

THE SCOPE OF PARTY AUTONOMY IN INTERNATIONAL  
COMMERCIAL CONTRACTS: A NEW DAWN?

By

Akinwumi Olawuyi Ogunranti

Submitted in partial fulfillment of the requirements  
for the degree of Master of Laws

at

Dalhousie University  
Halifax, Nova Scotia  
August 2017

© Copyright by Akinwumi Olawuyi Ogunranti, 2017

## Dedication

This thesis is dedicated to:

- God for his grace to accomplish this task
- My Parents for their unlimited support
- Schulich School of Law, Dalhousie University, for its boundless kindness to me

# Table of Contents

<b>Abstract .....</b>	<b>vii</b>
<b>List of Abbreviation and Symbols Used .....</b>	<b>viii</b>
<b>Acknowledgments .....</b>	<b>xv</b>
<b>CHAPTER 1: INTRODUCTION .....</b>	<b>1</b>
<b>1.1. General Introduction .....</b>	<b>1</b>
<b>1.2. Scope of the Thesis/ Statement of Limitation.....</b>	<b>3</b>
<b>1.3. Purpose and Rationale of the Study .....</b>	<b>4</b>
<b>1.4 Literature Review .....</b>	<b>5</b>
<b>1.5. Research Questions .....</b>	<b>9</b>
<b>1.6. Research Methodologies .....</b>	<b>9</b>
1.6.1 Historical Method.....	9
1.6.2. Doctrinal Research.....	12
1.6.3 Theory as Method .....	13
1.6.4. Comparative Methodology .....	14
1.6.5. Interdisciplinary Method.....	17
<b>1.7. Structure of the Thesis .....</b>	<b>18</b>
<b>CHAPTER 2: PARTY AUTONOMY: MEANING, HISTORY, AND ARGUMENTS .....</b>	<b>23</b>
<b>2.1. Meaning of Party Autonomy .....</b>	<b>23</b>
<b>2.2. History of Party Autonomy .....</b>	<b>24</b>
2.2.1. General History.....	25
2.2.2. Continental Europe (Civil Law Countries).....	26
2.2.3. Anglo-America (The United States and The United Kingdom).....	29

2.2.4. The United States.....	30
2.2.5. The United Kingdom.....	32
2.2.6. Party Autonomy in Latin America and Africa .....	35
2.2.7. Latin America .....	35
2.2.8. Africa.....	39
<b>2.3. Arguments for and against Party Autonomy.....</b>	<b>42</b>
2.3.1. Anti-Autonomy Arguments.....	43
2.3.2. Pro-Autonomy Arguments.....	44
<b>2.4. Conclusion.....</b>	<b>47</b>
<b>CHAPTER 3: CHOICE OF LAW RULES IN CONTRACT.....</b>	<b>49</b>
<b>3.1. Introduction.....</b>	<b>49</b>
3.1.1. The Law of the Place of Making (Lex loci contractus).....	51
3.1.2. The Law of the Place of Performance (Lex Loci Solutionis).....	54
3.1.3. Personal Law of the Parties (Lex Domicilii).....	56
3.1.4. Center of Gravity or Close Contact Rule.....	58
3.1.5. The Law of the Place Which Validates the Contract (Lex Validitatis).....	61
3.1.6. The Law of the Place of Litigation (Lex Fori) .....	63
3.1.7. Express Intention of the Parties (Party Autonomy).....	64
<i>3.1.7.1. Certainty and Predictability.....</i>	<i>66</i>
<i>3.1.7.2. Commercial Convenience/Flexibility.....</i>	<i>68</i>
<i>3.1.7.3. Uniformity.....</i>	<i>69</i>
<i>3.1.7.4. Less Burden on National Courts and parties.....</i>	<i>69</i>
<i>3.1.7.5. Sense of Justice between the Parties.....</i>	<i>71</i>
3.1.8. Criticism of the Party Autonomy rule .....	72
<b>3.2. Party Autonomy: An Unruly Horse?.....</b>	<b>73</b>

