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THE INTERNATIONAL ARBITRATION ACT 15 OF 2017: IMPETUS FOR DEVELOPMENTS ON THE CROSS-BORDER COMMERCIAL FRONT

1 *Introduction*

From a South African perspective, the promotion of international trade, as well as the development of effective judicial and extra-judicial dispute resolution institutions, is of paramount importance for increased economic growth. One of the main aims of the International Arbitration Act 15 of 2017, which came into operation on 20 December 2017, is to promote South Africa as an arbitration venue for international commercial disputes. The act represents best practice in international arbitration; however, in order to promote South Africa as a venue for international commercial dispute resolution, arbitration should be strengthened and supported by the concomitant development of South African private international law in crucially relevant areas, as well as improved access to South African courts in cross-border commercial disputes. This contribution seeks to highlight the most pertinent matters relating to arbitration and jurisdiction clauses, as well as applicable law issues under the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, as incorporated into Act 15 of 2017 and the potentially significant role to be played by the 1980 Convention on Contracts for the International Sale of Goods (the CISG).

2 *Legislative framework*

The current Arbitration Act 42 of 1965 was enacted to regulate both domestic and international arbitration. With the promulgation of Act 15 of 2017, the application of Act 42 of 1965 is now limited to domestic arbitration (s 4). Act 42 of 1965 provides for arbitration based on written arbitration agreements (s 1), as well as for the enforcement of such arbitral awards (s 31). The main point of criticism levelled against Act 42 of 1965 is that it allows too readily for curial intervention in the arbitration process, resulting in unnecessary delays and expense, as well as party autonomy being accorded insufficient respect (South African Law Commission *Domestic Arbitration*, Project 94 (2001) par 1.03-1.08 and par 2.16-2.23 and International Arbitration Bill B10 of 2017 par 5). Reforms to bring domestic arbitration in step with modern approaches to arbitration in other countries are in the pipeline but are yet to come to fruition (South African Law Commission, Project 94 (2001); South African Law Reform Commission *Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998*, Project 94 (2013) and International Arbitration Bill).

Following on South Africa's accession to the New York convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 in 1976, the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 was enacted to give effect to South Africa's obligations under the convention. One of the main shortcomings of Act 40 of 1977 was that it did not contain a provision for the enforcement of arbitration agreements; in addition, the text of the New York Convention was published in the *Government Gazette* (GN 1028 *GG* 5160 18-06-1976) but not incorporated into the implementing legislation. Act 40 of 1977 has now been repealed by Act 15 of 2017 – in its place, chapter 3 of Act 15 of 2017 provides for the "recognition and enforcement of arbitration agreements and foreign

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arbitral awards". The full text of the New York Convention is incorporated into Act 15 of 2017 (sch 3). Act 15 of 2017 also incorporates the UNCITRAL Model Law into South African law (as adopted by UNCITRAL in 1985, with amendments adopted in 2006 and subject to minor adaptations). The UNCITRAL Model Law contains provisions regarding the enforcement of international commercial arbitration agreements (a 8(1)), as well as provisions for the recognition and/or enforcement of international commercial arbitral awards (a 36). South Africa did not enter any reservations when it acceded to the New York Convention, with the result that its operation is not limited to commercial matters as far as South Africa is concerned (a 1(3)); the only exclusions are matrimonial causes or matters incidental thereto, as well as matters relating to status (s 2 of Act 42 of 1965, via s 4 of Act 15 of 2017).

Though not limited to arbitration, the Protection of Businesses Act 99 of 1978, which was enacted to protect local industries "from the draconian effects of certain foreign laws, in particular those allowing awards of penal or multiple damages" (South African Law Commission, Project 121 *Consolidated Legislation Pertaining to International Judicial Co-Operation in Civil Matters Report* par 5.1.1), presented a major obstacle to South Africa's obligations under the New York Convention. Act 99 of 1978 required ministerial consent for, and in some cases completely prohibited, the recognition and/or enforcement of certain foreign arbitral awards (s 1 and 1D). Act 15 of 2017 now removes arbitral awards from the ambit of Act 99 of 1978, which means that those restrictions and prohibitions no longer apply to foreign or international arbitral awards.

