the powers established and granted by the Act[64] - the LAC concluded that the LRA did apply as the London office was not divorced from the South African undertaking.[65] It was the substance of where the employee worked, after considering all important factors of the employment relationship, that was crucial, rather than merely its geographical form.[66] Accordingly, as understood in light of the *Serco* categories, Mr Monare was an expatriate employee who worked for a South African employer in London, for the purposes of carrying on the business situated in South Africa.

Judgments such as that in *Monare* are encouraging. However, the issue remains that the precedent left by *Genrec* and *Astral Operations* has fortified the statutory interpretive approach to such a point that often it is difficult for the Labour Court to look beyond the physical workplace of the employee. For this reason, it has been argued that the best approach to statutory employment rights, even where they contain free-standing rights, is to consider their international application on the ground of possible connecting factors that will guide a court's discretion in whether or not an Act will apply to disputes with foreign elements.[67] This discretion, it has been argued, will produce a fairer result and mitigate against the use of statutory interpretation – which has been criticised for producing inconsistent and unpredictable results.[68] Furthermore, while this may run counter to the objectives of legal certainty, connecting factors are held to be more adaptable to the changing status of legislation and the fluctuating nature of employment.[69]

[62] *Monare* (n 59) para 36.
[63] Tourism Act 3 of 2014.
[64] Tourism Act (n 63) sec 13.
[65] *Monare* (n 59) para 41.
[66] As above.
[67] Calitz & Garbers (n 12) 560.
[68] As above.
[69] As above.

3.5.2 Rome I

In Europe, the choice of law rules are outlined in the Regulation on the Law Applicable to Contractual Obligations, otherwise known as Rome I.[70] Article 8 regulates the law applicable to employment contracts and establishes the connecting factors that will determine the applicable law in the absence of choice.[71] This prescribes the law that the employee will be most familiar with and by which they would likely expect to be protected.[72] The wide approach taken by Lord Hoffman in establishing the categories in which a statutory right might find applicability has inadvertently fallen in place with the choice of law rules found under Article 8 of Rome I. Article 8(2), for instance, holds that the applicable law in the absence of choice is the law of the country in which, or from which, the employee habitually works.[73] This is reflected similarly in Lord Hoffman's first and second category of employees who physically work in Great Britain or may be said to be based there.[74] The third category, expatriate employees, requires a strong connection with the forum before the ERA applies. This is echoed in Article 8(4), which allows for the law of the place most closely connected to the contract to apply.[75]

Interestingly, while both *Secro* and *Genrec* followed a method of statutory interpretation, the result in *Serco* did not rule out the possibility of an Act applying to employees who did not work within the geographical bounds of Great Britain. By doing so, the judgment reflects the realities of globalised employment. As seen in subsequent case law, the categories set by Lord Hoffman has allowed for courts to develop their approach to statutory employment rights. For instance, in a culmination of cases that made its way to the Inner House Court of Session, Lord Hope held, in *Ravat*,[76] that the question of whether an expatriate employee may fall within the scope of a statutory right is answered through a test of sufficiently close connection – mirroring even more so the private international law approach in Article 8(4) of Rome

[70] 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).
[71] Rome I (n 70) Art 8.
[72] Grusic (n 40) 741.
[73] Rome I (n 70) Art 8(2).
[74] Grusic (n 40) 742.
[75] Rome I (n 70) Art 8(4).
[76] *Ravat v Halliburton Manufacturing Services Limited* [2012] UKSC para 1.

I. In *Duncombe*,[77] Lady Hale leaned even closer to private international law by giving recognition to the parties' choice of English law which had previously been held, by Lord Hoffman, to be irrelevant. Lady Hale rightly held, however, that a choice of law is a relevant consideration as it indicates the protection each party is expecting to enjoy.[78]

The court in *Astral Operations* did not leave the door open to subsequent development of the approach to international employment contracts. The judgment in *Lawson v Serco* illustrates that even where a court does abide by the methods of statutory interpretation and upholds the presumption that statutes are first and foremost territorial, the conclusion drawn does not and should not oust employees who, by virtue of the nature of their employment, may be said to be connected to a forum without necessarily physically and wholly working there. By taking a more open approach, the courts in Britain have innately begun applying principles found more commonly within the private international law approach, to which the research now turns.

3.6 Private international law approach

An important distinction that has been maintained throughout this dissertation is that between jurisdiction and choice of law. Where the Labour Court has established jurisdiction on the grounds of there being a connection between the forum and the dispute, a question of whether the claimant falls within the scope of a statutory right does not challenge the court's jurisdiction.[79] The only hindrance to jurisdiction is upon the conclusion that foreign law is the applicable law, as the Labour Court is bound to apply the remedies as found within the LRA.[80] The court is not able to proclaim on foreign law and, thus, any finding that South African law is not the applicable law will result in the Labour Court having to forfeit its jurisdiction, likely on the basis that it is not able to give an effective judgment. However, contrary to what the Labour Court

[77] *Duncombe and Others v Secretary of State for Children, Schools and Families* [2011] UKSC para 14.
[78] Grusic (n 40) 727.
[79] C Roodt 'Jurisdiction of the South African Labour Court: employer identity and party autonomy' (2003) 15 *Mercantile Law Journal* 145.
[80] *Windybrow Theatre v Maphela and Others* (2016) 76 ILJ 2641 (LAC) para 21.

has held in a number of decisions,[81] jurisdictional determination should not be the basis upon which a statute is found to apply. Jurisdiction is founded upon the connection between a court and the defendant or the cause of action.[82] Choice of law is an enquiry into the connections between the employment relationship and the statute in question. While the distinction is not always strictly upheld, the mere fact that a defendant is able to submit to a court's jurisdiction foregoes the territorial emphasis the Labour Court has maintained over its jurisdictional determination.

Despite the two concepts being so closely related, where jurisdictional principles guide the application of statute the opportunity for parties to manipulate the process is strengthened. For instance, the option for parties to forum shop becomes more frequent as parties are likely to choose the forum situated in a legal system that best suits their cause instead of picking the forum that is most convenient or appropriate.[83] This is exacerbated when foreign legislation is treated differently to forum legislation, as has been the case in the Labour Court.[84] Where it might be appreciated that the Labour Court has mitigated the risks of forum shopping, by ensuring that no claimant may invoke South African statutory employment rights without working here, such appreciation must be understood as placing employee's in an even more precarious position. A common feature of almost every employment relationship is the imbalance of information.[85] An employer, especially one that engages employees in multiple jurisdictions, will be more familiar with the various legal systems it potentially engages. In having this knowledge, an employer may employ employees to work abroad and sign employment contracts with a South African choice of law clause without consequence. An employee, on the other hand, likely without knowledge of territoriality and its implications, will see a South African choice of law clause and assume they will be protected by that law.[86] This is not only an injustice to the employee, but further an unconscionable limitation on party autonomy in the instances that the parties did reach a genuine consensus on the issue of choice of law.

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[81] See for instance, *Robineau v Schenker SA (Pty) Ltd & Others* (2020) 41 ILJ 1648 (LAC); *Astral Operations* (n 34); [81] *Mecs Africa v Commission for Conciliation Mediation and Arbitration* (2014) 35 ILJ 745 (LC).
[82] Roodt (n 79) 144.
[83] Keyes (n 5) 28.
[84] See in general, *Schenker South Africa (Pty) Ltd v Robineau and Others* (2019) 40 ILJ 213 (LC) 25.
[85] Grusic (n 40) 749.
[86] As above.

3.6.1 Party autonomy

One of the cornerstones of private international law is party autonomy. In short, party autonomy enables parties to agree on the proper law of their contract; the law that is to govern the contract.[87] Taking a closer look, however, the concept is rather formidable as it allows parties to dispose entirely of the objective choice of law, that being the law that would otherwise govern due to the proximity of the connections between the contract and a particular legal system.[88] Parties are free to choose the law that will govern the entirety of their contract, or even just parts of it.[89] It is a remarkable concept as it, in effect, allows parties to choose the rules they are to be subject to.[90] Considering the multiplicity of legal systems, parties are thus free to conclude a valid contract in one legal system and have it enforced in a forum where, but for the governing law, it would be deemed invalid.[91]

Considering its impact, there have been debates over whether party autonomy should be recognised to such an extent that it overpowers a courts authority as it, in essence, puts the will of the parties above the law.[92] Yet, the development of this concept, over time, has led to its recognition by legal systems worldwide and has become a foundational principle within several international instruments.[93] In South African private international law this concept has been readily accepted. Judgments have even gone so far as to impute support for unlimited party autonomy.[94] Undoubtedly then, following recognition of party autonomy by South African courts, a choice of law clause will likely be upheld.[95]

It has, accordingly, become an established principle used in the determination of choice of law.[96] Proponents in favour of this principle have held it to be an imperative

[87] C Kandiyero 'Party autonomy in Brazilian and South African private international law of contract' unpublished LLM Dissertation, 2015 University of Johannesburg at 1.
[88] FA Mann 'Statutes and conflict of laws' (1972) 46 *British Year Book of International Law* 119.
[89] Forsyth (n 18) 317.
[90] Forsyth (n 18) 318.
[91] As above.
[92] As above.
[93] Kandiyero (n 87) 1; Rome I (n 70) and The Hague Principles on Choice of Law in International Commercial Contracts [2015] all recognize the principle of party autonomy.
[94] See for instance; *Guggenheim v Rosenbaum* (1961) (4) SA 21 (W) at 31A and *Commissioner of Inland Revenue v Estate Greenacre (*1936) NPD 225 at 229.
[95] *Creutzburg v Commercial Bank of Namibia* (2006) 4 All SA 327 SCA at 330.
[96] Kandiyero (n 87) 2.

for legal certainty.[97] As will be seen, the approaches to obtaining the choice of law, especially in the absence of one, may cause considerable uncertainty when the determination is left to the courts.

A focus on statutory interpretation, however, overlooks the principle of party autonomy and oftentimes causes it to be overridden in instances where there exists no justifiable reason to do so. This is especially true in instances where an implied choice may be said to have been made.[98] This is incongruent to the developments of international commercial dealings where parties are found choosing the law to govern their contracts on reasons of convenience, suitability, neutrality or developments of a particular legal system.[99] It is further inconsistent with the developments of South Africa's own jurisprudence, which has seen this principle develop in other superior courts. This inconsistency may only be resolved through consideration of private international law.

3.6.2 Determining the proper law of the contract

An important aspect of the choice of law process that must be understood are conflict rules. The ascertainment of the proper law, devoid of a choice by the parties, is made through the application of a conflict rule.[100] Conflict rules are divided into unilateral and multilateral rules. In South Africa, the most prominent method is through the application of multilateral conflict rules.[101] These consist of a category and correlative connecting factor. For instance, the validity of a marriage is governed by the *lex loci celebrationis* (the law of the place the marriage was celebrated).[102] These rules are either established by the common law or are founded within statute.[103] They are preferred to unilateral rules as they maintain the equality between legal systems – a rule does not suggest preference for any legal system and merely indicates which is to apply.[104] Unilateral rules differ in that they suggest preference for the legal system from which they come by prescribing the circumstances in which they apply. For

[97] P Nygh *Autonomy in international contracts* (1999) 3.
[98] See in general; [98] *Parry v Astral Operations Ltd* (2005) 26 ILJ 1479 and *Astral Operations* (n 34).
[99] Kandiyero (n 87) 2.
[100] Forsyth (n 18) 6.
[101] Forsyth (n 18) 76.
[102] Forsyth (n 18) 280.
[103] Forsyth (n 18) 7.
[104] As above.

instance, section 7 of New Zealand's Property (Relationships) Act prescribes that the Act applies to immovable property situated in New Zealand or to movable property where one of the parties is domiciled in New Zealand.[105] They, thus, favour the law of the forum.

Unilateral conflict rules do not appear often in South African law. Thus, we turn to the application of multilateral conflict rules in an attempt to discern the applicable law in an international employment contract. While a number of factors may invoke the application of a connecting factor, free-standing statutory employment rights do not easily lend themselves to a specific category thereby lacking in identifiable and applicable conflict rules.[106] The possibility of an approach centered in private international law faltering therefore rests in the preliminary stages of the choice of law inquiry, during the process of characterisation.

3.6.3 Characterisation

The process of characterisation entails ascertaining the legal rule and assigning it into a legal category. That category implicates a specific connecting factor that will help determine the applicable law. Although the process seems simple enough, characterisation has gathered considerable attention for the difficulty it produces in the choice of law inquiry. This complexity rests in the conflict of characterisation – the difficulty in reaching a consensus on the classification of legal rules.[107] It is not uncommon to have one legal system classify a particular rule as, for instance, dealing with a matrimonial property regime where another classifies it as relating to succession.[108] The problems and difficulty drawn from this conflict has resulted in a number of theories aimed at providing a solution.

The first of these is understood as classification by the *lex fori*. Here a court should characterise a legal rule in terms of the law of the forum.[109] Where the court is approached with a foreign rule, they must do the best they can in classifying the rule as they would a rule of the forum that may be understood as analogous to the foreign

[105] Property (Relationships) Act 1976 (NZ) sec 7.
[106] Dutson (n 2) 85.
[107] V Allarousse 'A comparative approach to the conflict of characterisation in private international law' (1991) 23 *Case Western Reserve Journal of International Law* 479.
[108] Forsyth (n 18) 77.
[109] Allarousse (n 107) 481.

rule.[110] This may, however, cause uncertainty and unpredictability in the instance that a court is met with a rule that is unknown or unfamiliar to the forum. For this reason, a second theory was formulated. This is termed as classification by the *lex causae*. This theory requires a legal rule to be classified by the legal system to which it belongs.[111] In this way, no matter the forum, a dispute initiated by a set of legal rules will always be characterised the same.[112] This is criticised, however, for allowing the *lex causae* to govern the process of characterisation before characterisation has even led to the selection of the *lex causae*.[113] This theory also does not resolve the conflict between the legal norms upheld by different legal systems. If all potentially applicable legal rules are to be classified by the system from which they originate, the result may still lead to two or more conflicting legal norms and a court being left to determine the appropriate one.[114]

As a response to the dissatisfaction left by both theories, Falconbridge established a two-stage *via media* theory. This has since been adopted by courts in South Africa.[115] This theory attempts to establish a middle ground by firstly adopting the *lex causae* approach and classifying all potentially applicable legal rules in terms of the legal system from which they come.[116] Essentially the rule should be understood in its context. The second step then questions whether the rule can be included within the category associated with the dispute.[117] This is determined by the law of the forum.[118] By way of example, where a South African court is approached to determine the validity of a marriage concluded in France, the court should determine the rules relating to validity in all potentially applicable legal systems, for instance the *lex loci celebrationis* (the law of the place where the marriage is celebrated), and examine the provisions within that legal system to ascertain whether they relate to formalities or capacity, therefore implicating the validity of the marriage.[119] In the *Laurens* case, the

[110] Forsyth (n 18) 81.
[111] M Wolff *Private international* law (1950) 146; Allarosse (n 107) 485.
[112] Forsyth (n 18) 83.
[113] Allarosse (n 107) 486.
[114] Forsyth (n 18) 84.
[115] *Society of Lloyd's v Price and Lee* (2006) SCA 87 (SCA).
[116] Forsyth (n 18) 86.
[117] As above.
[118] As above.
[119] JHC Morris 'Falconbridge's contribution to the conflict of laws' (1957) 35 *The Canadian Bar Review* 620.

court further regarded the *via media* theory as approaching conflict rules from a holistic, "world-wide point of view."[120] This allows a court to make a final characterisation by taking account of any policy considerations underlying the legal rule, considerations of international harmony, justice and convenience that assist in determining which conflict rule and, in essence, which legal system is most appropriate and closely connected to the dispute.[121]

While the conclusion that may be drawn here is that the Labour Court might find favour in characterising a cross-border dispute by way of Falconbridge's *via media* theory, the court will in almost all instances be made to characterise a legal rule of the forum, as only a domestic legal rule will empower the Court. The focus, thus, shifts to classifying the dispute arising out of an international employment contract in light of the forum's conflict rules. Difficulty arises, again, in the classification of free standing employment rights. The conundrum being that where a statute cannot be categorised within the traditional categories, the rules of private international law cannot be applied.[122] In effect, the court is then restricted to methods of statutory interpretation in defining a statute's spatial scope.

Alternatively, it has been suggested that in these instances, a statute should be characterised as *sui generis* and a specifically tailored conflict rule should be devised by courts to reflect the purpose of the statute.[123] However, there is little difference in imposing a new conflict rule compared with the approach taken in *Serco* in formulating the instances in which a provision or statute applies. More so, with little development and somewhat incorrect application of private international law in Labour Court judgments, the prospect of the court devising a new conflict rule is very slim. Rather than creating a new conflict rule, others advocate for engaging with the nature and terms of the statute and characterising it as one would a common law claim.[124] Where a statute, for instance, involves personal injury it might make sense to characterise the

[120] *Laurens NO v Von Hohne* (1993) 2 SA 104 (W) para 116J-117A.
[121] *Society of Lloyd's v Price and Lee* (2006) SCA 87 (SCA) para 31; *Laurens* (n 120) para 116H-117E; JL Neels 'Falconbridge in Africa' (2008) 4 *Journal of Private International Law* 171.
[122] Dutson (n 2) 85.
[123] S Dutson 'The conflict of laws and statutes: the international operation of legislation dealing with matters of civil law in the United Kingdom and Australia' (1997) 60 *The Modern Law Review* 680.
[124] SGA Pitel & V Black 'Assumed jurisdiction in Canada: identifying and interpreting presumptive connecting factors' (2018) 14 *Journal of Private International Law* 219; *Club Resorts Ltd. v Van Breda* 2012 scc 17 (S.C.C.).

dispute as one arising out of delict.[125] Yet, the discretion in assigning a statutory claim to a common law category may lead to considerable uncertainty. This also does not resolve the issue on the occasion that a statute being relied upon regulates conduct rather than conferring private statutory rights.[126] In these instances, the statute is by its very nature *sui generis* and cannot be likened to a common law claim.

Nevertheless, employment contracts closely engage statutory employment rights and statutory duties. Regarding characterisation, Grusic explains that contractual and statutory claims, in respect of choice of law, have been merged by the Rome I Regulation.[127] Statutory claims are, therefore, characterised as contractual and the rules pertaining to contracts are applied. This is justified as, according to Grusic, where parties freely enter into employment contracts, they rightly assume that the rights and obligations arising out of employment statutes are incidental to the employment contract.[128] This is, further, consistent with the legitimate expectations each party has to the contract. If parties choose a particular law to be applicable, they assume that the whole law, including relevant statutory rights and duties, will be enforceable. It is necessary to remain consistent to the expectations the parties have when entering into employment contracts, considering that statutory employment rights are, in fact, the primary means through which an employee is protected. As Lady Hale remarked in *Duncombe*, "the law of unfair dismissal does not form part of the contractual terms and conditions of employment, but it was devised by Parliament in order to fill a well-known gap in the protection offered by the common law to those whose contracts were ended."[129]

While the central issue to the eligibility of protection – whether one qualifies to be protected – rests in the existence of an employment relationship and not an employment contract, both give rise to the same obligations and should, thus, be regulated by the same rules. It is, therefore, submitted that an employment dispute containing foreign elements should be characterised by the rules pertaining to contracts. In this way a court ensures that the parties' expectations are usually met

[125] As above.
[126] Dutson (n 2) 85.
[127] Grusic (n 40) 732.
[128] Grusic (n 40) 740.
[129] *Duncombe* (n 77) para 16.

and that adjudication is rendered predictable and certain. While not entirely clear as to the reasoning behind such classification, the Labour Court in *Parry v Astral Operations*,[130] after affirming that the matter concerned the rules of private international law, similarly regarded employment disputes as governed by either the *lex loci contractus* or the *lex loci solutionis* – rules that are usually applied to contracts.