3.2.1. Unequal Bargaining Power.....	73
3.2.2. Public Policy.....	74
<b>3.3. Conclusion .....</b>	<b>76</b>
<b>CHAPTER 4: SCOPE OF PARTY AUTONOMY IN CHOICE OF LAW IN CONTRACTS—THE CHALLENGE OF UNIFORMITY.....</b>	<b>78</b>
<b>4.0. Introduction .....</b>	<b>78</b>
<b>4.1. The Substantial or Close Connection Test .....</b>	<b>79</b>
4.1.1. The United States of America .....	80
4.1.2. Spain .....	82
4.1.3. Panama.....	83
4.1.4. Nigeria .....	84
4.1.5. The United Arab Emirates.....	84
4.1.6. The Close Connection Test is not a Universal Test.....	86
<b>4.2. The Choice of Law must be Bona fide, legal and not contrary to public policy .....</b>	<b>87</b>
4.2.1. Bona fide Test.....	88
4.2.2. Legality, Public Policy, and Mandatory Law .....	90
<b>4.3. Choice of Mode of Expression .....</b>	<b>92</b>
4.3.1. Countries that do not Recognize a Tacit Choice .....	94
4.3.2. Provision for a tacit choice – divergent indicators .....	95
<b>4.4. Internationality of the Contract .....</b>	<b>96</b>
4.4.1 Broad interpretation of an International Contract.....	98
4.4.2. Narrow Interpretation of an International Contract.....	98
4.4.3 Can Parties’ Choice of Law Create an International Contract?.....	99
<b>4.5. Exclusion of Party Autonomy in certain types of Contracts—Varying Considerations .....</b>	<b>101</b>

4.5.1. Localizing contracts in Africa .....	102
<b>4.6. Other areas of Limitation and Divergence.....</b>	<b>104</b>
<b>4.7. Conclusion .....</b>	<b>105</b>
<b>CHAPTER 5: INTERNATIONAL CODIFICATIONS OF THE SCOPE OF PARTY AUTONOMY ON CHOICE OF LAW – A NEW DAWN?.....</b>	<b>107</b>
<b>5.1. Introduction .....</b>	<b>107</b>
<b>5.2. Unifying the Scope of Party Autonomy – Regional and International Classification Efforts .....</b>	<b>108</b>
5.2.1. Synoptic History, Scope, and Justification of the New Soft law (Principles).....	112
<b>5.3. The Hague Principles and the Developing Countries.....</b>	<b>115</b>
5.3.1. Possible Effect and Acceptance of Article 3 in Developing Countries .....	124
<b>5.4. The Hague Principles and Hard laws .....</b>	<b>130</b>
5.4.1. Mandatory Laws .....	130
5.4.2. Non-state law .....	131
<b>5.5. The Scope of Article 3 of the Principles and its Relationship with other Soft laws or Non-State Law – The PICC and the CISG .....</b>	<b>132</b>
5.5.1. The Problematic nature and Scope of the Principles.....	133
5.5.2. Does Article 6 (1) (a) of the Principles Contemplate that the Choice of a Non- state law be applied to Putative Issues?.....	134
5.5.3. The Normative Relationship of the Principles with other Non-State Laws ..	138
<b>5.6. Conclusion .....</b>	<b>139</b>
<b>CHAPTER 6: CONCLUSION .....</b>	<b>141</b>
<b>6.1. Uniform Scope for Achieving Party Autonomy: Assessment.....</b>	<b>141</b>
<b>6.2. General Conclusion .....</b>	<b>146</b>
Bibliography .....	152

## Abstract

Transnational contracts are almost inevitable in the world today. It follows that a system of law must govern the resolution of disputes that arise from the contracts. The freedom of parties to choose a law that regulates transnational contracts is recognized by most countries as party autonomy. However, the extent of this autonomy has been controversial. This thesis unravels the controversy surrounding the doctrine of party autonomy and, more importantly, provides another perspective to the argument – that the application and scope of party autonomy in countries is determined by historical, colonial, economic, and religious factors. It uses this as a background to examine the new Hague Conference's *Principles on Choice of Law in International Contracts*, with the argument that the Hague Conference may have neglected these factors in some of the *Principles'* provisions. It proposes that these factors must be considered to persuade countries, especially developing ones, to adopt it.