3 *Arbitration and jurisdiction clauses*

3.1 Foreign arbitration and jurisdiction clauses

Party autonomy is the cornerstone of international commerce. This doctrine allows contracting parties to choose the forum where disputes arising from their contract will be adjudicated upon, as well as the method of dispute resolution (*eg*, arbitration or litigation) and the law that will be applied to resolve disputes (Nygh *Autonomy in International Contracts* (1999) 15 and 37). When parties opt for arbitration as a method of dispute resolution, the enforcement of their arbitration agreement is central to the swift and efficient resolution of any dispute that may arise. When South Africa acceded to the New York Convention, the implementing legislation (Act 40 of 1977) provided only for the enforcement of foreign arbitral awards (s 3; *recognition* of foreign arbitral awards was not expressly provided for either). Furthermore, no provision was enacted to give effect to article II(3) of the convention, which provides for the enforcement of the arbitration agreement itself:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

Due to this legislative oversight in regard to the enforcement of foreign arbitration agreements, section 6(2) of Act 42 of 1965 (being applicable to domestic and international arbitration until the promulgation of Act 15 of 2017) remained the only provision on the statute book:

> "If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just."

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This provision, which was not as strict as the provision in article II(3) of the New York Convention, allowed courts considerable leeway in respect of the enforcement of an arbitration agreement. Although most cases dealing with foreign arbitration clauses did not specifically refer to section 6(2) of Act 42 of 1965, the courts assumed a discretion in terms of whether to enforce such an arbitration clause or not. In most cases this discretion was exercised in the same way as an exclusive foreign jurisdiction clause in a contract. This is evident from the courts' reliance on *The Eleftheria Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v Owners of Ship or Vessel Eleftheria* (1969 2 All ER 641 (PDA)), the *locus classicus* on exclusive foreign jurisdiction clauses in Anglo-common law jurisdictions (see *Intercontinental Export Company (Pty) Ltd v MV* Dien Danielsen 1982 3 SA 534 (N); *Polysius* (*Pty*) *Ltd v Transvaal Alloys* (*Pty*) *Ltd* 1983 2 SA 630 (W); *MV* Iran Dastghayb *Islamic Republic of Iran Shipping Lines v Terra-Marine SA* 2010 6 SA 493 (SCA); *Foize Africa (Pty) Ltd v Foize Beheer BV* 2013 3 SA 91 (SCA)).

According to the *Eleftheria* case the principles applicable to a stay of proceedings in the case of an exclusive foreign jurisdiction clause are as follows:

> "(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:- (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial" (645B-E).

Apart from the factors that a court may take into consideration in exercising its discretion whether to grant a stay, it is important to note that the onus is on the plaintiff (the party breaching the exclusive foreign jurisdiction clause) to prove why a stay of proceedings should not be granted. In other words, the court will grant a stay in favour of the foreign court, unless the plaintiff is able to "show strong cause for not doing so". Therefore, while our courts did not apply the strict New York Convention provision in regard to the enforcement of foreign arbitration agreements (a II(3)), they at least embraced the heavy onus required to avoid a stay of proceedings in terms of the *Eleftheria* case, thereby protecting the sanctity of contract and party autonomy. Nevertheless, the exercise of a discretion, whether to stay proceedings or not, by the courts, was in direct contravention of article II(3) of the New York Convention.

In the *Foize* case Leach JA added additional considerations to those set out in the *Eleftheria* case, in exercising the discretion whether to stay proceedings or not. The relevant contract included an irrevocable consent to the jurisdiction of the courts of Holland [*sic*], an arbitration clause in favour of Amsterdam, as well as an express choice of Dutch law (par 8). The additional factors, which were not intended to be exhaustive, included the following:

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(1) Multiplicity of actions: In cross-border litigation, it is preferable to avoid multiple suits in different courts, which may result in conflicting decisions. Furthermore, a single action has the advantage of efficiency in terms of time and costs.
(2) Cost of litigation: The cost of litigating in different countries, as well as the speed of litigation, is an important consideration in transnational litigation.
(3) Arbitration clause: Leach JA was of the view that where a matter involved questions of law rather than fact, "arbitration may well prove to be both inconvenient and impractical" (par 28(e)).