3.6.4 Express or implied choice of law clauses

Choice of law is evidently a complex process engaging doctrine, method and theory.[131] Assigning a law to govern a dispute and, in effect, determining its territorial reach is no easy task. Yet, in the event that the Labour Court is approached with an employment contract that contains a choice of law clause, the court will usually be freed from engaging with the various methods in trying to distill the applicable law, at which point the process of characterisation may be avoided almost entirely. In such an instance, the court must begin questioning whether the choice of law clause should be upheld or not.[132] With the influence of party autonomy, however, it is likely the choice will be upheld unless exceptional circumstances apply.

A choice of law clause may be express, thereby clearly setting out which law will govern.[133] However, a choice of law may also be decided on tacitly and is nonetheless genuine for having been made tacitly.[134] A tacit choice may be said to have been made where, considering certain aspects of the contract and the surrounding circumstances from which it was drafted, the parties, although without expressly stating such, had the intention that a particular law was to govern their contract. An example of a tacit choice is where, for instance, the parties included the wording from parts of an Act within their contract or had made mention of technical terms from a particular legal system.[135] In *Kleinhans*, the court held that a tacit choice of law had been made where a subsequent employment contract guaranteed that conditions would remain the same as the

[130] *Parry* (n 98) para 30.
[131] C Roodt 'Reflections on theory, doctrine and method in choice of law' (2007) 40 *The Comparative and International Law Journal of Southern Africa* 76.
[132] Grusic (n 40) 741.
[133] Forsyth (n 18) 327.
[134] As above.
[135] Forsyth (n 18) 328.

original employment contract which had stipulated South African law to be applicable.[136]

Yet, while several facts may indicate a tacit choice, a court is not bound to uphold it. Tacit choices are usually rare and an indication thereof may merely reflect the contract's center of gravity, but not necessarily imply that the parties' minds had actually met on the issue of choice of law. In *Parry*, for instance, the Labour Court held that a tacit choice had been made on the strength of a number of factors, such as, the fact that South Africa was the forum with jurisdiction and that Parry was being paid in South Africa in South African Rands.[137] The court, however, held that if they were wrong in holding that a tacit law had been chosen, the factors listed in support of this notion further supported the contention that the contract was more closely connected to South Africa.[138] This exemplifies the difficulty in distinguishing between cases where a tacit choice has genuinely been made and where a court has to assign the proper law because the parties had not reached any consensus on the matter.[139]

The difficulty rests in determining the choice of law through the presumption that a subjective tacit choice had been made. This was the preferred approach by the court in *Standard Bank of South Africa Ltd v Efroiken and Newman*.[140] However, this has been met with reluctance in subsequent case law. Accordingly, where no express choice is evident and a tacit choice cannot be clearly deduced from the surrounding circumstances of the dispute, courts have laid down various methods in assigning the choice of law.

3.6.5 Assigning the proper law of the contract

Up to this point, methods of statutory interpretation have been rejected and in its place the rules and methods of private international law have been introduced. In contemplation of the principle of territoriality, it is appreciated that respect for choice of law clauses creates the impression that the scope of legislation is limitless and that

[136] *Kleinhans v Parmalat SA (Pty) Ltd* (2002) 23 ILJ 1418 (LC) para 25.
[137] *Parry* (n 98) para 81.
[138] *Parry* (n 98) para 84.
[139] Forsyth (n 18) 329.
[140] *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171.

anyone may be subjected to the forum's rules, thereby ignoring any necessary territorial implications regarding statutes. The practice of upholding a choice of South African law is not strictly a solution to the territorial question of employment legislation. However, choice of law is not devoid of substantive principles that guide the court in application of its rules. It is underpinned by comity and the respect for the equality of legal systems and aims at resolving the matter through the application of the legal system that is most appropriate. This may be the legal system as chosen by the parties, however, a choice of law clause is not absolute. In addition to the various ways in which party autonomy may be limited, as will be the focus of Chapter Four, a court is able to, and arguably should, be considerate of instances where it is evident that the contract is more closely connected to another legal system and application of their legal rules are more appropriate. This is similarly upheld in Rome I.[141] Enquiry into choice of law should carry with it consideration of the "closeness of the link between the legal system and the specific legal problem, the quality of the result, and the fairness of the result".[142] Such is the aim of the multilateral approach in private international law.

Clearly the scope of a statute thus rests in the connections that generate a close relationship between the forum's laws and the dispute. A choice of law clause is incidentally then a rather strong connection and, where parties have agreed to be bound by the rules of a particular legal system, the territorial problem ceases to endure. The reality, however, is that a dispute of this nature will be brought to the Labour Court by parties attempting to rely on South African law on the likelihood that no agreement on choice of law has been reached. The enquiry then turns to what connections, other than an express choice, are required for a claimant to satisfy the territorial scope of the statute they intend to rely on. Put differently, the court must engage with the multilateral conflict rule method by first characterising the dispute (submitted here as one arising out of contract) and applying the most appropriate conflict rule.

[141] Rome I (n 70) Art 8(4).
[142] C Roodt 'The integration of substantive laws and material justice in South African choice of law' (2003) 36 *The Comparative and International Law Journal of Southern Africa* 17.

This simplicity might, however, be overstated. It is not always clear how courts will approach assigning a choice of law.[143] In the search for applying a multilateral conflict rule several become relevant, thereby making it necessary for a court to occupy itself with determining each rule its relative weight.[144] How much weight to attach to a conflict rule is often a point of contention. This is further obscured by the practice, often favoured by South African courts, in providing a flexible and wide approach to the multilateral conflict rule method.[145] This considers more flexible, 'soft' and open ended rules and connecting factors, resulting in courts often rejecting the narrow application of a conflict rule and searching, rather, for the contract's center of gravity – the legal system that the contract is most closely connected to.[146] This is ascertained either through the subjective approach as endorsed by *Efroiken*, or the objective approach which, as the preferred approach, eliminates any reference to the parties' presumed, often non-existent, intentions.[147] With various methods at the Labour Court's disposal, how should they approach an international employment contract that does not possess an express or tacit *lex causae*?

In Europe, the Rome I Regulation emphasises the habitual place of work as the determinative connecting factor for employment contracts.[148] This is correlative to the *locus solutionis*, a prominent connecting factor attached to contracts.[149] It is often argued that the place of work is beneficial to the employee as this would refer to the legal system that the employee is most familiar with, thus granting them better standing with which to bring claims.[150] However, according to Calitz and Garbers, while this is reasonable under harmonious and relatively unified legal environments, such as that in the European Union, the same cannot be said for employees who are transferred to less developed countries where the labour standards are lower.[151] In

[143] Forsyth (n 18) 329.
[144] Forsyth (n 18) 332.
[145] Roodt (n 142) 5.
[146] EA Fredericks 'The proper law of the international contract of employment: interpreting the *Kleinhans* decision' (2006) 18 *South African Mercantile Law Journal* 80.
[147] Forsyth (n 18) 330.
[148] Rome I (n 70) Art 8(1).
[149] Forsyth (n 18) 333.
[150] Calitz & Garbers (n 12) 543.
[151] As above.

this instance, they assert that it might be more beneficial if the law of the place of business which engaged the employee is applied.[152]

On the other hand, Fredericks prefers the conventional view that the *lex loci solutionis* constitutes the governing law of the contract.[153] He disapproves of the method of weighing all relevant factors that connect the contract to a legal system as, while it maintains flexibility in the search for substantive justice, it erodes legal certainty.[154] The suggestion made by Fredericks is that the *lex loci solutionis* must be considered the most important connecting factor and should apply unless the surrounding circumstances indicate another legal system to be applicable.[155] Where the *locus solutionis* in respect to its characteristic performance (that being the place of work for employment contracts) differs from the place of payment, Fredericks endorses the unitary principles in determining which of the two legal systems should apply. This ensures that only one legal system governs the contract.[156] In determining which of the two *loci solutionis* to apply, the suggestion is to make the choice against the background of all factors of the dispute.[157] Where these do not assist in this determination, the default position is to apply the *lex locus solutionis* in respect of payment.[158] The approach endorsed by Fredericks is, accordingly, more result-oriented and creates similar consequences as the Rome I Regulation. It, further, albeit inadvertently, emphasises the territorial nature of employment and reasons this to preserving legal certainty.

Legal certainty is no doubt a vital aspect of private international law; however, the contention here is that it should not be premised on the territorial construct that restricts our understanding of employment. The reality is that the labour market is no longer a territorial entity.[159] The *locus solutionis* becomes illogical to apply in instances where an employee works for a multinational corporation in the ever growing gig-economy.

[152] As above.
[153] Fredericks (n 146) 79.
[154] Fredericks (n 146) 80.
[155] Fredericks (n 146) 79.
[156] As above; in contrast to the scission principle that would result in different governing laws for different parts of the contract.
[157] Fredericks (n 146) 81.
[158] As above.
[159] G Mundlak 'De-territorializing labor law' (2009) 3 *Law & Ethics of Human Rights* 192.

The growing use of online payment systems such as PayPal further obscures the application of the *locus solutionis* in respect of payment. As Mundlak illustrates;

> while intensified movement does not undermine the significance of states and borders, globalization also includes the increased interdependence of markets, the constitution of communities that transcend national borders, and the development of institutions outside and within the nation-state, which displace the locus of regulation from the traditional state level.[160]

He further comments on the interplay between the movement of labour and the movement of capital, illustrating that the existence of an employment relationship within a geographical territory is "often part of a broader process of movement and relocation."[161] The continued reliance on the territorial bounds of employment occurs against the dismantling of territorial notions of production, making development of the two incongruent.[162] Legal certainty might be guaranteed through the default application of the *locus solutionis*, yet, as Roodt claims, the selection of the most appropriate connecting factor on a case by case basis, which allocates consideration to underlying interests and concerns, will not erode certainty but rather promote rational solutions.[163]

The alternative to territoriality, according to Mundlak, is to replace the question of where the work is performed with the search for the substantive relationship underpinned by social, economic and political factors.[164] This requires identifying who the beneficiaries of the production and services offered by employees are and where they are located.[165] Employees should, thus, be able to claim rights from the legal system in which the beneficiaries of their production or services is located.[166] This is the same conclusion as reached by Calitz and Garbers, that the law of the place of business that engaged the employee is often better suited to protect the employee than their place of work and is, therefore, the most appropriate legal system to apply.

[160] Mundlak (n 159) 189.
[161] Mundlak (n 159) 195.
[162] Mundlak (n 159)192.
[163] Roodt (n 142) 15.
[164] Mundlak (n 159) 205.
[165] As above.
[166] Mundlak (n 159) 214.

It is submitted that this will likely be their home country.[167] Most case law engaged in this research has also shown this to be the case. While their reasoning, which considers the underdevelopment of certain legal systems, is rather harsh to be implemented over a process that supposedly values the equality of legal systems, their conclusion reached is still preferable.

The argument extends to considerations of state interventions within the labour market of a particular territory. If corporations are accountable to the employees they engage within that territory, they should be equally responsible for their employees who engage in production elsewhere.[168] Considering the purpose underlying the application of labour law, to balance out the inequality that is inherent within an employment relationship, dismissing the responsibility of corporations where that relationship extends beyond a state's borders is intrinsically unequal.[169] Posits of legal certainty should not assume superiority in these instances, particularly where that objective is made on the assumption that the place of performance will guarantee this. Instead, such a technical application of choice of law could, as Roodt claims, "foster… unpredictable results when a case poses new challenges".[170] Even in the exceptionally harmonious legal environment such as in the EU, the European Court of Justice (ECJ) has held that the place in which work is habitually carried out should be given a wide interpretation.[171]

Exposing the nature of labour law as crucial to the public interests of a given territory, furthermore, assumes its intervention in instances where a party's position is intrinsically unequal. This justifies its extra-territorial application in instances where a state deems it necessary to intervene in parties' private relationships, irrespective of territorial concerns. Considering this significance, it is not at all unlikely that a labour provision has overriding mandatory effect, making it directly applicable to a dispute. While this remains the focus of another chapter, making mention of this now seeks to justify a flexible approach to assigning a choice of law as it prompts a court to consider wider substantive factors that may be guided by what the statute is seeking to achieve.

[167] Calitz & Garbers (n 12) 543.
[168] Mundlak (n 159) 211.
[169] Mundlak (n 159) 211.
[170] Roodt (n 131) 80.
[171] *Heiko Koelzsch v État du Grand Duchy of Luxemburg* case C-29/10 para 45.

As Calitz and Garbers rightly hold, "labour law is based on fairness and fairness is ultimately a factual argument which cannot be predetermined and is best made within agreed parameters that often seem narrow, but are always surprisingly broad".[172]

That said, a flexible approach to choice of law is suggested. This requires the Labour Court to be sensitive to a number of factors that connect the employment contract to the forum. The most important include, the place of work, the residence or domicile of the employer and the employee and the place of payment. How much weight to accord to each of these may be determined through the surrounding circumstances of the dispute that give rise to a number of softer connecting factors. These may include, but are not limited to, the nature of the work to be performed, where dismissal took place, the circumstances surrounding dismissal and the impact the dispute has on the labour market of the forum or country in which the employee works.[173]

3.7 Should statutory interpretation be entirely rejected?

The focus of this research has been to reject a strict statutory interpretive approach that blindly favours the principle of territoriality. Statutory interpretation, however, remains a necessary and reasonable method that courts utilise in order to discern a number of matters. The conclusion drawn here is not to completely do away with such methods but rather to supplement them with a private international law approach where they fall short. Parties cannot, however, contract themselves into a right by simply having a chosen legal system apply to their contract.[174] They must still satisfy any limits, territorial or otherwise, that the statute imposes. For instance, a claimant may only be protected by the LRA where they are considered an employee as defined by the Act.[175] Private international law cannot grant this status to a claimant, nor can it disregard any qualifying time periods or territorial limits if any existed.

[172] Calitz & Garbers (n 12) 561.
[173] As above.
[174] Merrett (n 46) 358.
[175] Section 213 of the labour Relations Act 66 of 1995 (LRA) defines an employee as; (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person, who in any manner assists in carrying on or conducting the business of an employer…; Labour Relations Act Regulation 1774 of 2006 Code of Good Practice: Who is an employee? para 18.

Statutory interpretation may at times also overlap with private international law. For instance, the purposive method is often likened to the doctrine of mandatory rules as the consideration taken in determining whether a rule is mandatory may equally be considered under the purposive method.[176] Both further require a court to engage directly with the statute. Accordingly, where the doctrine of mandatory rules likewise facilitates the prospect of the Labour Court maintaining jurisdiction in the instance that a foreign law is unequivocally applicable, statutory interpretation cannot be seen as entirely fortuitous. Where a statute, however, does not determine its scope, as is the case with the employment statutes within South Africa, statutory interpretation cannot be the sole method used to establish their spatial limitations; and the presumption against extra-territoriality, working concurrently with statutory interpretation, must be seen as rebuttable (and rebutted) in the instances that methods of private international law establish those connections necessary to conclude such.

3.8 Conclusion

Relying strictly on the presumption against extra-territoriality has revealed a conflation of the processes surrounding jurisdiction and choice of law. While the Labour Court is reliant on South African law being applicable for the maintenance of its jurisdictional powers, the processes discussed under Chapter Two and here illustrate the differences in the focal points for both enquiries. Although jurisdiction in cross-border disputes often necessitates enquiring into the principle of close connection, as does the flexible approach in assigning a choice of law, the Labour Court need not necessarily do away with domestic principles in assuming jurisdiction. The presence of the parties in the area of the court's jurisdiction, for instance, is sufficient to justify the Labour Court's control over the parties to the dispute. Where the matter turns to choice of law, or rather the scope of the relevant employment statutes, the focus must shift from domestic practices of statutory interpretation to the methods as provided by private international law. The concept of territoriality, on its own, is incapable of providing answers to the spatial scope of a given statute, particularly where the statute is silent on the matter.[177] It has, furthermore, proven to cause considerable uncertainty and unpredictability in the adjudication of cross-border disputes as well as frustrating

[176] Dutson (n 2) 687.
[177] Hook (n 4) 462.

the functionality of employment statutes – that being to minimize the power imbalance between employees and their employers. By washing their hands of the choice of law question, the Labour Court also ignores their own interests in the application of these statutes.

Nevertheless, as the seminal case of *Lawson v Serco* has shown, a middle ground may be reached, where statutory interpretation and private international law work hand in hand to ascertain whether a claimant falls within the scope of a statute. That said, however, developments of this approach in the UK has shown that such a flexible, middle ground pre-empts the private international law approach, resulting in courts developing the connections that are required for a statute to be applicable. Here it has been argued that a flexible approach to assigning a choice of law should be followed, with the most important connecting factors to consider being the place of work, the place the contract was entered into, the domicile and or residence of the parties and the place of payment.

Chapter 4: The mandatory rule doctrine in the Labour Court

4.1 Introduction

The Labour Court, with its jurisdiction firmly held within the LRA, cannot proclaim on foreign law.[1] The result of this is that, where the choice of law in an international employment contract is unequivocally a foreign law, the Labour Court will not be able to give an effective judgment and will, thus, have to forfeit its jurisdiction. Choice of law is, as we now know, a facet of contracting parties' party autonomy.[2] Freedom of contract in South African domestic law is considered one of the cornerstones of contract law, as is good faith, privity of contract and sanctity of contract.[3] Ultimately, one is bound by the provisions therein because they are assumed to have freely entered into and agreed to the terms. Party autonomy is undoubtedly a cornerstone of private international law in contractual matters and so, similarly to the principles and practices that underpin contracts in a domestic setting, a choice of law will likely be upheld by a court.[4]

It would be erroneous, however, to consider party autonomy as unfettered and, by the same token, to believe that both contracting parties always contract with the same level of bargaining power and freely choose the terms incorporated within. The mere existence of standard form contracts makes this position dubious. More so, employment remains one of those concerns where the bargaining power is known to be unequal. As Kahn-Freund holds in his descriptive works *Labour and the Law*, "labour law is chiefly concerned with [the] elementary phenomenon of social power. And – this is important – it is concerned with social power irrespective of the share which the law itself has in establishing it".[5] It, thus, remains imperative to ensure regulation of these facets of inequality so as to minimise their impact. Under the guise of private international law, limiting party autonomy is one such form of regulation ensured by the forum state.[6]

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[1] *Parry v Astral Operations Ltd* (2005) 26 ILJ 1479 para 55.
[2] J Mitchell 'To override, and when? A comparative evaluation of the doctrine of mandatory rules in South African private international law to override and when' (2013) 130 *The South African Law Journal* 759.
[3] D Hutchison et al *The law of contract in South Africa* (2012) 21.
[4] *Guggenheim v Rosenbaum* 1961 (4) SA 21 (W) 31A.
[5] P Davies & M Freedland *Kahn-Freund's labour and the law* (1984) 14.
[6] P Nygh *Autonomy in international contracts* (1999) 46.