### **List of Abbreviation and Symbols Used**

§	Section
AC	Appeal Cases
ACWS (3d)	All Canada Weekly Summaries (Third Series)
All NLR	All Nigeria Law Reports
All SA	All South African Law Reports
AM J Comp L	American Journal of Comparative Law
Arab LQ	Arab Law Quarterly
Arb Intl	Arbitration International
Atk	Atkyns' Reports
Aust J Leg Phil	Australian Journal of Legal Philosophy
BC Stud	British Columbian Studies
BCSC	British Columbia Supreme Court
Bro PC	J Brown's Parliamentary Cases
Brook J Intl L	Brooklyn Journal of International Law
Burr	Burrow's King's Bench Report
Cal L Rev	California Law Review
Campbell L Reve	Campbell Law Review
Can Bar Rev	Canadian Bar Review
Can Bus LJ	Canadian Business Law Journal
Can Soc Sci	Canadian Social Science
Can YB Intl L	Canadian Yearbook of International Law
CAP	Chapter
Case W Res L Rev	Case Western Reserve Law Review
Ch	Chancery Law Reports



Ch. Div.	Chancery Division Law Reports
Chicago-Kent L Rev	Chicago-Kent Law Review
China L Rev	China Law Review
Chinese J Comp L	Chinese Journal of Comparative Law
CIR	Circuit
CISG	United Nations on Contracts for the International Sale of Goods
CLR	Commonwealth Law Reports
CML Rev	Common Market Law Review
Colum L Rev	Columbia Law Review
Cornell LJ	Cornell Law Journal
DCL	Doctoral thesis
De Jure LJ	De Jure Law Journal
Deakin L Rev	Deakin Law Review
DLR	Dominion Law Reports (Canada)
Doc.	Document
Duke LJ	Duke Law Journal
EA	The Eastern African Law Reports
ECL	Egyptian Competition Law
Ecology LQ	Ecology Law Quarterly
Ed	Edition
eKLR	Electronic Kenyan Law Reports
Emory Intl L Rev	Emory International Law Review
ENG REP	English Reprint Reports
Erasmus L Rev	Erasmus Law Review
Eur JL Reform	European Journal of Law Reform

Eur Leg F	European Legal Forum
Eur R Priv L	European Review of Private Law
F 2d	Federal Reporter (Second Series) (US)
F 3d	Federal Reporter (Third Series) (US)
F Supp 2d	Federal Supplement (Second Series) (US)
F Supp	Federal Supplement (US)
FC	Canada Law Reports, Federal Court
Fla St UL Rev	Florida State University Law Review
Fordham Intl LJ	Fordham International Law Journal
Ga J Intl & Comp L	Georgia Journal of Comparative Law
Ga J Intl & Comp L	Georgia Journal of International and Comparative Law
Geo Mason L Rev	George Mason Law Review
GLR	Ghana Law Report
Harv L Rev	Harvard Law Review
Hofstra L Rev	Hofstra Law Review
ICLQ	International & Comparative Law Quarterly
IJSA	International Journal of Sociology and Anthropology
Ill L Rev	Illinois Law Review
ILM	International Legal Materials
Intl J Bus & Soc Sci	International Journal of Business and Social Science
Intl LQ	International Law Quarterly
Iowa	Iowa Law Reports
J Afr	Journal of African Law
J Intl Arb	Journal of International Arbitration
J Leg Analysis	Journal of Legal Analysis