However, according to the New York Convention, none of the considerations pertaining to jurisdiction clauses are relevant to the enforcement of a foreign arbitration clause – enforcement can only be denied if the clause is "null and void, inoperative or incapable of being performed" (a II(3)). Not even the consideration that the matter may involve a question of law, rather than fact, should play a role.

Act 15 of 2017 now sets the record straight. In terms of section 16(1) of Act 15 of 2017 an arbitration agreement must be enforced in South Africa as required by the New York Convention – that is, unless it is null and void, inoperative or incapable of being performed (a II(3)). In addition, article 8(1) of the UNCITRAL Model Law contains a provision to similar effect. It is imperative that our courts take heed and apply Act 15 of 2017 to full effect in respect of the enforcement of foreign arbitration agreements. This will require a complete about turn by our courts regarding the treatment of foreign arbitration agreements. Initial indications are that our courts are doing this (*Atakas Ticaret Ve Nakliyat AS v Glencore International AG* (A42/2014) 2018 ZAKZDHC 32 (20 April 2018)).

3.2 Arbitration and jurisdiction clauses in favour of South Africa

While the position regarding foreign arbitration and foreign exclusive jurisdiction clauses should now be settled, the situation is different in respect of international arbitration and jurisdiction clauses in favour of South Africa.

In the recent case of *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL* 2015 1 SA 345 (SCA) the supreme court of appeal delivered a strong judgment in favour of the enforcement of international arbitration clauses, thereby endorsing sanctity of contract and party autonomy. In this case the only connection with South Africa was the South African arbitration venue (Gauteng). Both parties to the litigation were *peregrini* of the courts of South Africa, the contracts (main and interim) were concluded outside South Africa, performance was to take place outside South Africa and there was an express choice of law clause selecting English law as the proper law of the contract. In the words of Willis JA:

> "South African courts not only have a legal but also a socio-economic and political duty to encourage the selection of South Africa as a venue for international arbitrations. International arbitration in South Africa will not only foster our comity among the nations of the world, as well as international trade but also bring about the influx of foreign spending to our country" (par 30).

This was also emphasised by Gorven AJA:

> "With reference to the rules and the international trend referred to and relied on by both parties, it is clear that if courts arrogate to themselves the right to decide matters which parties have agreed should be dealt with by arbitration, the likelihood of this country being chosen as an international arbitration venue in future is remote in the extreme. Persons wishing to have their disputes resolved by arbitration do not wish the process to be retarded by constant recourse to courts" (par 59).

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This stance is now strengthened by Act 15 of 2017, which provides for the enforcement of arbitration agreements, unless the agreement is null and void, inoperative or incapable of being performed (s 16(1) and a II(3) of the New York Convention; a 8(1) of the UNCITRAL Model Law). As a result, there should not be any problems regarding the enforcement of arbitration agreements in favour of a South African venue, even in the absence of any other connections with South Africa. This means that South Africa can be chosen as a completely neutral arbitration venue and that an arbitration agreement will be enforced, unless it falls foul of Act 15 of 2017.

The position is far more complicated in respect of jurisdiction clauses selecting a South African forum as a neutral venue for transnational commercial litigation. In this regard, mere submission by consent to the jurisdiction of a South African court, in the absence of a recognised *ratio jurisdictionis*, will not suffice for jurisdictional purposes. This is especially the case in regard to claims sounding in money where the cause of action arose outside the court's area of jurisdiction and none of the parties is domiciled or resident in the court's area of jurisdiction, in other words, both parties are *peregrini* (Forsyth *Private International Law* (2012) 217). The position is further complicated by the fragmented nature of high court jurisdiction in South Africa: each division has its own territorial area of jurisdiction and therefore an individual may be an *incola* of one division of the high court but a (local) *peregrinus* of another division, while a foreigner will be a *peregrinus* of all the divisions of the high court (Forsyth 221 ff). This means that a jurisdiction clause, stipulating that the parties submit to the jurisdiction of the South African courts, will have to be interpreted with reference to a specific division of the high court, with all the attendant complexities relating to local and foreign *peregrini*.