The most prominent dictum on party autonomy may be found in *Vita Food Products Inc v Unus Shipping*.[7] Here Lord Wright held that, while a choice of law clause should be honoured, it should be done so only to the extent that the choice is bona fide, legal and not against public policy.[8] Hence, party autonomy is not absolute. It may be limited in various ways and numerous practices have been accepted by legal systems worldwide. A focus on statutory interpretation, however, has frustrated the choice of law process resulting in party autonomy being limited in instances where it need not be.[9] In contrast, the resultant effect has further implications for those instances where a choice of law is dictated entirely by an employer.[10] Here party autonomy needs to be limited so as to regulate the inequity formed in the employment relationship. Yet, where the choice of law process is neglected or obscured, the mechanisms through which party autonomy may be justifiably overridden go ignored.[11] Accordingly, the focus here lies on the application of the doctrine of mandatory rules as a common and widely accepted practice in overriding choice of law. This doctrine has been considered and applied in South African law, yet there still lacks certainty in what may constitute a mandatory rule.[12] Much has been written on its historical context and nature, yet the suitability of South African labour law as mandatory in nature and the question of when the Labour Court may apply this doctrine, so as to have an overriding effect on the choice of law process, remains largely unanswered.

4.2 The nature and extent of mandatory rules

4.2.1 Historical context

The nature of mandatory rules may be traced back to the writings of Friedrich Karl von Savigny who argued that the effects of multilateralism needed to be limited so as to give respect to the laws that he characterised as “laws of a strictly positive, imperative

[7] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] UKPC para 7.
[8] *Vita Food* (n 7) para 6.
[9] See in general; *Robineau v Schenker SA (Pty) Ltd & Others* (2020) 41 ILJ 1648 (LAC) and *Schenker South Africa (Pty) Ltd v Robineau and Others* (2019) 40 ILJ 213 (LC).
[10] MA Cherry ‘Regulatory options for conflicts of law and jurisdictional issues in the on-demand economy’ (2019) *International Labour Organisation Conditions of Work Series and Employment Series* 24.
[11] See in general; *Parry v Astral Operations Ltd* (2005) 26 ILJ 1479 and *Astral Operations Ltd. v Parry* (2008) 29 ILJ 2668 (LAC).
[12] Mitchell (n 2) 760.

nature".[13] The exception to party autonomy has, thus, been debated for centuries, yet problems as to the proper application of this exception still persist. The picture that Savigny sought to illustrate did not come to its full fruition. In his writings, which form the basis of the choice of law process today, he maintained that the process would comprise of multilateral conflict rules that would indicate the law applicable to the transaction without considering the substantive law thereof.[14] Laws that had a political and economic nature would be declared so by the legislature and reflect a common public interest that would not extend beyond individual nation states.[15] Eventually, the global state system would develop beyond the need for mandatory rules.[16]

Of course, this did not occur. While the application of conflict rules is common practice today, states have routinely sought to regulate private relationships, leading to the intervention of economic and political domains that form part of a community with distinct public interests.[17] Mandatory rules have, thus, been elevated as imperative for not only ensuring private individuals' interests but also furthering the economic, political and social interests of the state.[18]

Nonetheless, Savigny's writings formulated the concept now understood as mandatory rules that may be broadly defined as a "category of national laws which override the normal conflictual rules, including the choice made by parties to an international contract".[19]

Having an overriding nature, mandatory rules must thus be separated from bilateral and multilateral choice of law rules. While a statute may determine its territorial reach and, at that, its international application, it does not determine that a statute is mandatory in the sense as described above. Its application may still be affected by the choice of law process where parties have made an express choice thereby excluding a foreign statue or a statute of the forum. Even where a choice has not been made and the forum is made to question the applicable law, a statute with a bilateral or

[13] Nygh (n 6) 199.
[14] KAS Schafer *Application of mandatory rules in the private international law of contracts* (2010) 3.
[15] As above.
[16] As above.
[17] As above.
[18] Shafer (n 14) 4.
[19] Nygh (n 6) 199.

multilateral choice of law rule will remain just that, a conflict rule that will assist in determining which legal system is applicable depending on characterisation of the dispute.[20] The corollary is that unilateralism will usually suggest the mandatory nature of a statute. However, this risks overstating as only a clear and unambiguous intention by the legislature will make such suggestion, as Savigny predicted.[21] Not all statutes, however, will be considered mandatory in an international sense.[22]

4.2.2 Domestic and international mandatory rules

Notwithstanding the position where a statute clearly and with utmost certainty demands applicability irrespective of choice of law,[23] there are a number of statutes that are considered mandatory but only insofar as they are applicable as the *lex causae*.[24] These may be termed domestic mandatory rules.[25] This refers to statutes that become directly applicable if and when the choice of law is the law of the forum. Section 1 of the Intestate Succession Act that grants certain rights to a surviving spouse is an example.[26] These rights, while peremptory, may be excluded by simply making the *lex causae* a law other than the law of the forum.[27] They, thus, have no international mandatory application and will only find applicability over domestic contracts or international contracts that have determined such law to be applicable. They have no overriding effect.

An international mandatory rule may be explained through the definition as found in the Rome I Regulation.[28] There article 9(1) holds that overriding mandatory provisions are;

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[20] Nygh (n 6) 202.
[21] Mitchell (n 2) 762.
[22] Schafer (n 14) 11.
[23] CF Forsyth *Private international law: the modern Roman-Dutch law including the jurisdiction of the High Courts* (2012) calls these 'directly applicable statutes' which have the effect of overriding the choice of law process. An example is section 47 of the Electronic Communications and Transactions Act 25 of 2002 which states that 'the protection provided to consumers… applies irrespective of the legal system applicable to the agreement in question.'
[24] Forsyth (n 23) 13. *Lex causae* may be synonymously understood as choice of law.
[25] Nygh (n 6) coins these as domestic mandatory rules, but they have further been termed 'localising rules' or 'dispositions imperative' as found in Article 3 of the French Civil Code.
[26] Act 81 of 1987 sec 1.
[27] Nygh (n 6) 200.
[28] 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).

> provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.[29]

Without questioning the significance of what might constitute a mandatory rule as per this definition, it is evident that there exists a difference between international and domestic mandatory rules. Here it specifies that mandatory rules are rules that must apply irrespective of the chosen legal system. To further illustrate this point, article 9(2) holds that, "nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum."[30] The Regulation itself imposes certain conflict rules for member states in the European Union, making the implication of article 9(2) mean that regardless of what the *lex causae* is, whether expressly chosen or implicit through the conflict rules of the Regulation, the forum's mandatory rules will apply. This differs from domestic mandatory rules which, while peremptory, only apply when they form part of the *lex causae.*

This distinction, while nuanced, bares importance. A statute being peremptory is a necessary condition for it to have international mandatory effect – that is, having an overriding effect on the choice of law process.[31] However, that, on its own, is not a sufficient criterion for it to be declared an international mandatory rule.[32] The statute must go further and be of a specific nature, underpinned by a particular purpose, for it to justifiably override the choice of law process. Accordingly, this distinction begins the enquiry into what may constitute an international mandatory rule, an enquiry that must be determined by the law of the country where the mandatory rule originates.[33]

[29] Rome 1 (n 28) Art 9(1).
[30] Rome 1 (n 28) Art 9(2).
[31] Mitchell (n 2) 768.
[32] As above.
[33] A Chong 'The public policy and mandatory rules of third countries in international contracts' (2006) 2 *Journal of Private International Law* at 6.

4.2.3 Purpose of mandatory rules and their relationship with public policy

As already alluded to, the rationale behind mandatory rules is firmly rooted in public interest, that being both the interests of the state as well as those private interests that the state wishes to protect.[34] These have been described as laws that regulate markets and the economy, protection of the interests relating to land, the protection of monies and securities, the environment and labour.[35] Protection of private interests is inclusive of protecting those parties economically weaker to a contract. This encompasses consumers, insured parties and employees.[36]

Beyond this rather ambiguous understanding of what mandatory rules purport to do, there is no regulating framework, within South Africa, with which to work with. Essentially, any rule may be mandatory where the legislation deems it so.[37] Generally difficulty, thus, lies in identifying a mandatory rule as the intention of the legislator on this matter is not always directly expressed.[38] However, public interest is often expressed in a state's public policy. Mandatory rules, therefore, maintain a close relationship to public policy and, as such, have been considered an expression thereof.[39] Public policy demands that a court reject the application of a chosen law when such law offends the "fundamental values of the forum."[40] As Mayer puts it;

> mandatory rules of law are a matter of public policy and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws.[41]

While this assists in determining whether a rule is mandatory in nature, the proximity at which these two notions exist should not designate them to be one in the same

[34] Nygh (n 6) 203.
[35] As above.
[36] Nygh (n 6) 204.
[37] M Wojewoda 'Mandatory rules in private international law: with special reference to the mandatory system under the Rome Convention on the Law Applicable to Contractual Obligations' (2000) 7 *Maatricht Journal of European and Comparative Law* at 189.
[38] Wojewoda (n 37) 206.
[39] Nygh (n 6) 206.
[40] Wojewoda (n 37) 192.
[41] P Mayer 'Mandatory rules of law in international arbitration' (1986) 2 *International Arbitration* at 274.

thing. In fact, the view of most private international law scholars and practitioners is that no overlap should exist between the two.[42] Public policy has an inherent negative effect on the choice of law process, rejecting outright the application of the chosen law.[43] The primary and, arguably, only aim of public policy is to protect the fundamental values of the forum and does so by refusing application of a law that offends such.[44] Mandatory rules, on the other hand, are not considered law rejecting but rather law selecting.[45] Once a mandatory rule has been identified and selected, the rule must apply. There is no outright rejection of the choice of law, instead another law is given priority due to its imperative nature.[46] This is usually, and as is the emphasis here, the law of the forum.[47] As Nygh puts it, rejection of the chosen law on the grounds of public policy will usually direct the forum to apply another rule from that same legal system and only when this is not available does the law of the forum become applicable.[48] This is the position under both German and Swiss private international law.[49]

Other differences that exist further exemplify the purpose behind mandatory rules. For instance, public policy is considered a discretionary ground whereby a court is usually in the position to determine whether or not a foreign law is offensive to the values of the forum state.[50] Mandatory rules, however, are so pertinent that they demand applicability and denote a compulsory, rather than permissible, nature.[51] Distinguished from this is the view that a positive application of public policy is actually putting mandatory rules in action.[52] However, this view should not be overstated. While mandatory rules may be an expression of public policy, the separation between the two concepts should be maintained. This view should, thus, be merely taken as an emphasis on the nature of mandatory rules. Mandatory rules are implemented through the fundamental values of the state but their overriding effect derives from their fundamental importance and not the offending nature of the chosen law. The chosen

[42] Wojewoda (n 37) 193.
[43] Nygh (n 6) 206.
[44] Wojewoda (n 37) 193.
[45] As above.
[46] Nygh (n 6) 206.
[47] As above.
[48] As above.
[49] Shafer (n 14) 87.
[50] Wojewoda (n 37) 193.
[51] As above.
[52] Shafer (n 14) 86.

law might, for instance, be acceptable but is overridden for the simple fact that the law of the forum purports to offer more protection to the vulnerable party than does the *lex causae.* Public policy as a limitation on party autonomy will not find application under these circumstances.

4.3 The mandatory nature of labour law

The history, nature and purpose of mandatory rules has been the focus of many academic writings and as such – it is not difficult to pinpoint a commonality amongst them. Some opinions may differ slightly and there is no singular concrete definition of mandatory rules that exists on a global scale. However, it is possible to confidently conclude that when one speaks of mandatory rules they are speaking of rules that are so important to a given state, so fundamental to the precepts and functioning of such legal system and imperative to the economic and political structure thereof, that they must be applied in circumstances that find itself under the authority of such rule.

As mentioned, the difficulty thus lies in determining which laws fall under this classification. While mandatory rules have been considered in the Labour Court before, its development and acceptance has been slow and taken to in a piecemeal fashion. One reason for this is the enduring application of the presumption against extra-territoriality. With a strong opinion in the Labour Court that South Africa's employment statutes do not possess extra-territorial application, the processes under private international law, that are inclusive of the mandatory rule doctrine, are frustrated and ultimately overlooked. The overriding power of certain statutes or provisions, by virtue of their mandatory nature, leads to their extra-territorial application.[53] Accordingly, the finding that South African labour law comprises of an international mandatory nature will rebut the presumption against extra-territoriality and make the conclusion by the Labour Court incorrect.

[53] Wojewoda (n 37) 189.

4.3.1 The public and private dichotomy

Labour law is a hybrid of private and public law.[54] It is a component of private law because a private relationship between an employee and their employer is established by contract and the parties are free to exercise autonomy over such contract, with exceptions.[55] These exceptions allude to the public law component as the autonomous and private nature of an employment relationship is limited by the regulatory instruments of the state.[56] These instruments place restrictions on the employment relationship in so far as they create mechanisms that act as a countervailing force to the unequal bargaining power that is inherent therein.[57] This duality is expressed both on a domestic and international level. International norms have been enacted, primarily through the standards set by the International Labour Organisation, that emphasise both collective bargaining and cooperation between employees and their employers as well as calling for individual nation states to enact protective legislation in line with their standards.[58]

In terms of mandatory rules, a distinction is sometimes made between international mandatory rules of a public or private law nature.[59] Public law norms are considered imperative but the choice of law process, a facet of private international law, is, as the name suggests, an application of private law provisions.[60] This is in harmony with the principle of sovereignty, that states cannot enforce their public laws abroad.[61] The territorial implications assigned to South Africa's employment statutes, placed there by the Labour Court, might then find justification. An encroachment of one states' labour norms onto another could be unwarranted especially when considering public law as an extensions of a state's socio-political position.[62] There are, however, differing opinions on the matter.[63] The private and public dichotomy is not so clear cut. Labour law existing within both areas exemplifies this.

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[54] *Parry* (n 1) para 48.
[55] As above.
[56] *Parry* (n 1) para 49.
[57] Davies & Freedland (n 5) 18.
[58] *Parry* (n 1) para 50.
[59] Schafer (n 14) 13.
[60] Wojewoda (n 37) 194.
[61] As above.
[62] As above.
[63] As above.

International employment contracts blur the distinction further. Working outside their places of residence, employees are reliant almost exclusively on the protective provisions incorporated within their employment contract. The regulatory mechanisms offered by states are largely dependent on an express choice of law clause being made and in the absence of such, the conflict rules of the state with jurisdiction that may vary and in any case be manipulated so as to avoid a certain legal system.[64] International regulatory mechanisms are entirely voluntary and as such may not be of assistance to a given employee. At the same time, collective bargaining, a component of the private nature of labour law, is frustrated at an international level with employers being less likely to be willing to participate and oversight of this being insufficient.[65] Accordingly, when discussing mandatory rules as a doctrine that may offer an avenue of protection over possible injustice, the public and private contradiction should be overlooked at least in the ambit of labour law. As the Swiss Code on Private International Law holds, "any reference to foreign law encompasses all provisions applicable to the case according to that law and the sole fact that some of them may be characterized as public law cannot make them inapplicable".[66]

4.4. Approaches to mandatory rules

Having a public law component does mean, however, that labour law possesses an intrinsic mandatory nature.[67] This needs to be qualified though, as the importance here lies in South Africa's employment statutes bearing an *international* mandatory nature so that they may justifiably limit parties' choice of law by overriding it. It is important to keep in mind that the aim here is not only to consider the mandatory nature of South Africa's employment statutes, but it is to ensure that the Labour Court, when faced with an international employment contract, may maintain its jurisdiction and ensure that the purposes of the various employment statutes enacted here, which are constitutionally driven, are fulfilled.

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[64] K Calitz 'The jurisdiction of the Labour Court in international employment contracts in respect of workplaces outside South Africa' (2011) 32 *Obiter* 684.
[65] Directorate-General for Internal Policies: Employment and Social Affairs (2011) European Commission: Brussels at 12.
[66] Switzerland's Federal Code on Private International Law (CPIL) 1987 Art 13.
[67] *Parry* (n 1) para 57.

That being said, it remains necessary to delve into an analysis of the elements of labour law that emphasise an international mandatory characteristic and the approaches that justify their application. This is because even where the conclusion results in South Africa's employment statutes possessing an international mandatory nature, there is still the question of when the court should seek to limit a party's choice. It cannot be at every instance of an international employment contract where a choice of foreign law clause exists that the Labour Court override such choice in favour of the law of the forum. Whilst the application of territoriality may be rightly criticised, it should not be seen as entirely fortuitous. Accordingly, approaches to the application of international mandatory rules must be considered.

4.4.1 The European Union

The approach taken by the EU has been mentioned briefly above and may, accordingly, be found within the Regulation on the Law Applicable to Contractual Obligations, otherwise known as Rome I. Article 9(1) of this Regulation holds that where a provision is crucial for the safeguarding of the forum's political, economic and social organisation and there exists a significant public interest in the application of such provision, it may justifiably override the choice of law and be applied.[68] As mentioned, international mandatory rules are those that apply irrespective of the chosen law whereas peremptory provisions of the forum, or domestic mandatory rules, only apply where the *lex causae* is also the law of the forum. The Rome I Regulation upholds this distinction in Recital 37 where it states that provisions that cannot be derogated from must be interpreted differently from overriding mandatory rules with the latter being interpreted more strictly.[69] Provisions that cannot be derogated from are further qualified in the Regulation, specifically in terms of the protection offered to employees, whereby Recital 35 and Article 8(1) hold that employees cannot be deprived of the protection such provisions offer where they would find application in the absence of a choice of law.[70]

[68] Rome 1 (n 28) Art 9(1).
[69] Rome 1 (n 28) Recital 37.
[70] Rome 1 (n 28) Recital 35 & Art 8.

Accordingly, the approach taken by the EU stresses state interest and close connection.[71] Emphasis should, thus, be put on the word 'crucial' as it appears in Article 9(1).[72] May labour provisions be considered crucial and if so, what is it about labour law that bears prominence in the mandatory rules enquiry within the EU? The first enquiry should question the purpose of labour law. It has already been noted that labour law seeks to balance out the unequal bargaining power between an employee and his employer.[73] This is simple enough, however, it should bear weight especially in consideration of party autonomy and the limitation thereof. Party autonomy extends a veneer of equivalence that serves to conceal the unequal power balance between the contracting parties.[74] The Regulation recognises this by not only promoting the application of mandatory rules, but further expressing protection to employees in Article 8 that not only holds that provisions offering more protection may not be derogated from, but further includes specific objective conflict rules that favour the weaker party.[75]

In terms of overriding mandatory provisions, Grusic opines that labour provisions should be considered internationally mandatory only in so far as they impact the labour market of the forum.[76] This is because there is a personal scope that the state is seeking to regulate.[77] Thus, where provisions are aiming at misuse of managerial power they should not have an overriding effect.[78] Provisions that have a personal scope to them are, according to Grusic, those that regulate labour standards such as working hours, anti-discrimination and minimum wage, to name but a few.[79]

Grusic supports his claim through an analysis of the Posted Workers Directive (PWD) of the EU.[80] Article 3(1) of the Directive holds that Member States (of the EU) must apply the standards therein, regardless of what the choice of law might be, where

[71] Mitchell (n 2) 770.
[72] Mitchell (n 2) 762.
[73] Davies & Freedland (n 5) 18.
[74] As above.
[75] LM Van Bochove 'Overriding mandatory rules as a vehicle for weaker party protection in European private international law' (2014) 7 *Erasmus Law Review* at 147.
[76] U Grusic 'The territorial scope of employment legislation and choice of law' (2012) 75 *Modern Law Review* at 746.
[77] As above.
[78] As above.
[79] As above.
[80] Posted Workers Directive 96/71/EC.

workers have been posted to their territory.[81] The overriding effect of these provisions has been considered by the ECJ as so fundamental that even domestic legislation of a Member State, that claims to be internationally mandatory, cannot override or exclude a provision found within Article 3(1).[82] The ECJ further found Article 3(1) of the Directive to be an implementation of the mandatory rule doctrine in Article 9(1) of Rome I.[83] What this means is that any provision of a forum statute pertaining to any of the matters listed under Article 3(1) will be considered as overridingly mandatory.[84] Where they fall outside those matters, the provision must satisfy the test in Article 9(1), that the provisions are crucial for the safeguarding of the forum's political, economic and social organisation and that there is a significant public interest in the application of those provisions to justify their application.[85] That is to say that where the provision does not fall within one the listed categories in Article 3(1) of the PWD, the possibility of the provision having an international mandatory nature is not entirely ousted.