J Leg Stud	Journal of Legal Studies
J Priv Intl L	Journal of Private International Law
JBUS L	Journal of Business Law
JL & Com	Journal of Law and Commerce
JL & Com	Journal of Law and Commerce
Jurid Rev	Juridical Review
KB	Law Reports, King's Bench
KCLJ	Kings College Law Journal
KLR	Kenya Law Reports
L ED 2d	Lawyers Edition, Supreme Court Reports Second Series (US)
L Ed	Lawyers' Edition, Supreme Court Reports (US)
L ED	Lawyers' Edition, Supreme Court Reports (US)
La L Rev	Louisiana Law Review
Law Q Rev	Law Quarterly Review
Law Soc'y Rev	Law and Society Review
LFN	Laws of the Federation Nigeria
LJKB	Law Journal, Kings' Bench
LLM	Masters of Laws
LNTS	League of Nations Treaty Series
Loy L Rev	Loyola Law Review
LRC Comm.	Law Reports of the Commonwealth, Commercial Law Division
Marq L Rev	Marquette Law Review
Mass Jud Sup Ct	Massachusetts Judicial Supreme Court
McGill LJ	McGill Law Journal
Melb J Intl L	Melbourne Journal of International Law

Mercer L Rev	Mercer Law Review
Mich L Rev	Michigan Law Review
Minn LJ	Minnesota Law Review
Mod L Rev	Modern Law Review
Moo PCC	Moore's Privy Council Cases
Nat'l LJ	National Law Journal
Nw J Intl L & Bus	Northwestern Journal of International Law and Business
NWLR	Nigeria Weekly Law Reports
NY 2d	New York Court of Appeal Reports (Second Series)
NY	New York Court of Appeals Reports
NYUJL & Bus	New York University Journal of Law and Business
NYUL Rev	New York University Law Review
Ohio STLJ	Ohio State Law Journal
OJ C	Official Journal of the European Union
OR Sup Ct	Oregon Supreme Court
Otago L Rev	Otago Law Review
Oxford J Leg Stud	Oxford Journal of Legal Studies
PICC	Unidroit Principles of International Commercial Contracts
QB	Queen's Bench Reports
QBD	Queen's Bench Division, Law Reports
Rec des Cours	Recueil des Cours
Rev Const Stud	Review of Constitutional Studies
Rev	Revised
RJT	Russian Journal of Theriology
Rom Rev Priv L	Romanian Review of Private Law

S Ct	Supreme Court Reporter (US)
S Ill ULJ	Southern Illinois University Law Journal
S Tex LJ	South Texas Law Journal
SA	South Africa Law Reports
SC	Supreme Court
Scand Stud L	Scandinavian Studies in Law
SCL Rev	South Carolina Law Review
SCR	Supreme Court Reports (Canada)
SDNY	Southern District of New York
Sess.	Session
Seton Hall L Rev	Seton Hall Law Review
Sing Ac LJ	Singapore Academy of Law Journal
Sing JLS	Singapore Journal of Legal Studies
Sing	Singapore
SMULR	Southern Methodist University Law Review
So 2d	Southern Reporter (Second Series) (US)
ST R Qd	State Reports (QLD)
Stan L Rev	Stanford Law Review
Supp.	Supplement
SYBIL	Singapore Yearbook of International Law
Trans Grot Soc	Transnational Grotius Society
Tul Mar LJ	Tulane Maritime Journal
U Pa L Rev	University of Pennsylvania Law Review
U St Thomas LJ	University of Saint Thomas Law Journal
U Tasm L Rev	University of Tasmania Law Review

UC Davis Bus LJ	UC Davis Business Law Journal
UC Irvine L Rev	University of California Irvine Law Review
UCC	Uniform Commercial Code
UCCP	Upper Canada Common Pleas Reports
UK	United Kingdom
UNBLJ	University of New Brunswick Law Journal
UNCITRAL	United Nations Commission on International Trade Law
UNGAOR	United Nations General Assembly Official Records
UNIDROIT	International Institute for the Unification of Private Law
Unif L Rev	Uniform Law Review
US	United States Reports
Vand J Transnat'l L	Vanderbilt Journal of Transnational Law
VUWLR	Victoria University of Wellington Law Review
Walsh L Rev	Washington Law Review
WLR	Weekly Law Reports
Yale J Intl L	Yale Journal of International Law
Yale LJ	Yale Law Journal
YB	Yearbook

## **Acknowledgments**

My appreciation goes to people that have helped me in this academic pursuit. First, to the Schulich School of Law, Dalhousie University for their warm embrace and the Law Foundation of Nova Scotia for their financial support.