Forsyth's plea that parties to transnational contracts should, as a matter of policy, be able to and, indeed, be encouraged to choose South Africa as a neutral venue for litigation, was endorsed by Heher JA in *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* 2005 2 SA 522 (SCA) par 17). However, since the case concerned a local plaintiff and a peregrine defendant, Heher JA noted that his "approval of the practical advantages of recognising jurisdiction on the grounds discussed by Forsyth should not be understood as necessarily extending to [a peregrine plaintiff]" (par 17). In this case the contract did not contain a typical jurisdiction clause – submission to jurisdiction was based on a *domicilium citandi et executandi* (an address in Johannesburg: par 5) expressly chosen by the parties for service of process and legal notices. (The contract also contained an express choice of law clause in favour of South African law: par 5 and par 14.)

Submission to jurisdiction is widely recognised as a ground of international competence justifying the recognition and/or enforcement of foreign judgments and should therefore also be recognised in the form of jurisdiction clauses (Forsyth 231). Furthermore, giving effect to jurisdiction clauses will benefit South Africa commercially, since it will supplement the endorsement of party autonomy in the Act 15 of 2017 and contribute to an increase in commercial dispute resolution in South Africa. At a time when other countries are establishing dedicated international commercial courts for foreigners (*eg*, Singapore: https://www.sicc.gov.sg/) (20-09-2018), South Africa's jurisdictional regime still turns foreigners away. This must change, and one of the first matters to be addressed in this regard is accession to the Hague Choice of Court Agreements Convention (2005).

3.3 The Hague Choice of Court Agreements Convention (2005)

The "Choice of Convention" is regarded as the "litigation" counterpart of the New York Convention. Article 5(1) echoes article II(3) of the New York Convention:

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"The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State."

According to article 1(1), the convention applies to exclusive choice of court agreements in international civil and commercial matters. The basic premise of the convention is three-fold: the chosen court should hear the case (a 5), any court not chosen must decline to hear the case (a 6), and the judgment rendered by the chosen court must be recognised and enforced in other contracting states (a 8).

In view of the certainty accorded arbitration agreements in Act 15 of 2017, through the incorporation of the UNCITRAL Model Law and the New York Convention, accession to the Choice of Court Convention will guarantee the same certainty in respect of exclusive choice of court agreements and promote South Africa as a neutral venue for international commercial litigation. Although the convention only covers exclusive choice of court agreements, it will necessitate a complete re-evaluation of the entire South African legal position on jurisdiction clauses. Firstly, a proper distinction must be made between optional and exclusive jurisdiction clauses and, secondly, the effect of both kinds of clauses must be determined with reference to the choice of South African and foreign courts. This must be supported by the development of the South African law of cross-border jurisdiction to bring it in step with international best practice.

It is also strongly recommended that the term "choice of court agreements" be adopted in the place of "jurisdiction clauses" – this will place jurisdiction agreements on a par with arbitration agreements, emphasising their existence apart from the contract in which they are contained.

4 *Determining the law applicable to the substance of international commercial arbitration matters under the UNCITRAL Model Law on International Commercial Arbitration (as incorporated in Act 15 of 2017)*

An international arbitration matter gives rise to several choice of law questions. Firstly, the law governing the international arbitration agreement needs to be determined, since the arbitral agreement is indeed severable from the rest of the contract (a 7(1) of the UNCITRAL Model Law incorporated as schedule 1 to Act 15 of 2017). The law governing the arbitration agreement applies to its validity and interpretation. This first question has generated much scholarly commentary (see *eg* Born "The law governing international arbitration agreements: an international perspective" 2014 *Singapore Academy of Law Journal* 814). Secondly, the law applicable to the procedural aspects of the arbitration – the so-called *lex arbitri* or law of the juridical seat of the arbitration – needs to be determined (a 20 of the UNCITRAL Model Law). Thirdly, the law applicable to the substance of the dispute stands to be determined. The latter will be briefly analysed in this contribution.