The conclusion drawn by Grusic bears weight, however other approaches that emphasise the protection of the weaker party are notable too. These do not rely on the provision's relationship with the labour market but rather promote a preference for the legal system that offers more protection.[86] In *Unamar v Navigation Maritime Bulgare* the Court of Justice of the European Union (CJEU) implied the overriding mandatory nature of provisions that offer more protection.[87] This case involved the application of a Belgian statute that was held to be an implementation of the EU Directive on self-employed commercial agents.[88] The dispute concerned the failure to renew a commercial agency agreement concluded between Navigation Maritime Bugare, a container liner shipping service provider, and Unamar, who was to act as their agent.[89] When the agreement was terminated earlier than arranged Unamar sued

[81] Grusic (n 76) 743.
[82] *Commission v Luxembourg* Case C-319/06 [2008] ECR 1-4232.
[83] Grusic (n 76) 744.
[84] PWD (n 83); the listed matters include, maximum work periods and minimum rest periods, minimum paid annual leave, minimum rates of pay and overtime, the conditions of hiring workers from temporary employment agencies, health safety and hygiene at work, protective measures for pregnant women and women who have children, equality of treatment among men and women.
[85] As above.
[86] Van Bochove (n 75) 152.
[87] *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare* (Case C-184/12) [2013] EUECJ para 20.
[88] As above.
[89] As above.

on the basis of unlawful termination and claimed compensation.[90] A choice of law clause held Bulgarian law to be applicable, however the Commercial Tribunal in Belgium held the Belgian statute on Commercial Agency Agreements to be applicable as an overriding mandatory rule.[91]

Eventually the case was heard in the CJEU that professed it was up to the forum court to decide whether its law was of an international mandatory nature, implying as it did that statutes that purport to not only implement EU Directives, but also go beyond the scope of protection it offers, might be considered as such.[92] What this judgment does, is reflect the favourability principle in Article 8(1) of Rome I that grants an employee those protective provisions that would have been applicable in the absence of choice.[93] The stark difference, however, is that the CJEU in *Unamar v National Maritime Bulgare* did not provide definitive answers and left open considerable freedom for courts to use their discretion. Article 8(1), on the other hand, maintains the principle of close connection.[94]

For this reason, Nygh holds that where a court is of the opinion that a statute is intended to have overriding mandatory effect such court should determine its decision on the basis of four negative principles: it should not purport to extend protection to persons who fall outside of the protection of the regulating state, such as foreign nationals; protection should neither be extended to transactions which are not connected to the forum; nor should protection be extended to persons who do not need it and, finally; the reasonable expectations of the parties should not be ousted by a mandatory rule.[95] This may be interpreted to mean that party autonomy should not be overridden in circumstances where it is rational to assume the parties contracted on equal footing.[96]

[90] As above.
[91] Van Bochove (n 75) 149.
[92] *Unamar* (n 87) para 50.
[93] M Czerwinski 'The law applicable to employment contracts under the Rome I-Regulation' (2015) 5 *Adam Mickiewicz University Law Review* at 152.
[94] Von Bochove (n 75) 156.
[95] Nygh (n 6) 212.
[96] As above.

4.4.2 The United States of America: Restatement

Since statutes do not often specify their mandatory nature, courts result in applying their discretion to discern such.[97] Due to this, their approach is often supplemented by American doctrines of governmental interest analysis.[98] This approach emphasises the policies underlying statutes and the interest each legal system concerned has in applying them.[99] This is outlined in section 187(2)(b) of the American Restatement (Second) Conflict of Laws where it holds that the forum may override a choice of law when;

> application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of s188, would be the state of the applicable law in the absence of an effective choice of law by the parties.[100]

Interest analysis was heavily influenced by the American academic Brainerd Currie. Currie offered the interest analysis framework as an alternative to conflict rules that he argued, created false conflicts between presumed state interests.[101] According to Currie's theory, the first step involves deducing the potentially applicable rules and the policies that underline them.[102] To deduce underlying policy one only has to look at the purpose behind the enactment of a particular rule and the problems it seeks to address.[103] The second step requires determining if a state has an interest in the application of their rule. A state has an interest if its policy is furthered by implementation of that rule and not

[97] Nygh (n 6) 208.
[98] As above.
[99] Mitchell (n 2) 771; TG Guedj 'The theory of the Lois de Police, a functional trend in continental private international law – a comparative analysis with modern American theories' (1991) 39 *American Journal of Comparative Law* 661.
[100] The Restatement (Second) of Conflict of Laws (1971) (The Restatement) sec 187(2)(b). A third Restatement – Restatement of the Third Law, Conflict of Laws – is currently undergoing consideration but has yet to come into force. Sec 187(2)(b) of the Restatement as it appears herein is thus still applicable.
[101] JR Ratner 'Using Currie's Interest Analysis to Resolve Conflicts between State Regulation and the Sherman Act' (1989) 30 *William and Mary Law Review* 729.
[102] Guedj (n 99) 686.
[103] Ratner (n 101) 729.

necessarily because it has an interest in the subject matter at hand or because the rule is potentially applicable.[104]

The policy concerned must likewise be of a fundamental nature. Guidance as to what a fundamental policy is may be found in the commentary to the Restatement that exemplified policies that are "designed to protect a person against the oppressive use of superior bargaining power"[105] as fundamental. Arguably then, according to the Restatement approach, provisions that aim at protecting the weaker party are overridingly mandatory as they reflect fundamental policies of the state. These fundamental policies must, nevertheless, be policies that would have been applicable in the absence of choice.

The Restatement approach, however, must be qualified. While section 187(2)(b) may be classified as an application of the mandatory rule doctrine, the interest analysis framework, which the Restatement embodies, is more closely reflective of the principles underlying public policy.[106] The approach outlined in the Restatement has been classified as an indeterminate approach to the choice of law process that non-arbitrarily and predictably chooses the applicable legal system, while preserving protection for consumers and employees by recognising overriding public policies of an interested state when those policies are fundamental in an international sense.[107]

Bar this distinction, the two approaches analysed here seek to limit party autonomy in relatively the same way. 'Fundamental' may be understood to have the same exceptional application as those 'crucial' policies applied in the EU. Accordingly, both Rome I and the Restatement look towards the application of overriding provisions as exceptional to the choice of law process. When it comes to the protection of weaker contracting parties, the American Restatement approach is certainly clearer in its regard for the policies possessing an international mandatory nature than is the approach in the EU. However, both

[104] As above.
[105] RJ Weintraub *Commentary on the Conflict of Laws* (2010) 517.
[106] PJ Borcher 'Categorical exemptions to party autonomy in private international law' (2007) 82 *Tulane Law Review* 16.
[107] Ratner (n 101) 708.

would arguably maintain that these provisions cannot supplement a chosen legal system that aims at serving the same purpose as the forum's rule.[108]

4.5 Mandatory rules in South African labour law

The first point of departure when considering the mandatory nature of South Africa's labour legislation must be the Constitution. Having elevated labour rights as constitutionally imperative they form part of the country's public policy.[109] The statutes themselves reinforce this position. To this end reference is only made to the LRA, BCEA and EEA as they are significant in providing those rights and duties that the constitutional provision relating to fair labour practices envisions.[110] The purposes of these statutes further illustrate their constitutional importance. Both the LRA and BCEA aim at fulfilling section 23 of the Constitution as well as the Republic's commitments to the obligations set out by the ILO.[111] The EEA goes even further and specifies its aim as promoting the constitutional right to equality by eliminating discrimination in the workplace.[112] Accordingly, if the chosen legal system is one which acts against these purposes it may be rejected on the grounds of public policy.[113]

Mandatory rules have been discussed above as an expression of a state's public policy, albeit it with the former being so imperative as to demand its application. One may comfortably conclude then that South Africa's labour law is of a mandatory nature. This is in further consideration of the fact that the nature of labour law, as being closely linked to a state's socio-economic position, commands it to be mandatory. However, the impact here must not only be that it possesses a mandatory characteristic, but that such characteristic demands it to override the choice of law process. It must go beyond mere public policy and not reject the chosen law, but displace it in favour of the law of

[108] H Buxbaum 'Mandatory rules in civil litigation: status of the doctrine post-globalisation' (2008) 18 *Article by Maurer Faculty* 36.
[109] K Calitz 'Globalisation, the Development of Constitutionalism and the Individual Employee' (2007) 10 *Potchefstroom Electronic Law Journal* at 7.
[110] The Constitution of the Republic of South Africa, 1996 (The Constitution) sec 23.
[111] Labour Relations Act 66 of 1995 (LRA) sec 1 & the Basic Conditions of Employment Act (BCEA) sec 1.
[112] The aim of the Employment Equity Act 55 of 1996 (EEA) specifies that it, in recognition of the injustices faced during apartheid, the act aims to, *inter alia*, promote equality and antidiscrimination in the workplace.
[113] Calitz (n 109) 7.

the forum. That said, the international mandatory nature of labour law in South Africa has been considered before, deriving influence from the Rome I Regulation.

In *Parry v Astral Operations* the Labour Court made mention of the constitutionalism of labour rights in South Africa, holding that it strengthens the protective elements of this ambit of the law.[114] Party autonomy must, thus, exist within the limits of the Constitution. These limits are regulated by the employment statutes and so, there may be room to argue that the application of the LRA, for instance, as overriding a foreign choice of law may be justified. In *Parry*, the court further justified the limitation of party autonomy by referring to the Rome Convention (the predecessor to Rome I). Emphasis was placed on the protection the Convention offers to employees by not allowing parties to deprive them of the mandatory rules that would be applicable in the absence of choice.[115] Further holding that the Republic is not bound by the Convention, the court rightly maintained that it was time to consider it as it would be in accordance with section 39(1)(b) of the Constitution, that which directs a court to consider international law.[116] The approach taken by this court is unequivocally one that favours protection of the weaker contracting party, arguing that a choice of foreign law cannot avoid the protection of South Africa's labour law.[117]

A similar approach was seen in *August Läpple (South Africa) v Jarret* where the Labour Court held that external companies cannot avoid South Africa's labour laws by contractually claiming that persons posted to their subsidiaries are not employees when the LRA clearly defines them as such, arguing further that it would seriously disadvantage South African citizens who work for these companies.[118] The protection offered to employees was, thus, justified as treating labour law in South Africa as overridingly mandatory. The same is seen in *Kleinhans v Parmalat SA* where jurisdiction (and accordingly choice of law) was assumed in favour of the Republic because failure to do so would put the applicant at risk of losing his constitutional right of access to courts.[119] Here the dispute concerned, *inter alia*, the identity of the true

[114] *Parry* (n 1) para 53.
[115] *Parry* (n 1) para 70.
[116] The Constitution (n 110) sec 39.
[117] *Parry* (n 1) para 72.
[118] *August Läpple (South Africa) v Jarret & others* (2003) 12 BLLR 1194 (LC) para 46.
[119] *Kleinhans v Parmalat SA (Pty) Ltd* (2002) 23 ILJ 1418 (LC) para 47.

employer as Kleinhans was seconded to Parmalat Mozambique (PM) who was not a party to the dispute brought in the South African Labour Court.[120] Two contracts were drafted, a three year contract concluded in South Africa and a one year contract concluded in Mozambique. The court, thus, argued that by declining jurisdiction, the applicant could face proceedings in Mozambique against PM over the one-year contract. Kleinhans would, accordingly, be without any right of recourse over the three-year contract if the court were to decline jurisdiction and he were to be unsuccessful in Mozambique.[121]

The justification here was undoubtedly the significance of the Constitution and the necessity it carries in having its provisions (as well as its underlying values) fulfilled. The right of access to courts is not inherently a labour right; however, it is clearly evident that the Labour Court is willing and arguably obligated to protect the constitutional rights of employees as weaker contractual parties.[122]

It may, thus, be fair to conclude that labour rights that are embodied within the various employment statutes in the Republic are overrridingly mandatory insofar as they purport to protect employees from the inherently unequal bargaining power they hold against their employers. The approach is one that is embodied both in the EU and the American Restatement where recognition is given to the need to protect weaker contracting parties. However, while those two approaches are qualified in some way, the use of mandatory rules in the South African Labour Court is somewhat arbitrary in that it manifests as an unquestioned imposition of constitutional values over the choice of law process – as seen in the brief discussion of the abovementioned cases.

4.6 The approach to mandatory rules in the South African Labour Court

The implication here is not that constitutional rights, and statutes enacted in accordance with them, of the South African forum, are not internationally mandatory or are not justified in overriding the choice of law process. The importance here is that while they may possess an international mandatory characteristic there must be an

[120] As above.
[121] As above.
[122] Calitz (n 109) 11.

approach that expressly warrants their application. Seeing as labour rights are constitutionally imperative it would seemingly imply that at every instance where they are called into question, the Labour Court will apply South African law regardless of choice. As seen in the approaches both in the EU and the American Restatement, this cannot be the case. As Rome I maintains, the application of overriding mandatory rules must be exceptional and justified by a close connection with the forum. Similarly, in the American Restatement, overriding a choice of law is rationalised by the law of the forum being the law applicable in the absence of choice.

Evidently, the few times the Labour Court has approached the application of mandatory rules it has been at the instance of offering protection to the employee. Protective rules, however, should only be classified as internationally mandatory when they pursue a public interest amidst the protection of the private interests concerned.[123] While the American Restatement approaches protective rules as a justifiable reason to override a chosen law, as seen in the Commentary to the Restatement, the EU is far more restrictive. In South Africa, protection of fundamental rights is a public interest. Accordingly, where the statutes aim at protecting these rights there should be no doubt that the rule is internationally mandatory. There is, furthermore, no question that the South African forum has an interest in the application of these rights – there is an underlying value of constitutionalism within the jurisprudence of South African law.[124] Being the supreme law it may interpreted in a similar light to the Directives found within the EU. Looking towards the American Restatement, where a chosen law would be contrary to these fundamental constitutional values, there is justification in overriding it. It would be a mistake to overlook the overriding nature of the EEA, for instance, which opposes discrimination, considering the socio-political importance the South African Republic bears in upholding equality.[125]

What of something like unfair dismissal, a provision that is not innately associated with a constitutional right? When considering the mandatory nature of a rule, it has been

[123] Schafer (n 14) 311.
[124] C Fombad & E Kibet 'Transformative constitutionalism and the adjudication of constitutional rights in Africa" (2017) 17 *African Human Rights Law Journal* at 348.
[125] E Mureinik 'Bridge to where? Introduction to the Interim Bill of Rights' (1994) 10 *African Journal on Human Rights* at 32.

noted that the underlying policies behind such rule must be considered.[126] Such policies will reflect a state's political and economic interest in having the rule apply. Unfair dismissal in the EU has been noted as not having an international mandatory characteristic as it does not directly impact the labour market and reflects private, rather than public, interests. In South Africa, the inclusivity of this provision arose out of the Republic's dedication to the ILO.[127] This is illustrated by the wording within Chapter VIII of the LRA[128] as it draws significantly from the ILO Convention 158.[129] The policies underlying the rule might very well then justify the states interest in having it applied as the state is undoubtedly interested in ensuring its international obligations are fulfilled, such is the purpose of making a commitment to them. The Labour Court should, thus, when faced with the possible application of mandatory rules, question whether there is a fundamental public interest in having the rule apply. If it is constitutionally associated, the interest is a given. If not, the investigation must go further and question the purpose behind the provision's enactment in the first place.

However, when speaking of international mandatory rules, the effect is the extension of the rules scope of application.[130] While it may be easy enough to substantiate the Republics interest in having a labour provision applied by canvassing the protection that it is constitutionally mandated to uphold, there still remains the question of when this protection should be extended. While the approaches in the EU and the American Restatement differ slightly, there exists in both a connection to the forum rule that further reinforces the state's interest in having the rule apply.

A close connection may manifest within the choice of law enquiry in the consideration of conflict rules that allocate a connection between the contract and a particular legal system in the absence of choice. The doctrine of mandatory rules remains a component of the choice of law enquiry. Accordingly, a close connection must be maintained and yet, it must also go further by considering conflict rules that reflect both the public interests of the forum and the interests of the contracting parties in the

[126] Schafer (n 14) 18.
[127] A van Niekerk and others *Law@work* (2018) 237.
[128] Chapter VIII of the LRA (n 111) deals specifically with unfair dismissals.
[129] International Labour Organisation Termination of Employment Convention, 1982 (No. 158).
[130] Schafer (n 14) 311.

application or non-application of a rule.[131] In Rome I, the important connecting factors are the habitual place of work or, where that is inapplicable, the place where the business that engaged the employee is situated.[132] Another connecting factor that is not included in Rome I, but is submitted here for consideration, is the domicile or residence of the employee. If public interests are contemplated and the impact of the labour market is included in such contemplation, as it is in the EU, then a connection that arises from the South African domicile or residence of one of the parties should be noted as sufficient to conclude a connection (and subsequent public interest) of the forum in the mandatory rule enquiry.

Domicile and residence are personal connecting factors that create relationships between a person and a territory, tying them to a territorial legal system.[133] Where an employee is domiciled in South Africa, they will inevitably fall back on the Republic in the case of unemployment, thus impacting both the economy and the labour market.[134] It is reasonable to conclude then, that the forum will have an interest where the employee is domiciled or resident in the South African Republic and that a sufficient connection exists to justify an intrusion of the forum's law over the choice of law process. In the instance that the employee is not domiciled or resident in South Africa, but the company that employed them is, the connection may still be relevant. It should, however, be qualified that in such an instance the necessity in applying the forum's mandatory rules arises in an attempt to restrain South African companies from evading the protective legislation of the forum by posting employees to their subsidiaries.[135]

With the approach in the Labour Court emphasising the protection of the weaker party as the basis for the application of overriding mandatory rules, however, it means that at the very instance that the chosen foreign law offers such protection and inadvertently fulfils any constitutional objective, the forum should not apply its own laws. In this instance, the state cannot be said to have any interest in the application of the forum rule irrespective of any connection that may exist. The forum's laws are

[131] Schafer (n 14) 306.
[132] Rome I (n 28) Art 8(2) & 8(3).
[133] M Uddin 'Domicile as a personal connecting factor: an assessment of judicial decision' (2018) 1*International Journal of Global Community* at 294.
[134] Uddin (n 133) 293.
[135] *August Läpple* (n 118) para 46.

not the background of which to test this either. The Labour Court should not apply the law of the forum if the chosen law offers adequate protection to the aggrieved party and satisfies both parties' interests and expectation as to their contract. Even where the law of the forum offers more protection than the chosen law it is not enough to justify an intrusion. While the CJEU in *Unamar* implied a preferential approach in applying the legal system that offers the most protection, it should be submitted that where the chosen law offers enough protection and does not frustrate the socio-political and economic standards of the forum there is no reason to override it.