The guidance of my supervisor, Professor Vaughan Black, the reader of my work, Professor Sara Seck, and the Dean of Law, Professor Camille Cameron ,in the successful completion of this thesis will forever be remembered. Equally worthy of my special gratitude is Mr. David Dzidzornu who made sure that I better harnessed my writing skills during this program. Thanks also to Professor Richard Devlin, whose feedbacks on my writings, has equipped me for further future academic challenges. I also appreciate the assistance of the staff of the Sir James Dunn Law Library, particularly David Michels, and the Law Graduate Studies Administrative Assistant, Samantha Wilson, for always finding time to guide me to the right path.

Lastly, thanks to my colleagues, Niran and Wura, who made this academic journey an interesting one.

To God, who is the author and finisher of my faith, I return all the glory and praise.

## CHAPTER 1: INTRODUCTION

### 1.1. General Introduction

Due to transactions or private relationships across borders or territories, national courts are usually faced with disputes that involve making a decision based on the law of another country. Therefore, apart from national laws that deal with crime, tort and commerce, countries have developed a system of law that decides disputes which involve a foreign law. This is called private international law or conflict of laws.<sup>1</sup> Private international law is a branch of law that deals with cases involving a foreign element.<sup>2</sup> Foreign element means that an event or transaction before the court has close connections with a foreign system of law which necessitates the court's recourse to that system of law.<sup>3</sup> A foreign system of law is "a distinctive legal system prevailing in a territory other than that in which the court functions."<sup>4</sup>

Private international law is not a distinct branch of law, like contract or tort, but an all-pervading branch of law. It has been noted that

It [private international law] starts up unexpectedly in any court and in the midst of any process. It may be sprung like a case in a plain common law action, in an administrative proceeding in equity, or like a mine in a divorce case, or a bankruptcy case... The most trivial action of debt, the most complex case of equitable claims, may be suddenly interrupted by the appearance of a knot to be untied only by Private International Law.<sup>5</sup>

Owing to its all-pervading nature, one of the aims of conflict of laws is to achieve uniform judicial decisions in legal disputes, regardless of the jurisdiction

---

<sup>1</sup> See Lawrence Collins et al, eds, *Dicey & Morris on The Conflict of Laws*, 13th ed (London, UK: Sweet & Maxwell, 2000) at 4.

<sup>2</sup> E Cheatham, "Sources of Rules for Conflict of Laws" (1941) 89:4 U Pa L Rev 430 at 430-431. This is different from public international law because, while public international law seeks to regulate the relations between different sovereign states, private international law seeks to regulate individuals' actions across sovereign states. Also, while the rules of public international law are the same everywhere, the rules of private international law are different from country to country. See also Collins, *ibid*.

<sup>3</sup> JJ Fawcett & JM Carruthers, eds, *Cheshire, North & Fawcett: Private International Law*, 14th ed (Oxford: Oxford University Press, 2008) at 5.

<sup>4</sup> *Ibid* at 9.

<sup>5</sup> Frederic Harrison, *On Jurisprudence and the Conflicts of Laws* (Oxford: Clarendon Press, 1919) at 101-102.



where litigation takes place.<sup>6</sup> This is to promote transnational trade between persons from different jurisdictions or legal systems. Thus, if disputes are resolved by common criteria in different legal systems of the world, parties are certain of the consequences of their legal relations in international trade, and by these they are encouraged to make international contracts.<sup>7</sup>