4.1 Party autonomy as foundation

Party autonomy is a fundamental principle in international arbitration (Jones "Choosing the law or rules of law to govern the substantive rights of the parties" 2014 *Singapore Academy of Law Journal* 911) and article 28(1) of the UNCITRAL Model Law provides that the arbitral tribunal shall decide the dispute "in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute". The principle of party autonomy is also recognised as part of South African law (*Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 3 SA

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509 (D)). A choice of applicable law may be express or tacit. It is important to note that article 28(1) refers to "rules of law" and not "the law", which means that parties are allowed to choose non-national rules of law or an international instrument such as the Convention on Contracts for the International Sale of Goods or CISG to govern the substance of their dispute (see the UNCITRAL Secretariat Guide on the New York Convention http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (13-09-2018); http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (13-09-2018)). When having to determine, interpret or apply a choice of law by the parties, arbitral tribunals should consider having regard to the Hague Principles on Choice of Law in International Commercial Contracts (https://www.hcch.net/en/instruments/conventions/full-text/?cid=135 (13-09-2018)). These principles are considered to be current best practice rules on choice of law (see, in general, Neels "The nature, objective and purposes of the Hague Principles on Choice of Law in international Commercial Contracts" 2015 *TSAR* 774).

4.2 Determining the applicable law in the absence of choice

If the parties fail to choose the law applicable to the substance of the dispute, then article 28(2) of the Model Law dictates that the arbitral tribunal applies the law determined by the conflict of laws rules "which it considers applicable". This phrase clearly empowers the arbitral tribunal with a discretion on the conflicts rules to be applied. However, it does require arbitral tribunals to utilise choice of law rules in their determination of the applicable law. This approach is termed the *voie indirecte* method of determining the applicable law. The Model Law's method of determining the applicable law is in contrast to the so-called direct approach found in several modern sets of arbitration rules that simply require the tribunal to determine the applicable law or rules of law (see Jones 913-915). An example of the direct approach may be found in article 21(1) of the International Chamber of Commerce Rules of Arbitration that provides that, in the absence of a choice by the parties, the tribunal applies "the rules of law which it determines to be appropriate" (in force from March 2017, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_21 (11-06-2018)).

Several methods have been followed by arbitral tribunals under the directive to apply the "conflict rules it considers applicable". These include the application of the conflict rules of the *lex arbitri*, "cumulative application of domestic conflict norms" and the application of general principles of choice of law (Petsche "Choice of law in international commercial arbitration" in Garimella and Jolly (eds) *Private International Law* (2017) 19 22). The cumulative method entails considering the conflicts rules of all the legal systems the dispute is connected with. If the different choice of law rules point to the same substantive law, that is then the set of rules applied. "The idea behind this method consists of demonstrating a 'false conflict' to show that all analyses would lead to the same applicable law" (Jones 921). The third method of identifying general principles of private international law or internationally recognised conflicts principles may refer to the application of the *lex mercatoria* or possibly trade usages and practice (see Derains "Jurisprudence of international commercial arbitrators concerning the determination of the proper law of the contract" 1996 *International Business Law Journal* 514 528 and Jones 924).

It is postulated that the adoption of Act 15 of 2017 will increase the number of international commercial arbitration matters heard in South Africa. At this stage, an international commercial tribunal sitting in South Africa and determining that the

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local private international law rules should apply to determine the applicable law, will be faced with outdated and ambiguous conflicts rules in this respect. When the parties have reached no agreement as to the law applicable to a contract, it is the task of the court to assign a proper law to the contract (Schoeman, Roodt and Wethmar-Lemmer *Private International Law in South Africa* (2014) 53). Authority exists in South African law for two approaches in this regard. The subjective approach is termed the "presumed intention" theory. In terms of this approach, the court tries to determine what the intention of the parties concerning the choice of an appropriate law would have been, had they applied their minds to the issue. The court therefore assigns an intention to the parties. The *locus classicus* for this approach is *Standard Bank of South Africa Ltd v Efroiken and Newman* (1924 AD 171). It was found that the proper law of the contract is "what ought, reading the contract by the light of the subject-matter and of the surrounding circumstances, to be presumed to have been the intention of the parties" (185). The subjective approach was also endorsed in *Guggenheim v Rosenbaum (2)* (1961 4 SA 21 (W)).