On this note, however, a final remark should be made on the BCEA. It has been mentioned that international mandatory rules are a direct application of unilateralism. Some statutes though, expressly or implicitly render themselves directly applicable.[136] Accordingly, in direct contrast to the position held in the Labour Court,[137] it is held here that the BCEA is one such statute. The implication of section 5 that holds that the "Act takes precedence over *any* agreement"[138] may be interpreted to include international contracts. If that is an overstatement, there is still room to argue that a local employer would not be able to avoid the BCEA by choosing a foreign law to govern the contract and employing individuals to work abroad in their subsidiaries.[139]

4.7 Conclusion

The scope of mandatory rules is vast, however the development of this doctrine in South Africa has been rather slow. The attempt, therefore, has been to canvas how the Labour Court may apply the doctrine when approached with an international employment contract. The conclusion drawn is that the three employment statutes discussed here, that seek to regulate the employment relationship, possess a mandatory characteristic with the exception of the BCEA being implicitly unilateral. They are mandatory in an international sense due to their intrinsic link with the fundamental values and rights embedded within the Constitution. This may be furthered by arguing that the Constitution itself accentuates the application of these statutes as mandatory under section 39(2) that highlights the necessity in interpreting

[136] Forsyth (n 23) 15.
[137] In *Astral Operations* (n 11) the court specifically rejected the extra-territorial reach of the BCEA.
[138] BCEA (n 111) sec 5 [my emphasis].
[139] Forsyth (n 23) 15.

statutes in line with the Bill of Rights.[140] Not only that, but the same section stresses the development of the common law consistently with the Bill of Rights.[141] Accordingly, the use of mandatory rules to ensure protection of fundamental rights, predominantly here rights that protect employees, is constitutionally sound.[142]

The concern is, therefore, not so much whether the statutes and their provisions mentioned herein may be considered as international mandatory rules, but rather when it would be appropriate to limit party autonomy through the use of this doctrine. Ultimately, any rule may be mandatory if the legislature deems it to be and courts, being inclined to use their discretion to discern whether a rule is mandatory may very well be inclined to apply their own laws when there is a connection to the contract that might justify them doing so.[143] As articulated, a connection is but one precondition to having the doctrine apply and the connection itself must be one that encompasses the interests of the forum state and the parties concerned. The contract having been concluded in the forum with jurisdiction is not enough, for instance.

The mandatory rule enquiry, therefore, requires judges to play an active role in establishing the preconditions that justify limiting party autonomy. In the Labour Court, it also requires them to reject territoriality as a foregone conclusion to international employment contracts. Having established the mandatory nature of the Republic's employment statutes, there should be significant doubt placed on the ruling that the statutes have no extra-territorial reach. Under certain prerequisites that have been outlined here these statutes certainly find application in disputes with foreign elements. Accordingly, private international law principles should find application in the Labour Court when adjudicating over an international employment contract. Even where a foreign law is seemingly present within a dispute, the Labour Court has the opportunity to nonetheless impute the law of the forum and maintain its jurisdiction when it is necessary for the protection of its own interests and the interests of the parties.

[140] The Constitution (n 110) sec 39(2).
[141] As above.
[142] Calitz (n 109) 9.
[143] Van Bochove (n 75) 156.

Chapter 5: Comparative approaches

5.1 Introduction

A central premise of this research rests in the assertion that shifts in employment, heightened by the Fourth Industrial Revolution and a mounting global economy, require courts to look beyond territorial approaches to regulation of employment. This was, furthermore, the position in the ILO's Condition of Work and Employment Series 106[1] that argued that continuing to focus on the workplace as the means for justifying regulation would result in ineffective regulation of online employment sectors such as crowdwork.[2] From a global standpoint, the Labour Court, when imputing strictly territorial limits on their ability to adjudicate has, accordingly, relinquished itself from imagining regulation of any new forms of work.

In consideration of digital labour platforms, the necessity in determining the appropriate jurisdiction in which to bring a dispute has been highlighted. With platform employees and their employers spanning multiple jurisdictions, the question of which court is best suited to hear a dispute becomes pertinent. Concluding that regulation is hinged on the workplace being within the geographical borders of the regulating state "[does] not make sense when confronted with the global network that comprises web-based digital labour platforms".[3] It has been observed that even national regulation of persons within the territory of the regulating state will face compliance issues over matters concerning online workforces. This will only result in less opportunity to engage in digital labour platforms as the platforms are likely to stop posting jobs in states that have higher labour standards.[4]

The difficulties of ensuring compliance, problems with legal uncertainty produced through inconsistent judgments and risks involved with forum shopping are, nonetheless, ubiquitous to most forms of transnational employment. As has been illustrated throughout this dissertation, a strictly territorial approach to cross-border

[1]MA Cherry "Regulatory Options for Conflicts of Law and Jurisdictional Issues in the On-Demand Economy" 2019 *International Labour Organisation Conditions of Work Series and Employment.*
[2] Cherry (n 1) 37.
[3] J Berg, MA Cherry & U Rani 'Digital labour platforms: a need for international regulation?' (2019) *Spanish Journal of Labour Economics* 126.
[4] Berg, Cherry & Rani (n 3) 121.

employment disputes is ill-equipped to deal with these issues, whether they arise out of more commonly known forms of transnational employment (such as airline pilots) or through newer, unfamiliar forms such as those arising out of the gig-economy.

The purpose of this chapter is, therefore, to reimagine regulation of employment by considering approaches in foreign jurisdictions. While scattered throughout this dissertation are fragments of foreign sources of private international law, as a means through which to impute a private international law approach over one established by territoriality; this chapter will wholly encompass the benefits of applying private international law to cross-border employment disputes. Although it has been noted that the formation of an international governing system would best ensure standard minimum protection to employees,[5] until such a system is devised it is necessary that the Labour Court frame it's adjudication in line with similar approaches taken elsewhere. In this way risks of uncertainty generated by inconsistencies in judgments will be mitigated as far as possible. Considering various different, but similar, approaches should prompt further scrutiny into the best possible solution, having regard to the aims instilled in South African labour law.

Accordingly, the rules pertaining to jurisdiction in Europe and Canada will be considered. In Europe, emphasis is predominantly placed on ensuring an employee's interests are well protected and the vulnerability of their position against their employer is mitigated.[6] As illustrated in this dissertation where the Labour Court fails to consider private international law, the avenues through which employees may, and arguably should, be safeguarded from their employers' control of the employment relationship are equally neglected.[7]

In Canada, the common law illustrates a clear and unambiguous break from methods of statutory interpretation in favour of the application of the rules of private international law. This approach is policy-driven and underpinned by elements of fairness and

[5] Berg, Cherry & Rani (n 3) 122.
[6] Regulation (EU) no 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Recast Regulation) Art 21-22.
[7] See generally; *Astral Operations Ltd. v Parry* (2008) 29 ILJ 2668 (LAC).

justice.[8] Accordingly, it makes for an interesting comparison where these elements are oftentimes overlooked in approaches rooted in statutory interpretation. Case law has, furthermore, established a test through which new connecting factors for disputes that are considered *sui generis* may be formulated.[9] If the conclusion that a statutory claim should be characterised as one arising out of contract is unsatisfactory, then an exploration into the ways in which new connecting factors may be established will only be beneficial.

Lastly, Australia is considered for aspects regarding choice of law. Applying domestic statutes to disputes with foreign elements is often grounded on statutory interpretation; however, in employment disputes, the FWA allows for express extra-territorial application. These laws apply to Australian employers and foreign employers that are incorporated or do business within Australia.[10] Australian case law regarding the FWA may further give an indication as to the connections required to establish a choice of law that implicates a forum's statute. This gives explicit consideration to the employment relationship as a whole and not solely to the manner and place of an employee's work.[11]

By engaging with foreign sources, the aim is, therefore, to consolidate the private international law approach, as has been advocated for in this dissertation. This necessitates analysing the principles, approaches and methods, as they are implemented in foreign jurisdictions, that should be considered in the adjudication of international employment contracts.

5.2 The European Union

The rules pertaining to jurisdiction over international employment contracts in the EU are found within the Brussels Recast Regulation. With quite a formidable legislative history, the Brussels Recast Regulation is regarded as the nucleus of private

[8] SGA Pitel & V Black 'Assumed jurisdiction in Canada: identifying and interpreting presumptive connecting factors' (2018) 1 *Journal of Private International Law* 219; *Club Resorts Ltd. v Van Breda* 2012 scc 17 (S.C.C.) 2.
[9] *Van Breda* (8) para 91.
[10] *Fair Work Act 2009* (Cwlth) s70.
[11] T Frost, G Gowland & I Chaudhri 'Globally mobile employees: whose labour laws apply?' (2016) *LegalTalk.*

international law within Europe.[12] Accordingly, the approach in assuming jurisdiction within EU member states is firmly rooted in private international law practice thereby creating a distinct separation between assuming jurisdiction and assigning choice of law.[13] What began as a process of harmonising the rules relating to jurisdiction and the recognition and enforcement of judgments on a voluntary basis, the Brussels Convention, as it was known as the time, went through a series of amendments and was eventually converted into a formal Regulation that was Recast in 2012.[14] The regime established by the Recast Regulation and its predecessors has been hailed as an unqualified success story in taking impressive strides at legal integration.[15] It's influence has been felt outside the EU, with non-member states incorporating several of the Regulation's provisions within their domestic legislation. For instance, the Private International Law Act of Montenegro[16] incorporated similar provisions regarding jurisdiction for employment contracts, thereby giving recognition to the status of employees as weaker contractual parties deserving of jurisdictional advantages. Accordingly, the Regulation remains a vital source of comparison for South Africa regarding jurisdiction in international employment contracts.

In general, the aims of the Regulation are to protect defendants established within the EU.[17] However, in certain instances, protection is aimed at the weaker party to the contract. Similar to the Rome I Regulation, this encompasses consumers, employees and insured parties. Rules of jurisdiction are, thus, framed to be more favourable to these parties' interests than are the general rules.[18] This is made with concern for the inequality in litigational capacity that is inherent within an employment relationship.[19]

[12] Z Meskic & D Radoncic 'Brussels I Recast and the South-East Europe' (2013) 15 *Revija za Evropsko pravo* 56.
[13] See for instance; 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).
[14] SC Symeonides 'The Brussels I Regulation and Third Countries' August 15 2018 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3231715 (Accessed 16 April 2021) 2.
[15] Symeonides (n 14) 2.
[16] Meskic & Radoncic (n 12) 58.
[17] M Poesen 'Concurrent liabilities and jurisdiction over individual contracts of employment under the Brussels Ia Regulation' (2020) 16 *Journal of Private International Law* 232.
[18] Poesen (n 17) 232; Brussels Recast Regulation (n 6) Recital 18.
[19] U Grusic 'Recognition and enforcement of judgments in employment matters in EU private international law' (2016) 12 *Journal of Private International Law* 525.

The aim, therefore, is to allow the employee to litigate "where it will generally be least burdensome".[20]

This is achieved by allowing an employee to approach a number of forums in which to bring their claim. These include the employer's place of incorporation, the place of habitual employment, the place where the business that employed the employee is, or was, situated, as well as the general jurisdictional bases incorporated within the Brussels Recast Regulation.[21] An employer, on the other hand, may only sue an employee in their place of domicile.[22] By granting a jurisdictional advantage to the employee and providing different jurisdictional bases, the employee has a greater chance at bringing their claim in an advantageous forum.[23] This might be a forum that is, amongst other factors, neutral, provides legal aid and offers the utility of specialised labour tribunals or has favourable choice of law rules.[24] In this way, an employee is prevented from having to present their claims or defend their cases in inaccessible forums.[25] Since they may only be sued in their place of domicile, employees further avoid the risks of courts wrongfully assuming jurisdiction and, as a result, being forced to "participate in foreign proceedings, hire a foreign lawyer and challenge the foreign court's jurisdiction",[26] factors that are financially burdensome to an individual employee. Jurisdictional agreements are, furthermore, only effective if they were entered into after the dispute arose or if it grants the employee a forum other than those already outlined in the Regulation.[27] The Regulation is, accordingly, premised on principles aimed at providing protective jurisdictional rules, which ultimately seek to grant an employee the privilege of suing or defending a dispute in their home country.[28]

In addition to offering employees a number of forums to institute their claim, the CJEU has developed a series of interpretational principles that promote the aim of employee

[20] *Giulia Pugliese v Finmeccanica SpA, Betriebsteil Alenia Aerospazio* Case C-437/00Pugliese EU:C:2002:511 para 57.
[21] Poesen (n 17) 324; Art 21-22 of the Brussels Recast Regulation.
[22] Brussels Recast Regulation (n 6) Art 21-22; Poesen (n 17) 324.
[23] Grusic (n 19) 525.
[24] As above.
[25] As above.
[26] Grusic (n 19) 533.
[27] Brussels Recast Regulation (n 6) Art 23.
[28] Grusic (n 19) 533.

protection.[29] This includes providing jurisdictional protection to employees as well as ensuring that section 5 (that pertaining to employment) is interpreted to enhance foreseeability – thereby enabling litigants to predict whether the section applies or not.[30] Evidently, interpretation in the Labour Court diverges significantly as protection is neither guaranteed nor has the Court took to clarifying their position with regards to international employment contracts. Oftentimes, interpretation is rooted in the purposive method as seen in *Genrec* or *Astral Operations* or the court attempts to interpret a statute's provisions in light of private international law rules, often under incorrect assumptions as seen in *Kleinhans* and *Robineau*.

Interestingly, while the rules pertaining to jurisdiction and those pertaining to choice of law are clearly separate within the EU, the rules of jurisdiction are aimed at balancing the rights and interests of the private parties involved, as well as the states interests.[31] Accordingly, under employment contracts, the rules of jurisdiction are complementary to choice of law rules as, oftentimes, jurisdiction is conferred on the courts of a state whose laws are applicable to the employment contract.[32] Grusic argues that, because the choice of law rules are designed to ensure they lead to the application of the law of the state that is legitimately interested in regulating the employment contract, state interests are protected in conjunction with private parties' interests – that ultimately being the protection of employees as weaker parties.[33] While an employee may only be sued in the place where they are domiciled, it is argued that, in this instance, the protection of state interests is subordinate to the private interests of an employee.[34] This is achieved through the flexibility of the jurisdictional bases through which an employee may bring their claim. The ILO further highlighted the benefit of such a flexible approach to jurisdiction and choice of law as it ultimately allowed the employee a chance to "claim the norm that is more favourable to him".[35] This was held to be an avenue through which protection for employees hired to work on digital labour platforms may also be achieved.[36]

[29] Poesen (n 17) 324.
[30] *Sandra Nogueira and Others v Crewlink Irland Ltd* Cases C-168/16; *Miguel Jose Moreno Osacar v Ryanair Designated Activity Company* C-169/16 Ryanair EU:C:2017:688 para 47; Poesen (n 17) 324.
[31] Grusic (n 19) 527.
[32] As above.
[33] Grusic (n 19) 528.
[34] Grusic (n 19) 528.
[35] Cherry (n 1) 22.
[36] As above.

The rules governing jurisdiction in the EU are, thus, primarily focused on ensuring protection of the weaker contracting party – similarly to the rules on choice of law. This is likely to achieve a close proximity between the forum's jurisdiction and their legal system. However, where this proximity is not achievable for whatever reason, the focus remains on ensuring employee protection.[37]

As has been argued in this dissertation, by approaching jurisdiction, and coincidentally choice of law, as a matter of statutory interpretation, the Labour Court fails to ensure adequate protection of the weaker contracting party. This occurs irrespective of the fact that the statutes' direct interpretation thereof to give effect to the statutes primary objectives – that being compliance with the Constitution and the Republic's public international law obligations, primarily those commitments made to the ILO.[38] As mentioned above, the ILO in fact promotes the flexibility in the EU's approaches to choice of law and jurisdiction that ultimately allow of protection for employees to be achieved.[39]

Accordingly, the Labour Court should be mindful of achieving an outcome, in determining jurisdiction, that affords an employee the opportunity to approach a forum favourable to them. In terms of the Brussels Recast Regulation these include, for instance, the place where they habitually work or the place where the business is incorporated.[40] In previous judgments, the Labour Court has only given attention to the place where the employee works, often to the employee's detriment.[41] Instead, an approach that is more cognisant of the protection warranted by the inequality inherent within an international employment contract, should be developed. As demonstrated above, this approach is rooted, and furthered, through the application of private international law rules.

A cause of concern, however, rests in the Euro-centrism that the Brussels Recast Regulation is founded upon.[42] Employees who are domiciled within an EU member

[37] Grusic (n 19) 528.
[38] Section 3 of the LRA.
[39] Cherry (n 1) 22.
[40] Brussels Recast Regulation (n 6) Art 21.
[41] See for instance; *Mecs Africa v Commission for Conciliation Mediation and Arbitration* (2014) 35 ILJ 745 (LC) & *Astral Operations Ltd. v Parry* (2008) 29 ILJ 2668 (LAC).
[42] Meskic & Radoncic (n 12) 58.

state are entitled, as claimants, to bind a non-member defendant to the jurisdictional rules of the Brussels Recast Regulation or, where those are inapplicable, the national rules of an EU member state.[43] This allows all EU plaintiffs access to the same forum regardless of the defendant's domicile.[44] With regards to the recognition and enforcement of judgments, discrimination against third party defendants is extended by giving automatic recognition to judgments rendered in EU member states without extending that same courtesy to judgments rendered against EU member state defendants by a court situated outside the EU.[45] Arguably, this makes transferring the rules of the Brussels Recast Regulation to a national framework less suitable.[46] While the factors within the Regulation that empower a court with jurisdiction, as well as the basic premise that weaker contracting parties should be offered flexibility in the course of assuming jurisdiction, must be considered, the principle of equality – that underlies private international law – should not be abandoned.[47]

This discrimination is, nonetheless, further sanctioned by the Labour Court due to their inflexibility in jurisdictional determination. As previously highlighted, it is unconscionable to consider the fact that an Italian citizen, employed by a South African company to work in Botswana, would be successful in evoking the jurisdiction of an Italian court through application of the Brussels Recast Regulation, but a South African citizen, employed under the same circumstances, would likely be unsuccessful in empowering the South African Labour Court with jurisdiction.[48] At the very least where connections other than the place of work are considered, the discriminatory aspect akin to the Brussels Recast Regulation might be mitigated.

5.3 Canada

The foundation of the Canadian legal system has its origins in the English common law with Quebec being an exception as it retains a civil legal system over matters of private law.[49] As a federal state system, the federal government has limited authority

[43] Brussels Recast Regulation (n 6) Recital 14 & Art 6.
[44] Symeonides (n 14) 5.
[45] Symeonides (n 14) 6.
[46] Meskic & Radoncic (n 12) 54.
[47] As above.
[48] Symeonides (n 14) 6
[49] Canada Guide 'The Canadian legal system' https://thecanadaguide.com/basics/legal-system/#:~:text=Canada's%20legal%20system%20is%20based,Charter%20of%20Rights%20and%2

over private law matters as this is governed independently within the separate provinces of Canada, subject to the Constitution.[50] This makes for three comparative approaches as the provinces follow distinct, albeit similar, methods in assuming jurisdiction.