However, despite efforts by scholars, international instruments and conferences, the goal of uniformity has been elusive over the years, especially on the scope of party autonomy, which is the freedom of parties to choose their contractual governing law.<sup>8</sup> This thesis examines these efforts, especially the introduction of the new soft law by the Hague Conference in 2015 – *Principles on Choice of Law in International Commercial Contracts*.<sup>9</sup> The thesis argues that despite the introduction of this instrument, the scope of party autonomy may still remain globally divergent because the *Principles* do not take into consideration national interests, especially those of developing countries in Africa and Latin America. It argues that the history/development of party autonomy, as well as factors bordering on inequality of bargaining power and state regulation of contracts in these regions (Africa and Latin America), may still account for the divergence in the scope of party autonomy.<sup>10</sup> It, therefore, suggests ways that the *Principles* may be interpreted/ recalibrated/ revised to achieve uniformity and certainty of the scope of party autonomy in most of the jurisdictions of the world.

This thesis deliberately uses the phrase “in most jurisdictions” because it acknowledges that it may be an overstatement to talk of a “global” scope of party autonomy.<sup>11</sup> This is because the sovereignty of each country dictates its political, economic and social approach to party autonomy in handling international contracts disputes. However, we must not neglect to seek uniformity by accommodating the

---

<sup>6</sup> Fowler V Harper, “Policy Bases of the Conflict of Laws: Reflections on Reading Professor Lorenzen’s Essays” (1947) 56:7 Yale LJ 1155 at 1159.

<sup>7</sup> Robert A Leflar, “Conflict of Laws: More on Choice-Influencing Considerations” (1966) 54:4 Cal L Rev 1584 at 1586.

<sup>8</sup> See e.g Maria Mercedes Albornoz & Nuria Gonzalez-Martin, “Towards the Uniform Application of Party Autonomy for Choice of Law in International Commercial Contracts” (2016) 12:3 J Priv Intl L 437.

<sup>9</sup> [*Principles*], online: <[www.hcch.net/en/instruments/conventions/full-text/?cid=135](http://www.hcch.net/en/instruments/conventions/full-text/?cid=135)>.

<sup>10</sup> See generally for example, Maria Mercedez Albornoz, “Choice of Law in International Contracts in Latin American Legal Systems” (2010) 6:1 J Priv Intl L 237.

<sup>11</sup> B Zeller, “Uniformity of Laws: A Reality or just a Myth” (2008) 1:3 Intl J Priv L 231 at 235 (creating a global law was compared to crossing the Sahara).

core interests of countries in relevant provisions in applicable international instruments.<sup>12</sup> Indeed, Kamba agrees that “it is now readily conceded that unification at the international level is only feasible and desirable in more limited spheres of law such as: commercial law, maritime law, conflict of laws, and in new areas such as space law, broadcasting law and atomic law.”<sup>13</sup> To this extent, reference to “uniformity” in this thesis relates to substantial uniformity and not necessarily a globalized one.

## 1.2. Scope of the Thesis/ Statement of Limitation

Generally, discussions on conflict of laws focus on three issues: choice of law, choice of jurisdiction and enforcement of foreign judgments.<sup>14</sup> Considering the broad scope of these issues, this thesis is limited to discussions on choice of law. Furthermore, discussions of choice of law can be divided into: choice of law in contractual relationships, and choice of law in non-contractual relationships.<sup>15</sup> Also, there are two types of contracts: contracts executed between parties within the same jurisdiction – domestic contracts; and contracts executed where at least one party resides or carries out business outside jurisdiction –international contracts.<sup>16</sup> Relying on these classifications, this thesis is concerned with the choice of law in contractual relationships, that is, international commercial contracts.

Discussion of choice of law is also limited in this thesis. Although there are various choice of law rules, this thesis focuses on party autonomy or express intention rule which allows parties to choose the governing law in international contracts. Although this thesis examines some other choice of law rules, including the law of the place of contracting (*lex loci contractus*), law of the place of

---

<sup>12</sup> *Ibid* (“history and practical experience has shown that the only solution is to create a halfway house”). Indeed, scholars have advocated for unification in choice of laws. See e.g. Symeon C Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford: Oxford University Press, 2014).