This subjective approach has not been emphatically rejected by the supreme court of appeal, although many judges have expressed themselves in favour of the objective approach (*Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 2 SA 138 (C) 146H-147A; the *Laconian* case 526D-H and 530I; *Ex parte Spinazze* 1985 3 SA 650 (A) 665H). In the older cases the general rule followed in assigning the proper law to a contract was that the *lex loci contractus* governs unless the contract is to be performed in a country other than that of the *lex loci contractus*, in which case the *lex loci solutionis* (law of place of performance) governs (the *Efroiken* case 185 ff). In the early cases this rule was justified on the basis that it accords with the presumed intention of the parties. In most later cases, however, in order to assign an intention to the parties, the court considers all the relevant connecting factors (see the *Guggenheim* case 31A).

The objective approach, on the other hand, seeks to determine the law of closest and most real connection to the contract by taking into account all relevant connecting factors in a qualitative manner (the *Laconian* case 528G-H; *Kleinhans v Parmalat* 2002 9 BLLR 879 (LC) par 21; *Parry v Astral Operations Ltd* 2005 10 BLLR 989 (LC) par 40). Relevant connecting factors include the *locus solutionis*, *locus contractus*, domicile/habitual residence or nationality of the parties and the place of agreed arbitration – to name but a few (*cf* Fredericks and Neels "The proper law of a documentary letter of credit (part 1)" 2003 *SA Merc LJ* 63 67-68; Neels and Fredericks "The music performance contract in European and Southern African private international law" 2008 *THRHR* 529). The *locus solutionis* is regarded as the most important connecting factor, but this may also be fraught with difficulty where the *locus solutionis* in respect of payment and that in respect of the characteristic performance differ. Under these circumstances, courts have applied either the unitary principle (the *Improvair* case) or the scission principle (the *Laconian* case). In terms of the latter, the court applies the law of the place of the performance that did not take place or was defective (see the *Laconian* case 528H-529B). These approaches may still not provide a clear answer as to the law of closest connection. If it is still not possible to choose between the two *leges loci solutiones*, then one of three solutions have been proposed. Firstly, Van Rooyen proposed that the scission principle be followed in such cases (*Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) 200). Secondly, it was proposed in an *obiter dictum* in the *Laconian* case that the *lex loci solutionis* in respect of payment should be applied (529E-F). Thirdly, in *Maschinen Frommer GmbH & CO KG v Trisave*

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Engineering & Machinery Supplies (Pty) Ltd 2003 6 SA 69 (C) it was proposed that the *lex loci solutionis* in respect of delivery of the goods should be applied.

It is clear that the dichotomy of approaches under South African private international law is not in keeping with modern, internationally accepted choice of law regimes. Due to the problematic position currently under South African private international law, arbitrators would probably rather turn to internationally accepted conflicts principles and most possibly have regard to the law of closest connection to the dispute. One may hope that international commercial arbitral tribunals' search for, and application of appropriate conflicts rules, would over time influence South African domestic private international law and lead to the adoption of a more current and acceptable approach to assigning the proper law in the absence of a choice by the parties. We support a solution similar to the Rome I Regulation (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) *Official Journal of the European Union* 2008 L 177/6; see, also, Marshall "Reconsidering the proper law of the contract" 2012 *Melbourne Journal of International Law* 505 and Wethmar-Lemmer "Harmonising or unifying the law applicable to international sales contracts between the BRICS states" 2017 *CILSA* 373 393). There should be fixed rules for commercial contracts, and in the case of an international sales contract, it should be in line with the Rome I Regulation's approach of applying the law of the place of habitual residence of the seller (characteristic performer) that has clearly found favour outside the European Union as well (*eg* in the Chinese private international law act, a 41 – English translation included in Basedow and Pissler *Private International Law in Mainland China, Taiwan and Europe* (2014) 439-446; see, also, He "Recent developments of new Chinese private international law with regard to contracts" in Basedow and Pissler 157 164). In terms of article 4(1)(*a*) of the Rome I Regulation, a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence. This fixed rule is coupled with an escape clause in article 4(3) allowing for the contract to be governed by the law of the country with which it is most closely connected if it is determined that the contract is manifestly more closely connected with another legal system than the legal system provided for in subsection 4(1).