The focus here, however, is limited to the common law test in assuming jurisdiction. Where the common law is not followed, the provinces are bound by the Court Jurisdiction and Proceedings Transfer Act[51] or, in Quebec, the Civil Code.[52] These codified instruments are both rooted in private international law rules. For instance, the CJPTA approaches jurisdiction by looking to establish a real and substantial connection that, according to the Act, may be found, for instance, where a contractual obligation is to be performed in a province where the Act is in force.[53] With regards to territoriality, the Act defines a courts territorial competence as;

> the aspects of the court's jurisdiction that depend on a connection between (i) the territory or legal system of the state in which the court is established, and (ii) a party to a proceeding in the court or the facts on which the proceeding is based.[54]

In Quebec, the Code likewise allows a court to assume jurisdiction over foreign litigants where there is a substantial connection between the dispute and the province.[55] Under employment contracts, such a connection may be established where the employee is resident or domiciled in Quebec.[56] The approach is, therefore, very similar to that in the EU, where certain factors are considered as granting a court sufficient connection to assume jurisdiction. Importantly, jurisdiction is established upon rules developed in private international law.

0Freedoms.&text=Laws%20that%20violate%20the%20Constitution,Canada%20being%20the%20highest%20authority. (accessed 5th August 2020).

[50] As above.
[51] The Court Jurisdiction and Proceedings Transfer Act, S.B.C. (2003) c. 28 (CJPTA).
[52] Civil Code of Quebec L.Q. (1991) ch. 64.
[53] CJPTA (n 51) sec 9(e)(1).
[54] CJPTA (n51) sec 2(h).
[55] Civil Code (n 52) Art 3136.
[56] Civil Code (n 52) Art 3149.

The contention throughout this dissertation has been to establish an approach that utilises the rules of private international law. However, the aim is not to simply inundate this chapter with various frameworks that utilise private international law rules in assuming jurisdiction. While this may stress the necessity in harmonising jurisdictional approaches in the Labour Court with approaches elsewhere, it is necessary to consolidate this by illustrating the significance of rejecting strict territorial approaches to jurisdiction. Accordingly, the emphasis remains on the common law courts of Canada that have expressly rejected canons of statutory interpretation in favour of a real and substantial connection test.[57]

Section 92 of the Constitutional Act of Canada determines the territorial limits of the common law provinces' prescriptive jurisdiction.[58] Issues of territoriality are, thus, statutory as the Act restricts the application of provincial legislation to out-of-province or foreign defendants.[59] While the Act did not expressly establish the same limitations to the jurisdiction of provincial courts, the Supreme Court of Canada decided that the territorial restrictions on provincial legislatures had to apply equally to the judicial reach of provincial courts.[60] With the issue of territoriality defined by statute, the delimitation of the reach of provincial statutes and provincial court's jurisdiction were governed by both principles of statutory interpretation and principles of private international law.[61] Accordingly, judgments were divided by courts that preferred to use methods of statutory interpretation to those that preferred the use of private international law rules.[62] In *Ladore v Bennett*[63] the court designated the pith and substance approach to determining the territorial reach of statutes.[64] However, this proved to be unsatisfactory especially with regards to the scope of civil rights.[65]

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[57] *Van Breda* (n 8).
[58] E Edinger '*Club Resorts v Van Breda*: extraterritoriality revisited' (2014) 55 *Canadian Business Law Journal* 265.
[59] Edinger (n 58) 266.
[60] Edinger (n 58) 266.
[61] *Hunt v. T & N plc* [1993] 4 S.C.R. 289 (S.C.C.).
[62] E Edinger & V Black 'A new approach to extraterritoriality: Unifund Assurance Co. V. I. C. B. C.' (2004) 40 *Canadian Business Law Journal* 166.
[63] *Ladore v Bennett* [1939] A.C. 468 (Ontario P.C.).
[64] As above; T Blackshield 'Working the metaphor: the contrasting use of "pith and substance" in Indian and Australian law' (2008) 50 *Journal of Indian Law Institute* 587: the pith and substance approach can be understood as a form of statutory interpretation whereby the statute is analysed to identify the true nature and character of the legislation.
[65] Edinger (n 58) 266.

The turning point came in *Morguard Investments Ltd. v De Savoye*[66] where the concept of jurisdiction *simpliciter* was introduced. This case concerned the recognition and enforcements of foreign judgments and held that a provincial judgment would be recognised by another province's court where jurisdiction was founded upon a real and substantial connection between the dispute and the originating forum.[67] This is similar to establishing a *ratio jurisdictionis*.[68] *Morguard* was the turning point as subsequent courts, when faced with the possible application of another province's statute or adjudication of foreign or out-of-province defendants, chose to rely on the test set out in *Morguard* instead of rules of statutory interpretation.[69]

This test was interpreted, applied and modified in subsequent case law and while it wasn't perfect, it became evident that an interpretative approach was unsatisfactory.[70] Accordingly, the real and substantial connection test gained further clarity in *Muscutt v Courcelles*[71] where the court set out an eight-factor test to determine whether a real and substantial connection exists.[72] Here the court remarked on the outdated rules regarding assuming jurisdiction by holding that;

> the jurisdictional issues that arise on this appeal emerge from a rapidly evolving area of law. Until the early 1990s this area was governed by a set of rigid common law rules developed in England in the nineteenth century. These rules … were shaped by the sovereignty concerns of a dominant nineteenth century

[66] *Morguard Investments Ltd. v De Savoye* (1990), 76 D.L.R. (4th) 256, [1990] 3 S.C.R. 1077 (S.C.C.).
[67] J Blom 'New ground rules for jurisdictional disputes: the *Van Breda* quartet" (2012) 53 *The Canadian Business Law Journal* 1.
[68] K Calitz 'The jurisdiction of the Labour Court in international employment contracts in respect of workplaces outside South Africa' (2011) 32 *Obiter* 694.
[69] Calitz (n 68) 268.
[70] See *Hunt* (n 61) where it was held that the pith and substance approach was criticised for causing too much uncertainty; *Van Breda* (n 8) 265.
[71] *Muscutt v Courcelles* (2002), 213 D.L.R. (4th) 577, 60 O.R. (3d) 20 (Ont. C.A.).
[72] S Pitel & V Black 'Assumed jurisdiction in Canada: identifying and interpreting presumptive connecting factors' (2018) 14 *Journal of Private International Law* 194. T Monestier 'A real and substantial mess: the law of jurisdiction in Canada' (2007) 33 *Oueen's Law Journal* 184; the eight factors consisted of; a connection between the forum and the plaintiff's claim, the connection between the forum and the defendant, unfairness to the defendant in assuming jurisdiction, unfairness to the plaintiff in not assuming jurisdiction, involvement of other parties to the suit, the courts willingness to recognise and enforce an extra-provincial judgment rendered on the same jurisdictional basis, whether the case is interprovincial or international in nature and comity and the standards of jurisdiction elsewhere.

> world power anxious to safeguard its territorial sovereignty and jealous of any attempt by foreign states to intrude.[73]

The devout support for sovereignty that the principle of territoriality is premised upon was, accordingly, expressly rejected. The court further remarked on the necessity in developing rules regarding the jurisdiction of courts to foreign disputes as "[c]oncern for the rights of domestic plaintiffs who sought justice in the courts of their home province began to prevail over concern for the sovereignty of other states".[74]

In employment disputes concerning unfair dismissal, the *Muscutt* factors were again regarded. In both *Hodnett v Taylor Manufacturing Industries*[75] and *Newton v Larco Hospitality Management Inc*,[76] the court in Ontario seized jurisdiction on the basis of there being a real and substantial connection between the circumstances surrounding the dismissal and the Ontario court. In *Hodnett* the court further regarded the impact globalization had on the assumption of jurisdiction in growing cross-border cases, holding that;

> In the current world in the ever-increasing forces of 'globalization', it is very common to see a business enterprise that is active in many jurisdictions. …The real question on a motion such as the one at hand is whether there are sufficient connecting factors between the foreign defendant and the domestic jurisdiction such that it is just (and is seen to be just) for the domestic court to retain jurisdiction.[77]

In *Newton* the Ontario court gave express recognition to the need to protect vulnerable employees. The court assumed jurisdiction even where it was clear that the employee worked in Nevada and that the law of Nevada was the proper law of the employment contract. On this the court remarked that;

[73] *Muscutt* (n 71) para 12.
[74] *Muscutt* (n 71) para 24.
[75] *Hodnett v Taylor Manufacturing Industries* (2002) 18 C.C.E.L. (3d) 297 (Ont. S.C.J.).
[76] *Newton v Larco Hospitality Management Inc* ((2004), 70 O.R. (3d 04), 70 O.R. (3d 0427 (Ont.S.C.J.).
[77] *Hodnett* (n 75) para 29.

> refusal to assume jurisdiction would result in the loss of a substantial juridical advantage, with the probable result that the plaintiff would be without a remedy. Canadian courts view employees as vulnerable parties to employment contracts, deserving of protection from more powerful employers. Nevada courts apparently do not.[78]

Evidently, the test set out in *Muscutt* was underpinned by both factual and policy-driven considerations and was motivated primarily by elements of fairness.[79] This was, however, criticised for creating too much uncertainty and leaving the determination of jurisdiction at the discretion of the courts.[80] Accordingly, the Supreme Court of Canada in *Club Resorts Ltd. v Van Breda*[81] set out to modify the test so as to ensure certainty and predictability in cross-border litigation.[82] The challenge, as held by LeBel J, was to "reconcile fairness with the need for security, stability and efficiency in the design and implementation of a conflict of laws system".[83] The modified test in *Van Breda* assumes jurisdiction on the existence of objective factors linking the dispute to the forum.[84] Put simply, the court laid out presumptive connecting factors which, depending on the dispute at hand, will establish jurisdiction if they are proved to be present in a particular dispute.[85] *Van Breda* concerned a tort. The presumptive connecting factors for torts, as held by LeBel J, included the defendant being domiciled in the jurisdiction of the forum, the defendant carrying on business in the forum, the tort being committed in the forum and a contract connected to the dispute having been entered into in the forum.[86]

Similarities exist in South African law where the presence of a connecting factor, such as the place where a delict was committed, will usually allow a South African court to assume jurisdiction.[87] *Van Breda* further discussed the establishment of new

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[78] *Newton* (76) para 435.
[79] As above.
[80] As above.
[81] *Van Breda* (n 8).
[82] Pitel & Black (n 72) 8.
[83] *Van Breda* (n 8) para 73.
[84] *Van Breda* (n 8) para 82.
[85] As above.
[86] *Van Breda* (n 8) 90.
[87] CF Forsyth *Private international law: the modern Roman-Dutch law including the jurisdiction of the High Courts* (2012) 205.

connecting factors where they cease to be readily available in a particular dispute.[88] However, while the court set out to establish presumptive connecting factors for tortious claims, the court did not determine what the presumptive connecting factors for other causes of action might be.[89] Instead, the court in *Van Breda* left it to be determined at a later stage. Accordingly, "the common law development of assumed jurisdiction in Canada now consists of judges interpreting and applying the four connecting factors for tort established in [*Van Breda*], exploring possible new connecting factors for tort claims, and identifying presumptive connecting factors for claims other than tort and fleshing out their contours".[90]

Nevertheless, the court in *Van Breda* did hold that in identifying new presumptive connecting factors regard must be had for connections that are of a similar nature to those that have been listed.[91] The court further listed factors that should be taken into consideration when establishing a new connecting factor.[92] These include similarity between the newly established connecting factor and recognised presumptive connecting factors, treatment of the connecting factor in case law and similarity in legislation and lastly, treatment of the connecting factor in other legal systems that share the same commitments to order, fairness and comity.[93] This, of course, has left many questions open, the most important being, what weight should be accorded to each presumptive connecting factor?[94] Leaving this question to be answered in each individual cross-border dispute causes considerable uncertainty. On the other hand, it has been stated that a degree of flexibility "could perform a corrective function to avoid a totally unjust result".[95]

Nevertheless, from the above discussion it should be clear that, in the era of globalisation, methods of assuming jurisdiction need to look beyond territorial constructions that uphold sovereignty. The difficulty, as exemplified by Canada's development of assumed jurisdiction, is not in imagining the possibility of foreign

[88] *Van Breda* (n 8) para 91.
[89] Pitel & Black (n 72) 194.
[90] As above.
[91] *Van Breda* (n 8) para 91.
[92] As above.
[93] As above.
[94] Edinger (n 58) 274.
[95] JG Castel 'The uncertainty factor in Canadian private international law' (2007) 52 *McGill Law Journal* 555.

litigation taking place on domestic shores, but rather in establishing the proper connecting factors and applying them appropriately so as to ensure a result that is certain and predictable, whilst giving due consideration to what is fair and just under the particular circumstances of the dispute.

It is likely that development of jurisdictional approaches in the Labour Court will, similarly to developments in Canada, take place on a case by case basis until the correct connecting factors and their relative weight are thoroughly determined. While the employee's workplace may be a suitable connecting factor, having due consideration for what is fair in the circumstances and considering the weaker position of the employee, it might be necessary to think beyond narrow conditions that may have little connection with the employment relationship as a whole. As illustrated, the globalisation process and the growing realisation that employees require protection from this process, have forced courts in foreign jurisdictions to consider the possibility that the court situated in the place where work is performed will not always be the most appropriate forum in which to bring a claim.[96] It is, therefore, time for the Labour Court to consider a position that, as LeBel J held, balances fairness and stability.[97] While this may have not yet succeeded in Canada following the *Van Breda* judgment, it is certainly achievable.

5.4 Australia

The above two comparative sources dealt with territoriality as it impacts a court's jurisdiction. Territoriality, however, has an equally, if not greater, impact on the scope of domestic statutes. Applying domestic law to disputes with foreign elements is considered a significant encroachment on the sovereignty of a state that may be genuinely interested in governing the events that gave rise to the dispute.[98] Central to this position is, furthermore, the notion that labour laws are inherently territorial. Interpreted in this way, the territorial limitations placed on the employment statutes within South Africa find justification. However, Australia's FWA[99] challenges this. The Act regulates the employment relationship by prescribing minimum statutory

[96] Calitz (n 68) 693.
[97] Calitz (n 68) 673.
[98] FA Mann 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil Des Cours* 123.
[99] *Fair Work Act 2009* (Cwlth) s70.

entitlements, enabling flexible working arrangements and prohibiting workplace discrimination.[100] Essentially, the statute embodies the same provisions as found within the LRA, BCEA and EEA. In contrast to South Africa's employment statutes, however, the FWA has express extra-territorial application.[101]

The Act is applicable to all national system employers. A national system employer is defined, under section 14, as a company incorporated in Australia or a foreign company incorporated elsewhere that carries on business in Australia.[102] Protection is, furthermore, granted to a national system employee that, according to section 13, is an employee employed by a national system employer.[103] Section 34, furthermore, expressly extends the application of the Act to both Australian employers and Australian-based employees – both of whom are defined within section 35 of the Act. Importantly, the definition of an Australian-based employee is inclusive of those employed by an Australian employer irrespective of whether or not they work in Australia.[104] An Australian employer is, further, defined as a company whose central management and control is in Australia, thereby reflecting section 14 and not limiting the application of the Act to companies incorporated within the territory.[105] In determining the connections required for the Act to apply, the Australian Federal Court, further, held that the circumstances surrounding the employment relationship, and not the form or place of work, must be considered.[106] Accordingly, territoriality has a significantly less bearing on the application of employment rights in Australia.

In *Fair Work Ombudsman v Valuair Limited*,[107] the Federal Court again clarified the instances in which a foreign company would fall within the definition of an Australian employer. In this case, the Fair Work Ombudsman initiated proceedings against Valuair Limited, a company incorporated in Singapore, that contracted with Jetstar Airways, an Australian company, for the provision of cabin crew members.[108] Valuair regularly flew their employees to and from Australian ports of entry and sometimes

[100] FWA (n 99) sec 3.
[101] FWA (n 99) sec 34.
[102] FWA (n 99) sec 14.
[103] FWA (n 99) sec 13.
[104] FWA (n 99) sec 35(2)(b).
[105] FWA (n 99) sec 35(1)(f).
[106] *Fair Work Ombudsman v Valuair Limited (No 2)* [2014] FCA 759.
[107] As above.
[108] *Valuair* (n 106) para 6.

their employees performed duties on international flights operated by Jetstar. These duties operated on 'tag flights', which were flights occurring between domestic ports within Australia. The Ombudsman alleged that the company had failed to comply with a number of obligations set out in the FWA and initiated proceedings in the Federal Court.

The Court, firstly, rejected the notion that because some duties were performed within Australia that Valuair was now subject to the FWA.[109] As mentioned, the point of contention was the employment relationship, making the location of an employee and their duties insignificant in the determination of whether a close connection exists. Instead, the court held that the employment relationship must be "in and of Australia."[110] As such, the employment relationship was deemed insufficiently connected to Australia and the Act did not apply. The following factors were considered in this conclusion: the fact that the contract was entered into between a non-Australian company and non-Australian nationals, the employees were not resident within Australia, the contract had been entered into outside of Australia and payment was, likewise, made outside of Australia[111]. The employees' duties, furthermore, commenced and ended at their home base in Singapore.[112]

The significance of this decision is two-fold. Firstly, it shifts the attention away from the place and manner of work and finds importance within the employment relationship. The Federal Court expressly held that by focusing on the fact that the employees' performed some of their duties within Australia, the Applicant "[paid] insufficient regard to operational realities".[113] Secondly, the judgment seems to establish an all or nothing approach, whereby if sufficient connections between the employment relationship and Australia exist, the FWA applies to the totality of that relationship and not just the portions that are connected to the territory.[114] Another notable feature of this judgment is in the court's analysis of the employment relationship. On this note, the Federal

[109] *Valuair* (n 106) para 8.
[110] *Valuair* (n 106) para 74.
[111] *Valuair* (n 106) para 84.
[112] As above.
[113] *Valuair* (n 106) para 13.
[114] N Martin & E Blakers 'Casual employee overhaul: a guide for employers in Australia' (2021) https://www.squirepattonboggs.com/en/insights/publications/2021/04/casual-employee-overhaul-a-guide-for-employers-in-australia (accessed in July 2021).

Court remarked that an employment relationship is based on and arises from a contract of employment. Importantly, however, the Court held that the performance of work and the payment of remuneration are not in and of itself circumstances that identify an employment contract.[115] The nuance of this bears prominence as often times multiple contracts are signed in an attempt to either obtain work permits or procure services for a subsidiary,[116] thereby reducing the employment relationship to the locality of the workplace as specified within the contract.