<sup>13</sup> Walter J Kamba, “Comparative Law: A Theoretical Framework” (1974) 23:3 ICLQ 485 at 502.

<sup>14</sup> Jean Gabriel Castel, *Canadian Conflicts of Laws*, 4th ed (Toronto: Butterworth publishers, 1997) at 6.

<sup>15</sup> An example of contractual relationship is choice of law cases arising from contracts, while an example of non-contractual relationship is choice of law in cases arising from torts or succession.

<sup>16</sup> See AJE Jaffey, “Essential Validity of Contracts in the English Conflict of Laws” (1974) 23:1 ICLQ 1 at 2; See also Georges Rene Delaume, “What is an International Contract? An American and a Gallic Dilemma” (1979) 28:2 ICLQ 258. See also the *Principles*, *supra* note 9 at para 1.11.

performance (*lex loci solutionis*), law of the place that validates the contract (*lex validitatis*), and the law of the place of domicile (*lex domicilii*), it only does so “comparatively” with the party autonomy rule.<sup>17</sup> While discussions on other choice of law rules are by no means comprehensive, they are enough to show that their application, sometimes, results in uncertainty and absurdity. Also, due to the time and space constraint of this thesis, party autonomy only refers to cases where parties have, either through a choice of law clause or an independent choice of law agreement, expressly stated the governing law of their contract – express choice of law; and not cases where courts infer or imply the choice of law from contracts terms or the surrounding circumstances of the contract – implied choice of law.

Finally, although this thesis seeks to examine efforts via regional instruments to unify the scope of party autonomy, the examination is by no means exhaustive. It does not go into the details of the provisions of these instruments; it only generally examines their weaknesses as a justification for the enactment of a new soft law. It particularly argues that the limited contribution of these instruments to universal recognition and application of the scope of party autonomy necessitated the emergence of a new instrument to serve as a model law for adoption, not only in national conflict of laws statutes, but in regional choice of law instruments.

### **1.3. Purpose and Rationale of the Study**

It has been noted that transnational trade or commerce is inevitable in the world today.<sup>18</sup> Transnational commerce has, therefore, generated transnational disputes which national courts must settle. Given the role of private international law in helping national courts to resolve disputes that are connected to a foreign system of law, there is a need to ensure that private international law encourages uniform

---

<sup>17</sup> It is acknowledged that comparing party autonomy with other choice of law rules is similar to comparing oranges and apples – both set of rules apply in different circumstances. While party autonomy rule applies in contracts where parties have made a choice of law; other choice of law rules apply in contracts where parties have not made such choice. It should be noted that, unlike scholars who treat party autonomy as an expression of other choice of law rules, this thesis examines party autonomy exclusively from other choice of law rules.

<sup>18</sup> Saul Perloff, “The Ties that Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration” (1992) 13:2 U Pa J Bus L 323 at 324.

transnational judicial decisions.<sup>19</sup> As explained above, this ensures certainty of contractual relations for international parties on choice of law. Party autonomy, arguably the most acceptable conflict of law rule, is a way of ensuring such uniformity.<sup>20</sup> This is because a “universal acceptance” of the scope of the principle will promote transnational commerce because contractual parties will be sure of their legal choices, especially on issues relating to the choice of the governing law.<sup>21</sup> This way, the reasonable expectations of parties are protected.<sup>22</sup> Consequently, litigation costs arising from prolonged disputes over choice of law is eliminated since parties know the scope of the governing law.<sup>23</sup>

This thesis, therefore, examines party autonomy and some provisions of the soft law instrument that seeks to propose global uniform provisions for countries and regional legislative bodies. It suggests better ways to achieve certainty and uniformity through these provisions in order to boost transnational trade and commerce.

#### **1.4 Literature Review**

Generally, there has been no agreement on choice of law issues, especially on the application and scope of party autonomy. Kermit Roosevelt III remarked that “choice of law is a mess. That much has become a truism. It is a dismal swamp, a morass of confusion, a body of doctrine killed by a realism intended to save it, and

---

<sup>19</sup> It has been noted that “the main justification for the Conflict of Laws is that it implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence.” See Collins, *supra* note 1 at 4-5.