The Rome Regulation's approach has much to commend it in that it provides the necessary legal certainty combined with flexibility and judicial discretion.

5 *International Commercial Arbitration in South Africa and the application of the CISG (via the rules of private international law)*

Many international commercial arbitral disputes involve international sales contracts that fall within the intended ambit of the CISG. South Africa is not a contracting state to the CISG yet (see the CISG status document http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (26-06-2018)). However, article 1(1)(*b*) of the CISG provides for application of the convention if the law of a contracting state is found to be applicable in terms of the rules of private international law.

> "It is submitted that when a forum's rules of private international law refer to the law of a CISG contracting state, article 1(1)(*b*) directs that the applicable sales law should be the CISG and not the proper law's domestic sales law. In this sense, article 1(1)(*b*) constitutes an internal conflict rule from the perspective of the CISG contracting state – if its law is found to be the proper law of the contract, article 1(1)(*b*) determines that the CISG, and not domestic sales law, should be applied. A multitude

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of reported case law exists in support of the view that a reference to the law of a CISG contracting state includes a reference to the CISG. All commentators also support this view" (Wethmar-Lemmer *The Vienna Sales Convention and Private International Law* (2014) 149-152 and all sources cited therein).

The CISG has often been applied *via* this private international law route by arbitral tribunals as well. There is a specific CIETAC case (CIETAC award of 21-10-2005 http://www.unilex.info/case.cfm?pid=1&do=case&id=1202&step=Abstract (12-06-2018)) that provides a good illustration of the application of CISG via a 1(1)(*b*) by arbitral tribunals. This case involved an international sales dispute between a Chinese buyer and a Japanese seller. With regard to applicable law, the tribunal held that the CISG had to be applied, since the rules of private international law led to the application of Chinese law and that the relevant principles were contained in the CISG.

The CISG is indeed found to be a most suitable set of governing rules for international sales contracts and, as such, its application to international sales law disputes, whether heard by national courts or arbitral tribunals, is to be promoted. With regard to its suitability, the CISG currently has 89 contracting states representative of all legal traditions worldwide (see the CISG status document). It is estimated that it is potentially applicable to far more than two thirds of all international trade transactions globally (Calliess and Buchman "Global commercial law between unity, pluralism, and competition: the case of the CISG" 2016 *Uniform Law Review* 1 19).

An increased international commercial arbitration footprint on South African soil through the adoption of Act 15 of 2017 would most likely lead to better knowledge of the CISG in South Africa and provide more impetus for accession to the CISG.

6 *Conclusion*

South Africa is entering a new era of cross-border commercial litigation and dispute resolution. One of the main goals of Act 15 of 2017 – to invite international commercial arbitration to South Africa – will not be achieved in the absence of well-developed private international law rules regarding jurisdiction and choice of law. It is imperative that private international law scholars and teachers embrace cross-border jurisdiction and international arbitration as integral areas of any study or course on private international law. For decades these have been the Cinderellas of private international law and now we have a situation where these Cinderellas will become the major obstacles unless suitably remedied.

First, Act 15 of 2017 now demands a clear distinction to be drawn between arbitration agreements and jurisdiction clauses or choice of court agreements. It is important that choice of court agreements be placed on a sound jurisprudential footing in order to promote South Africa as a neutral litigation forum. This will enhance South Africa's potential to become a destination for international commercial dispute resolution, be it arbitration or litigation. In this regard accession to the choice of court convention will be a major step forward.

Second, the fact that the UNCITRAL Model law (as incorporated) requires a tribunal to determine the applicable law in the absence of choice via a conflicts approach, will expose the current inadequacies of the South African approach in this area of private international law. This should stimulate reforms and the adoption of more internationally acceptable rules for assigning a proper law to international commercial contracts by the courts. A solution similar to the Rome I Regulation's approach is supported.

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Finally, it is hoped that knowledge of the CISG will increase in South Africa through its frequent application by international arbitral tribunals. Increased local awareness of the importance of the CISG for the harmonisation of international sales law would certainly provide momentum to the call for its adoption by South Africa.

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