In another dispute, the geographical location of the employee, as procuring services in Israel, was rejected as an argument against the application of the FWA. In *Shur v Innovit Australia*,[117] the Fair Work Commission expressly held that the location of the employee does not determine whether they meet the definition of an Australian-based employee within section 35. The question, rather, is whether there are "substantial connections between the Applicant's employment and Australia".[118] Accordingly, the fact that the employee entered into the contract while still based in Australia and performed maintenance over Australian products that were sold in Australia, the FWA applied to him as an Australian-based employee. With regards to the fact that the applicant worked in Israel, the court noted that it was merely "due to the nature of the work performed by the Applicant [that] he was able to perform that work from Israel, and the Respondent allowed him to perform the work from Israel".[119]

Notwithstanding the extra-territorial application of the FWA, the prospect of an employee falling within the scope of a statute is, thus, dependent on the factors that connect the employment relationship to the regulating state. The manner in which an employee works and from where they work are, in terms of the FWA, not determinative factors in this investigation. Nevertheless, where a statute is silent as to its territorial scope, the Australian Law Reform Commission recommended that generally worded

[115] *Valuair* (n 106) para 76.
[116] *Mecs Africa v Commission for Conciliation Mediation and Arbitration* (2014) 35 ILJ 745 (LC) para 10; in this case the two employment contracts were drafted, however, the second one was held to have been drafted merely so the employee could obtain a work permit to begin working in the Democratic Republic of Congo.
[117] *Shur v Innovit Australia Pty Ltd* [2021] FWC 830.
[118] *Shur* (n 117) para 84.
[119] *Shur* (n 117) para 84.

statutes be interpreted in light of choice of law rules.[120] The Report has been partially implemented; however, the approach had arguably already been secured by the High Court of Australia as early as 1934 in the case of *Wanganui-Rangitikei Electric Power Board v AMP Society*,[121] where Dixon J held that the choice of law approach is suitable for issues of territoriality in that it allows a statute to comply with the presumptions against extra-territoriality – where the necessary connections are established, the scope of the statute becomes intra-territorial as opposed to extra-territorial.[122]

In Chapter Three, this dissertation argued that the territorial scope of South Africa's employment statutes should be determined, not through a process of statutory interpretation, but rather through appropriate choice of law rules. There it was further argued that the place where the employee works should not have such a significant bearing on whether or not an Act applies. In Australia, the position is exactly that – the territorial scope has been expressly determined by parliament and so methods of statutory interpretation are unnecessary. In determining whether an applicant falls within the scope of the extra-territorial provision of the FWA, the place of their employment is not considered. Instead, the employment relationship as a whole is regarded. Issues of legal certainty do not arise as often as litigants are able to anticipate the FWA applying where a connection between the employment relationship and Australia exist.[123] While a number of connections might be applicable, the flexibility in this regard should be upheld – the multitude of different circumstances that might arise out of the changing nature of employment necessitate so.[124]

5.5 Conclusion

The extra-territorial scope of the FWA disputes the traditional perspective that labour requires domestic regulation. The ILO, in fact, highlighted the possibility of regulations with an extra-territorial reach becoming a means through which those working on digital labour platforms may be adequately protected.[125] This is especially

[120] M Keyes 'Statutes, choice of law and the role of forum choice' (2008) 4 *Journal of Private International Law* 12.
[121] *Wanganui-Rangitikei Electric Power Board* v *AMP Society* (1934) 50 CLR 581 para 601.
[122] As above.
[123] *Valuair* (n 106) para 83.
[124] Cherry (n 1) 3.
[125] Cherry (n 1) 28.

necessitated in the instances that private international law rules fail to appropriately and sufficiently resolve conflicts between different legal systems.[126] Yet, in most instances, a statute will be silent as to its territorial scope. Where this is the case in Australia, the Law Reform Commission recommended using choice of law rules to determine the scope.

In Canada, regarding jurisdiction, methods of statutory interpretation have been expressly rejected and an approach rooted in private international law has been established. The same is seen in the EU, where the Brussels Recast Regulation is hailed as the nucleus of private international law over matters of jurisdiction and the recognition and enforcement of foreign judgments. Accordingly, each comparative source correctly illustrates the global system of work, imagining new forms of work that require flexible forms of regulation and recognising the growing need to protect employees who work in this global system.

[126] As above.

Chapter 6: Conclusion

6.1 Introduction

This dissertation has attempted to criticise the approach developed in the Labour Court in their adjudication of international employment contracts. A central critique was made over the strict territorial implications the Labour Court has placed over the application of South Africa's employment statutes and how this, in turn, has become a determinative factor for assuming jurisdiction.[1] This conclusion has seen the Labour Court either rejecting jurisdiction upon the blanket application of the presumption against extra-territoriality, a practice established in *Genrec*, or jurisdiction is assumed upon the applicability of the statute concerned, thereby conflating and often ignoring the principles and methods underlying the choice of law enquiry.[2] The result of the latter conclusion is that the Labour Court is empowered with jurisdiction through the connections that establish a link between the employment relationship and the statute in question, resulting in a negation of the statutory jurisdictional principles that are outlined in the LRA.[3]

The question of whether the Labour Court may assume jurisdiction over a cross-border employment dispute has persistently been answered through a method of statutory interpretation.[4] Here the Court examines the provisions of the Act in question to ascertain parliament's intention regarding its territorial scope.[5] This approach has been heavily criticised throughout this dissertation. An argument has been submitted, instead, for the application of the methods found within private international law.

This position is made, firstly, on the premise that the correct legal principles should guide a court in their adjudication of a dispute. The correct principles, argued here, are found within private international law – strengthened on the view that parliament would not have intended to abolish these processes in favour of the presumption against

[1] See generally; *Astral Operations Ltd. v Parry* (2008) 29 ILJ 2668 (LAC) and *Mecs Africa v Commission for Conciliation Mediation and Arbitration* (2014) 35 ILJ 745 (LC).
[2] See generally; *Kleinhans v Parmalat SA (Pty) Ltd* (2002) 23 ILJ 1418 (LC) and *Robineau v Schenker SA (Pty) Ltd & Others* (2020) 41 ILJ 1648 (LAC).
[3] Labour Relations Act 66 of 1995 (LRA) secs 151, 156 & 157.
[4] *Astral Operations Ltd. v Parry* (2008) 29 ILJ 2668 (LAC); *Mecs Africa v Commission for Conciliation Mediation and Arbitration* (2014) 35 ILJ 745 (LC) and *Schenker South Africa (Pty) Ltd v Robineau and Others* (2019) 40 ILJ 213 (LC).
[5] S Dutson 'The territorial application of statutes' (1996) 22 *Monash University Law Review* 87-88.

extra-territoriality.[6] Secondly, the contention is furthermore, made in the appreciation for the precariousness of cross-border employment and the changes that the nature of employment has undergone, thus, further necessitating the need to look beyond traditional territorial notions of labour regulation.[7]

Methods of statutory interpretation will, however, prevail until such a time that the methods of private international law have been comprehensively delineated. Such has been the aim of this dissertation. The methods and principles of private international law have been presented throughout; however, this concluding chapter will concisely reflect on the approach in its totality, devoid of the analyses already made, so that it may culminate as a formal recommendation to the Labour Court over the adjudication of international employment contracts. This necessitates looking once more at the processes followed in regard to jurisdiction and choice of law.

6.2 Jurisdiction

As mentioned, the jurisdiction of the Labour Court is defined within the LRA.[8] Accordingly, entrenched within those provisions are principles outlining the court's subject-matter and personal jurisdiction. Closely aligned is prescriptive jurisdiction. However, this is a matter that falls within the choice of law enquiry as it deals with the powers of the legislature and the regulatory reach of statutes.

The Labour Court's subject-matter jurisdiction is rooted in employment.[9] Personal jurisdiction is, according to the Act, restricted to employment matters that occur within the Republic.[10] While the jurisdiction of the Labour Court is entrenched within statute, the Court is, nonetheless, able to govern the processes surrounding jurisdiction – processes that are not determined by the Act.[11] Accordingly, the Labour Court is free to utilise the common law methods developed in private international law to assist them in determining jurisdiction. Territoriality, as has been argued, might have a

[6] M Hook "The "statuist trap" and subject-matter jurisdiction' 2017 13 *Journal of Private International Law* 440.
[7] MA Cherry 'Regulatory options for conflicts of law and jurisdictional issues in the on-demand economy' (2019) *International Labour Organisation Conditions of Work Series and Employment Series* 3.
[8] LRA (n 3) secs 151, 156 & 157.
[9] LRA (n 3) sec 175 & Basic Conditions of Employment Act 77 of 1997 sec 77.
[10] As above.
[11] *Windybrow Theatre v Maphela and Others* (2016) 76 ILJ 2641 (LAC) para 17.

bearing on the application of South Africa's employment statutes, but should not be the guiding principle in the determination of jurisdiction.

The assumption of jurisdiction is, in any case, already premised on territorial principles. Even through the application of private international law provisions there needs to be an established connection between the forum and the circumstances leading to the dispute before a court may rightly assume jurisdiction over the parties.[12] These connections are termed *rationes jurisdictionis*.[13] Those connections, however, are not strictly limited to the place where the employee works. Recognised connections have been established in private international law and include, domicile, residence, the commission of a delict, creation or breach of a contract and the situation of property to name a few.[14] In domestic disputes, where the parties are resident or domiciled in South Africa (as is usually the case) the Labour Court is able to assume jurisdiction as it follows the general principle that the defendant should be sued where they are domiciled.[15] There is no reason that these domestic jurisdictional principles should be abandoned when faced with a cross-border dispute. The basis of jurisdiction does not change merely because foreign elements are involved.

The place of work, otherwise known as the *locus solutionis*, is a connection commonly found within the EU given that the Brussels Recast Regulation holds than an employee may sue their employer in the forum where they habitually work.[16] However, as has been illustrated, this is but one connection that may establish jurisdiction.[17] The place of work has been held as the most suitable connection for employment disputes as usually this is the forum that is most favourable to the employee.[18] Yet, as the ILO has highlighted, this is often no longer the case.[19] Instead, the place where an employee works is oftentimes fortuitous to the employment relationship as a whole and, following

[12] CF Forsyth *Private international law: the modern Roman-Dutch law including the jurisdiction of the High Courts* (2012) at 169.
[13] As above.
[14] As above.
[15] Forsyth (n 12) 169; this general principle is known as *actor sequitur forum rei*.
[16] Regulation (EU) no 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Recast Regulation) Art 21.
[17] Brussels Recast Regulation (n 16) Arts 21-23.
[18] K Calitz & C Garbers 'A comparative perspective on the application of domestic labour legislation in international employment disputes' (2013) 3 *Stellenbosch Law Review* 543.
[19] Cherry (n 6) 3.

the effects of the current (and growing) digital age, an employee may work somewhere simply because they can and not because their employment requires them to.[20]

Another principle underlying jurisdiction in cross-border disputes is the doctrine of effectiveness. This requires the court to ensure it is in a position to give an effective judgment.[21] This is usually satisfied where the defendant is domiciled or resident in the forum as the court has control over those persons or entities and may thus impart a meaningful judgment that may be effectively enforced thereafter.[22] The place of work, in the instances that it is fortuitous to the employment relationship as a whole, will not always be the most appropriate forum to bring a dispute and will, accordingly, not be the forum that may dispose of a meaningful judgment.[23]

Accordingly, the Labour Court errs in two respects; firstly, by making the territorial scope of South Africa's employment statute the determining factor for jurisdiction and secondly, by placing too much emphasis on the workplace. Rather, the Labour Court should enquire into whether a link between the South African territory and the dispute or parties exists.[24] The cases discussed within this dissertation all comprised of a defendant that was incorporated in South Africa. Most, in fact, involved an employee who was also domiciled in South Africa. Accordingly, on the strength of these factors alone, the Labour Court may have justifiably assumed jurisdiction. Where the court is met with facts that involve an employee who is domiciled and works outside of South Africa, regardless of the fact that the company that employed the employee is incorporated in South Africa, the Labour Court may justifiably reject jurisdiction as another forum is evidently more appropriate to adjudicate over the matter. This may only be determined, however, by looking into all the circumstances of the dispute, and not merely the circumstances surrounding where the employee works.[25]

[20] *Shur v Innovit Australia Pty Ltd* [2021] FWC 830.
[21] Forsyth (n 12) 170.
[22] As above.
[23] K Calitz 'The jurisdiction of the Labour Court in international employment contracts in respect of workplaces outside South Africa' (2011) 32 *Obiter* 693.
[24] Forsyth (n 12) 169.
[25] This was the case in *Astral Operations* (n 1).

6.2 Choice of law

In consideration of the fact that the Labour Court is restricted to applying South African law,[26] the processes surrounding choice of law need to be further clarified. While the contention here is that the Court should be mindful of keeping the two principles separate, choice of law, nonetheless, has a significant bearing on the Court's ability to assume jurisdiction. Accordingly, while the enquiry into jurisdiction usually comes before choice of law, it is likely that the two will be enquired into almost simultaneously. The processes surrounding private international law are known as a four-stage enquiry that usually starts with jurisdiction, however, there is no strict order in which this must occur.[27] Choice of law may, accordingly, be commenced with as a primary issue.

The importance of keeping these two processes separate has been discussed throughout this dissertation. The separation of these two processes has, further, been confirmed in foreign jurisdictions – particularly within the EU.[28] While the processes may engage similar connecting factors, the principles underlying choice of law are often negated when the enquiry is subsumed under jurisdiction. Party autonomy is often overlooked, resulting in the obscurity of express choice of law clauses.[29] Either a choice of law clause is disregarded in favour of the law of the forum, without any real clarity on the reasons for this limitation,[30] or a choice is upheld without consideration of the circumstances that might justify its limitation – where, for instance, the protection of the employee as a weaker contracting party is necessitated.[31]

Ultimately, the Court only questions whether the forum's legislation is applicable, thereby neglecting to consider the possibility of foreign legislation.[32] It is appreciated that the Labour Court finds it imperative to determine whether the forum's law is applicable to the dispute, considering that the Court has no power beyond the Act.

[26] LRA (n 3) sec 158 specifies the appropriate order(s) that the Labour Court may make. The Labour Court is, accordingly, bound by this section and may not proclaim on foreign law.
[27] Forsyth (n 11) 10.
[28] See generally; 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) for matters on choice of law and the Brussels Recast Regulation (n 16) on jurisdiction.
[29] See generally; *Robineau v Schenker SA (Pty) Ltd & Others* (2020) 41 ILJ 1648 (LAC).
[30] As above.
[31] Rome I (n28) Art 9(2).
[32] M Keyes 'Statutes, choice of law and the role of forum choice' (2008) 4 *Journal of Private International Law* 26.

However, where the Court may justifiably assume jurisdiction because the parties are both present within the Republic, the Court is also justified in having to forfeit that jurisdiction for the simple reason that they cannot adjudicate on the basis of foreign law. The conclusion that the Labour Court does not have jurisdiction due to the inapplicability of the LRA, for instance, is not incorrect in the instances that choice of law is founded upon the correct methods and principles. The method to be followed, as has been advocated for in this dissertation, is rooted in the application of multilateral conflict rules.[33] This requires a court to characterise the dispute and apply the appropriate conflict rule associated with that legal category.[34]

6.2.1 Characterisation and assigning choice of law

In Chapter Three, the contention surrounding the characterisation of free standing employment rights was analysed. Where the Labour Court has to determine the applicability of the provisions relating to unfair dismissals,[35] for instance, it has been proposed that the dispute should be nonetheless characterised as arising out of contract. This was argued in consideration of the fact that the rights and duties arising out of employment statutes are incidental to the employment contract and were, accordingly, devised to supplement the gaps in protection offered by the common law.[36] Characterising the dispute as contractual is, furthermore, consistent with the legitimate expectations of the parties who, in entering into a contract of employment, expect the rights and duties arising out of statute to be applicable to their employment relationship.[37]

Following the characterisation of an employment dispute as contractual, in the instances that the parties have not chosen the proper law of their contract, the Labour Court must embark on assigning the law that is most closely connected to the employment relationship.[38] This requires analysing the connections between the

[33] Forsyth (n 12) 7.
[34] Forsyth (n 12) 11.
[35] LRA sec 186 & 187.
[36] U Grusic 'The territorial scope of employment legislation and choice of law" (2012) 75 *Modern Law Review* 740; *Duncombe and Others v Secretary of State for Children, Schools and Families* [2011] UKSC 14 & 36 para 16.
[37] As above.
[38] C Roodt 'The integration of substantive laws and material justice in South African choice of law' (2003) 36 *The Comparative and International Law Journal of Southern Africa* 17.

employment relationship and South African law[39] The method proposed in Chapter Three was a flexible approach to choice of law. Accordingly, the law of the place of work – or the *lex loci solutionis* – should not be considered as the most important conflict rule. The assertion is usually that the *lex loci solutionis*, in being considered the most important conflict rule for international employment contracts, ensures legal certainty.[40] However, the suggestion here is that such an approach would not be adequate to determine cases that pose new challenges. The nature of labour, in becoming significantly less territorial, will continually pose new challenges and new forms of disputes. The current discourse surrounding the adjudication of gig-economy workers exemplifies this.[41]

The Labour Court should, thus, when assigning a choice of law, be considerate of a number of factors that may connect the employment relationship to the forum. The most prominent that arise in disputes of this nature have been discussed and, thus, it is submitted here that the following connections must be considered: the place of work, the place where the contract was entered into, the residence and or domicile or the parties and the place of payment.[42] Their relative weight may be determined by consideration of other, less formal, connecting factors such as the circumstances surrounding a dismissal and the nature of the work to be performed. Such a flexible approach is followed similarly in Canada as exemplified in Chapter Five.[43] In Australia, the extra-territorial application of the FWA further illustrates the importance of connections that are not associated with the place of work. For instance, corporations may be sued within Australia by their employees on the grounds that they are incorporated within Australian territory.[44] This corresponds to the dismantling of territorial notions of production, thereby reflecting the unrestricted flow of capital as a result of an employee's labour – wherever that may be derived from.[45]

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[39] As above.
[40] EA Fredericks 'The proper law of the international contract of employment: interpreting the *Kleinhans* decision' (2006) 18 *South African Mercantile Law Journal* 79.
[41] See generally; Cherry (n 7) and J Berg, MA Cherry & U Rani 'Digital labour platforms: a need for international regulation?' (2019) *Spanish Journal of Labour Economics*.
[42] These refer to the following conflict rules; the *lex loci solutionis*, *lex loci contractus* and the *lex loci domicilii*.
[43] See generally; *Club Resorts Ltd. v Van Breda* 2012 scc 17 (S.C.C.).
[44] *Fair Work Act 2009* (Cwlth) s70 sec 34 & 35.
[45] G Mundlak 'De-territorializing labor law' (2009) 3 *Law & Ethics of Human Rights* 192.

6.2.2 Mandatory rules

As mentioned, in the instances that the Labour Court treats choice of law and jurisdiction as one and the same, the principles surrounding party autonomy are obscured. While this might cause a choice of law clause to be ignored or limited in instances where there is no reason to do so, it equally fails to mitigate against any imbalance of bargaining power between the parties to the employment contract. A choice of law clause in an international employment contract risks being entirely dictated by employers.[46] Accordingly, the Labour Court should be mindful of the methods, established under private international law, that are intended to safeguard against the ill-effects of party autonomy.[47] While there are several avenues in which to safeguard against this, this dissertation has explored the application of the doctrine of mandatory rules. Reasoning for this lies in the appreciation of the jurisdiction of the Labour Court. Since mandatory rules justify the application of the law of the forum, the Labour Court is able to maintain jurisdiction even in the instances that a foreign law is seemingly applicable.[48] Nevertheless, since the doctrine of mandatory rules is a facet of the choice of law enquiry, the Labour Court risks overlooking such avenues where choice of law is subsumed under jurisdiction. Accordingly, the separation between these two concepts is constantly stressed.

After contemplation of the position in both the EU and the American Restatement, a mandatory rule may be understood as being so fundamental to the functioning and structure of the economic and political setting of a given legal system that it demands application to disputes that are brought before the forum that enacted such rule.[49] South African labour law, as has been argued, falls within this context. However, the stance here has not been to impose South African law on every cross-border employment dispute brought before the Labour Court. Instead, the doctrine was analysed in its totality, having regard to its nature and purpose, so that it may be applied in appropriate instances.

[46] Cherry (n 12) 24.
[47] P Nygh *Autonomy in international contracts* (1999) 46.
[48] Nygh (n 46) 193.
[49] As above.

Nevertheless, where a foreign law is unequivocally applicable to the dispute brought before the Labour Court, in certain instances the Court is able to override such a choice in favour of the law of the forum. This is established where the state has an interest in the application of its rules and a close connection exists between the interests of the state and the parties and the application of the forum's rules.[50] The interests of the state are, arguably, established where the labour provision involved is linked to a constitutional right of the forum.[51] Where the provision is not constitutionally driven, then the Court must enquire into the purpose behind the enactment of such provision to establish whether its underlying policies trigger the state's interests.[52] Where state interest is established, there must still be a connection to the rule that is intended to override the foreign choice of law. These connections usually present themselves within the choice of law enquiry.

Although other connections might exist (the doctrine requires the Labour Court to be active in establishing the preconditions that justify limiting party autonomy), domicile and residence were held, in Chapter Four, to be rather prominent connections for the application of the doctrine. Arguably, the presence of the parties within the Republic has a significant impact on the labour market of the state, thereby connecting the interests of the state to the application of its own rules. The interests of the parties are usually involved here too as the South African domicile of an employee further stresses the necessity in having their constitutional rights realised – constitutional protection was, in fact, found to be the most common ground justifying the application of South African labour law to cross-border employment disputes.[53] Where such protection is offered by a foreign law that is unequivocally applicable, however, the Labour Court should not override such law in favour of the law of the forum as there usually lacks justification in doing so.[54]

[50] KAS Schafer *Application of mandatory rules in the private international law of contracts* (2010) 306.
[51] *August Läpple (South Africa) v Jarret & others* (2003) 12 BLLR 1194 (LC); *Parry v Astral Operations Ltd* (2005) 26 ILJ 1479 (LC).
[52] Schafer (49) 18.
[53] *August Lapple* (50) para 46; *Parry* (n 50) para 72; *Kleinhans v Parmalat SA (Pty) Ltd* (2002) 23 ILJ 1418 (LC) para 47.
[54] Nygh (n 46) 205.

6.3 Final remarks

This dissertation is intended to fill the gaps surrounding academic literature on international employment contracts and disputes. From the onset of this dissertation it was acknowledged that scholarly commentary on private international law, and particularly its relationship with labour law, was lacking. The gaps left by the legislature as to the territorial scope of the various employment statutes it enacted should, nevertheless, be supplemented by the rules of private international law. While the best possible solution would be for the legislature to expressly determine the territorial scope of the Acts discussed within this dissertation, as is seen in Australia and the FWA, until such a time that this occurs the Labour Court must expressly reject methods of statutory interpretation in their adjudication of international employment contracts and follow, rather, a flexible approach to determining jurisdiction and, most importantly, choice of law.

Bibliography

Books

Bennion FAR *Understanding common law legislation: drafting and interpretation* (Oxford University Press 2009).

Davies P & Freedland M *Kahn-Freund's labour and the law* (Stevens & Sons 1984).

Dicey, AV; Morris, JHC & Collins, L *Dicey Morris & Collins on the conflict of laws* (Sweet & Maxwell 2014).

Forsyth CF *Private international law: the modern Roman-Dutch law including the jurisdiction of the High Courts* (Juta 2012).

Hutchison D; Pretorius, CJ Naude, T Du Plessis, JE Eiselen, S Floyd, TB Hawthorn, L Kuschke, B Maxwell, CJ & De Stadler, E *The law of contract in South Africa* (Oxford University Press Southern Africa 2012).

Nygh P *Autonomy in international contracts* (Clarendon Press 1999).

Oppong R *Private international law in commonwealth Africa* (Cambridge University Press 2013).

Sack RD *Human territoriality: its theory and history* (Cambridge University Press 1986).

Schafer KAS *Application of mandatory rules in the private international law of contracts* (Peter Lang 2010).

Schwab K *The Fourth Industrial Revolution* (Crown Publishing 2016).

Torremans, P; Fawcett, JJ & Grusic, U *Cheshire, North & Fawcett private international law* (Oxford University Press 2017).

Van Niekerk A; Smit, N Christianson, M McGregor, M & van Eck, S *Law@work* (LexisNexis 2018).

Weintraub RJ *Commentary on the Conflict of Laws* (West Publishing Company 2010).

Wolff M *Private international* law (Oxford Clarendon Press 1950).

Journal Articles

Allarousse, V 'A comparative approach to the conflict of characterisation in private international law' (1991) 23 *Case Western Reserve Journal of International Law* 479.

Berg, J; Cherry, MA and Rani, U 'Digital labour platforms: a need for international regulation?' (2019) *Spanish Journal of Labour Economics* 104-128.

Berman, PS 'The globalization of jurisdiction' (2002) 151 *University of Pennsylvania Law Review* 311.

Black, V 'Simplifying court jurisdiction in Canada' (2012) 8 *Journal of Private International Law* 411.

Blackshield, T 'Working the metaphor: the contrasting use of "pith and substance" in Indian and Australian law' (2008) 50 *Journal of Indian Law Institute* 4.

Blom, J 'New ground rules for jurisdictional disputes: The *Van Breda* quartet' (2012) 53 *The Canadian Business Law Journal* 1.

Blom, J 'The Court Jurisdiction and Proceedings Transfer Act and The Hague Conference's Judgments and Jurisdiction Projects' (2018) 55 *Osgoode Hall Law Journal* 1.

Bogg, A 'Labour law is a subset of employment law revisited' (2020) 43 *Dalhousie Law* 2.

Borcher, PJ 'Categorical exemptions to party autonomy in private international law' (2007) 82 *Tulane Law Review* 1645-1661.

Braunig, LT 'Statutory interpretation in a choice of law context' (2005) 80 *New York University Law Review* 3.

Buxbaum, HL 'Mandatory rules in civil litigation: status of the doctrine post-globalisation' (2008) 18 *Article by Maurer Faculty* 21.

Buxbaum, HL 'Territory, territoriality and the resolution of jurisdictional conflicts' (2009) 57 *The American Journal of Comparative Law* 631.

Calitz, K and Garbers, C 'A comparative perspective on the application of domestic labour legislation in international employment disputes" (2013) 3 *Stellenbosch Law Review* 538-561.

Calitz, K 'The jurisdiction of the Labour Court in international employment contracts in respect of workplaces outside South Africa' (2011) 32 *Obiter* 3.

Calitz, K 'Globalisation, the development of Constitutionalism and the individual employee' (2007) 10 *Potchefstroom Electronic Law* 2.

Castel, JG 'The uncertainty factor in Canadian private international law' (2007) 52 *McGill Law Journal* 555.

Cherry, MA 'Regulatory options for conflicts of law and jurisdictional issues in the on-demand economy' (2019) *International Labour Organisation Conditions of Work Series and Employment Series* 106.

Childress, DE 'Comity as conflict: resituating international comity as conflict of laws' (2010) 44 *University of California Law Review* 11.

Chong, A 'The public policy and mandatory rules of third countries in international contracts' (2006) 2 *Journal of Private International Law* 1.

Czerwinski, M 'The law applicable to employment contracts under the Rome I-Regulation' (2015) 5 *Adam Mickiewicz University Law Review* 147-162.

Dutson, S 'The conflict of laws and statutes: The international operation of legislation dealing with matters of civil law in the United Kingdom and Australia" (1997) 60 *The Modern Law Review* 5.

Dutson, S 'The territorial application of statutes' (1996) 22 *Monash University Law Review* 69.

Edinger, E '*Club Resorts v Van Breda*: extraterritoriality revisited' (2014) 55 *Canadian Business Law Journal* 2.

Edinger, E and Black, V "A new approach to extraterritoriality: Unifund Assurance Co. V. I. C. B. C." (2004) 40 *Canadian Business Law Journal* 2.

Florey, K 'Resituating territoriality (2019) 27 *George Mason Law Review* 1.

Fombad, C & Kibet, E 'Transformative constitutionalism and the adjudication of constitutional rights in Africa" (2017) 17 *African Human Rights Law Journal* 2.

Fredericks EA 'The proper law of the international contract of employment: interpreting the *Kleinhans* decision' (2006) 18 *South African Mercantile Law Journal* 1.

Frost, T; Gowland, G and Chaudhri, I 'Globally mobile employees: whose labour laws apply?' (2016) *LegalTalk.*

Ginsburg, T 'Comment on: a new jurisprudential framework for jurisdiction' (2015) 109 *AJIL UNBOUND* 69-74.

Guedj, TG 'The theory of the Lois de Police, a functional trend in continental private international law – a comparative analysis with modern American theories' (1991) 39 *American Journal of Comparative Law* 4.

Grusic, U 'Recognition and enforcement of judgments in employment matters in EU private international law' (2016) 12 *Journal of Private International Law* 3.

Grusic, U 'The territorial scope of employment legislation and choice of law' (2012) 75 *Modern Law Review* 5.

Hook, M "The "statuist trap" and subject-matter jurisdiction' 2017 13 *Journal of Private International Law* 2.

Johnston, R 'Territory and territoriality in a globalizing world' (2003) 70 *EKISTICS* 418-419.

Le May, D 'The Quebec legal system: An overview' (1992) 84 *Law Library Journal* 189.

Keyes, M 'Statutes, choice of law and the role of forum choice' (2008) 4 *Journal of Private International Law* 1.

Mann, FA 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil Des Cours* 1.

Mann, FA 'Statutes and conflict of laws' (1972) 46 *British Year Book of International Law* 1.

Mayer, P 'Mandatory rules of law in international arbitration' (1986) 2 *International Arbitration* 4.

Merrett, L 'New approaches to territoriality in employment law' (2015) 44 *Industrial Law Journal* 53.

Merrett, L 'The extra-territorial reach of employment legislation' (2010) 20 *Industrial Law Journal* 4.

Meskic, Z and Radoncic, D 'Brussels I Recast and the South-East Europe' (2013) 15 *Revija za Evropsko pravo* 1.

Mitchell, J 'To override, and when? A comparative evaluation of the doctrine of mandatory rules in South African private international law to override and when' (2013) 130 *The South African Law* 4.

Monestier, T 'A real and substantial mess: the law of jurisdiction in Canada' (2007) 33 *Oueen's Law Journal* 179.

Morris, JHC 'Falconbridge's contribution to the conflict of laws' (1957) 35 *The Canadian Bar Review* 6.

Mudlak G 'De-territorializing labor law' (2009) 3 *Law and Ethics of Human Rights* 2.

Mureinik, E 'Bridge to where? Introduction to the Interim Bill of Rights' (1994) 10 *African Journal on Human Rights* 31.

Neels JL and Fredericks EA 'An introduction to the African principles of commercial private international law" (2018) 2 *Stellenbosch Law Review* 29.

Pitel, SGA & Black, V 'Assumed jurisdiction in Canada: identifying and interpreting presumptive connecting factors' (2018) 1 *Journal of Private International Law* 2.

Poesen, M 'Concurrent liabilities and jurisdiction over individual contracts of employment under the Brussels Ia Regulation' (2020) 16 *Journal of Private International Law* 2.

Ratner, JR 'Using Currie's Interest Analysis to Resolve Conflicts between State Regulation and the Sherman Act' (1989) 30 *William and Mary Law Review* 705.

Roodt, C 'Jurisdiction of the South African Labour Court: employer identity and party autonomy' (2003) 15 *Mercantile Law Journal* 1.

Roodt, C 'Reflections on theory, doctrine and method in choice of law' (2007) 40 *The Comparative and International Law Journal of Southern Africa* 1.

Roodt, C 'The integration of substantive laws and material justice in South African choice of law' (2003) 36 *The Comparative and International Law Journal of Southern Africa* 1.

Schultz T and Ridi N 'Comity and international courts and tribunals' (2017) 50 *Cornell International Law Journal* 3.

Uddin, M 'Domicile as a personal connecting factor: an assessment of judicial decision' (2018) 1 *International Journal of Global Community* 3.

Van Bochove, LM 'Overriding mandatory rules as a vehicle for weaker party protection in European private international law' (2014) 7 *Erasmus Law Review* 3.

Wojewoda, M 'Mandatory rules in private international law: with special reference to the mandatory system under the Rome Convention on the Law Applicable to Contractual Obligations' (2000) 7 *Maatricht Journal of European and Comparative Law* 2

Case Law

Astral Operations Ltd. v Parry (2008) 29 ILJ 2668 (LAC).

August Läpple (South Africa) v Jarret & others (2003) 12 BLLR 1194 (LC).

Club Resorts Ltd. v. Van Breda 2012 SCC 17.

Commission v Luxembourg Case C-319/06 [2008] ECR 1-4232.

Creutzburg v Commercial Bank of Namibia (2006) 4 All SA 327 SCA.

*Commissioner of Inland Revenue v Estate Greenacre (*1936) NPD 225.

Duncombe and Others v Secretary of State for Children, Schools and Families [2011] UKSC.

Estate Agents v Lek 1979 (3) SA 1048 (A).

Ewing McDonald & Co Ltd v M & M Products Co 1991 (1) SA 252 (A).

Fair Work Ombudsman v Valuair Limited (No 2) [2014] FCA 759.

Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry & others (1995) 16 ILJ 51 (A).

Giulia Pugliese v Finmeccanica SpA, Betriebsteil Alenia Aerospazio Case C-437/00Pugliese EU:C:2002:511.

Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board 1950 (2) SA 420 (A).

Guggenheim v Rosenbaum 1961 (4) SA 21 (W) 31A.

Heiko Koelzsch v État du Grand Duchy of Luxemburg case C-29/10.

Heiko Koelzsch v Grossherzogtum Luxembourg C-29/10 ECJ.

Hilton v Guyot 159 U.S. 113, 164 (1895).

Hodnett v Taylor Manufacturing Industries (2002) 18 C.C.E.L. (3d) 297 (Ont. S.C.J.).

Hunt v T&N plc (1993), 4 S.C.R. 289, 109 D.L.R. (4th) 16.

Kleinhans v Parmalat SA (Pty) Ltd (2002) 23 ILJ 1418 (LC).

Ladore v Bennett [1939] A.C. 468 (Ontario P.C.).

Laurens NO v Von Hohne (1993) 2 SA 104 (W).

Lawson v Serco [2006] UKHL 3; [2006] 1 All ER, 823.

Madondo v Safety and Security Sectoral Bargaining Council and Others (2015) 36 ILJ 2314 (LC).

Mecs Africa v Commission for Conciliation Mediation and Arbitration (2014) 35 ILJ 745 (LC).

Miguel Jose Moreno Osacar v Ryanair Designated Activity Company C-169/16 Ryanair EU:C:2017:688.

Monare v South African Tourism and Others (2016) 37 ILJ 394 (LAC).

Morguard Investments Ltd. v De Savoye (1990), 76 D.L.R. (4th) 256, [1990] 3 S.C.R. 1077 (S.C.C.).

Mukaddam v Prioneer Foods (Pty) Ltd and Others (2013) 10 BCLR 1135 (CC).

Muscutt v Courcelles (2002), 213 D.L.R. (4th) 577, 60 O.R. (3d) 20 (Ont. C.A.).

Newton v Larco Hospitality Management Inc ((2004), 70 O.R. (3d 04), 70 O.R. (3d 0427 (Ont.S.C.J.).

Parry v Astral Operations Ltd (2005) 26 ILJ 1479.

Ravat v Halliburton Manufacturing Services Limited [2012] UKSC.

Robineau v Schenker SA (Pty) Ltd & Others (2020) 41 ILJ 1648 (LAC).

Sandra Nogueira and Others v Crewlink Irland Ltd Cases C-168/16.

Schenker South Africa (Pty) Ltd v Robineau and Others (2019) 40 ILJ 213 (LC).

Serfontein v Balmoral Central Contracts SA (Pty) Ltd (2000) 21 ILJ 1019 (CCMA).

Shur v Innovit Australia Pty Ltd [2021] FWC.

Spendiff NO v Kolektor (Pty) Ltd 1992 (2) SA 537 (A).

Society of Lloyd's v Price and Lee (2006) SCA 87 (SCA).

South African Tourism v Monare and Others (2014) 35 ILJ 2280 (LC).

Standard Bank of South Africa Ltd v Efroiken and Newman 1924 AD 171.

Todd v British Midland Airways [1978] ICR 959.

United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare (Case C-184/12) [2013] EUECJ.

Vita Food Products Inc v Unus Shipping Co Ltd [1939].

Wanganui-Rangitikei Electric Power Board v *AMP Society* (1934) 50 CLR 581.

Windybrow Theatre v Maphela and Others (2015) 36 ILJ 1951 (LC).

Legislation

Basic Conditions of Employment Act 77 of 1997.

Constitution of the Republic of South Africa, 1996.

Civil Code of Quebec L.Q. 1991, ch. 64.

Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28.

Electronic Communications and Transactions Act 25 of 2002.

Employment Equity Act 55 of 1996.

Employment Rights Act 1996 c 18.

Fair Work Act 2009 (Cwlth) s70.

Interstate Succession Act 81 of 1987.

Labour Relations Act 66 of 1995.

Labour Relations Act Regulation 1774 of 2006 Code of Good Practice: Who is an employee?

Property (Relationships) Act 1976 (NZ).

Superiors Courts Act 10 of 2013.

Supreme Court of Queensland Act 1991; Uniform Civil Procedure Rules 1999.

The Constitution of the Republic of South Africa, 1996.

Tourism Act 3 of 2014.

Switzerland's Federal Code on Private International Law (CPIL) 1987.

Dissertation and Thesis

Kandiyero, C 'Party autonomy in Brazilian and South African private international law of contract' LLM Dissertation, 2015 University of Johannesburg

International Legislation

Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC).

International Labour Organisation Termination of Employment Convention, 1982 (No. 158).

Posted Workers Directive 96/71/EC.

Regulation (EC) no 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations

The Hague Convention on the Principles on Choice of Law in International Commercial Contracts (2015) Netherlands: The Hague

International Publications

Directorate-General for Internal Policies: Employment and Social Affairs (2011) European Commission: Brussels

Unpublished papers

Allsop, J and Ward, D 'Incoherence in Australian private international laws' (2013) unpublished paper delivered at Sydney Centre for International Law Conference, Sydney Law School, Australia.

Dickinson, A 'The future of private international law in Australia' (2011) Symposium paper delivered at the University of Sydney.

Internet Sources

Canada Guide 'The Canadian legal system' https://thecanadaguide.com/basics/legal-system/#:~:text=Canada's%20legal%20system%20is%20based,Charter%20of%20Rights%20and%20Freedoms.&text=Laws%20that%20violate%20the%20Constitution,Canada%20being%20the%20highest%20authority. (accessed 23rd July 2021).

Martin, N and Blakers, E 'Casual employee overhaul: a guide for employers in Australia'(2021) https://www.squirepattonboggs.com/en/insights/publications/2021/04/casual-employee-overhaul-a-guide-for-employers-in-australia (accessed July 2021).

Latham, B 'SA's border closures leave workers stranded, risks lives and jobs https://www.biznews.com/briefs/2021/01/14/sa-border-closures (accessed 15th January 2021).

Symeonides, S 'The Brussels I Regulation and third countries' (2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3231715 (accessed 16th April 2021).