<sup>20</sup> Russell J Weintraub, “Functional Developments in Choice of Law for Contracts” (1984)187 *Rec des Cours* 239 at 271; Yntema says “the law selected by the parties, the solution which alone provides a uniform result with respect to the scope of their power of election and correspondingly answers the needs of inter- national commerce for assurance in legal right.” See Hessel E Yntema “Autonomy’ in Choice of Law” (1952) 1:4 *Am J Comp L* 341 at 356; Francis A Gabor, “Emerging Unification of Conflict of Law Rules applicable to the International Sales of Goods: UNCITRAL and the New Hague Conference on Private International Law” (1986) 7:4 *Nw J Intl L & Bus* 697 at 701 (“party autonomy provides the best safeguard for protecting the parties’ expectations and creating a universally recognized form of legal certainty in transactions cutting across national boundaries”).

<sup>21</sup> Yntema, *supra* note 20 at 356; Albornoz & Martin, *supra* note 8 at 438-439.

<sup>22</sup> Leflar, *supra* note 7 at 1586.

<sup>23</sup> Anna Erin O’Hara & E Larry Ribstein, “Conflict of Laws and Choice of Law” in Boudewijn Bouckaert & Gerrit de Geest, eds, *Encyclopaedia of Law and Economics* vol 5 (Cheltenham: Edward Elgar, 2000) at 643.

now universally said to be a disaster.”<sup>24</sup> Rodriguez also notes that “as an unfortunate legacy of developments that unfolded during the nineteenth century, choice of law in international contracts has become chaotic, characterized by conflicting solutions around the world.”<sup>25</sup> Party autonomy, as a choice of law rule, has not been excluded from this chaos; its application and scope have been wrapped in one controversy or the other. For example, early writers like Beale argue that the doctrine usurps state powers and should be neglected.<sup>26</sup> Other writers like Mancini argue that it is the best expression of the will of the parties.<sup>27</sup> Cheshire takes a middle position: he argues that, although parties can choose the governing law, the validity of their contract is outside the scope of the party’s will.<sup>28</sup>

However, most modern writers now acknowledge the importance of party autonomy. Nygh says, “[t]oday the freedom of the parties to an international contract to choose the applicable law and its corollary, to choose the forum, judicial or arbitral, for the settlement of their disputes arising out of such contract is almost universally acknowledged.”<sup>29</sup> Party autonomy has been described as “perhaps the most widely accepted private international rule of our time,”<sup>30</sup> “leading principles of contemporary choice of law,”<sup>31</sup> “a fundamental human right,”<sup>32</sup> and “a proverbial motherhood and apple pie.”<sup>33</sup>

---

<sup>24</sup> Kermit Roosevelt III, “The Myth of Choice of Law: Rethinking Conflicts” (1999) 97:8 Mich L Rev 2449 at 2449.

<sup>25</sup> José Antonio Moreno Rodríguez, “Beyond the Mexico Convention and the Hague Principles: What’s Next for the Americas?” (2017) 22:2 Unif L Rev 435.

<sup>26</sup> Joseph Henry Beale, *A Treatise on the Conflict of Laws*, vol 2 (New York: Baker, Voorhis & Co, 1935) at 1079-1080; see also Antone Pillet, *Principes de Droit International Privé* (Paris: Pedone Grenoble, Allier Frères, 1903) at 430; JP Niboyet, “La théorie de l’autonomie de la volonté” (1927) 16 Rec des Cours 1.

<sup>27</sup> Pasquale Stanislao Mancini, “De l’utilité de rendre obligatoires pour tous les Etats, sous la forme d’un ou de plusieurs traits internationaux, un certain nombre de règles générales du droit international privé pour assurer la décision uniforme des conflits entre les différentes législations civiles et criminelles” (1874) JDI 221 at 221-239, 285-304 cited in Peter Nygh, *Autonomy in International Contracts* (Oxford: Clarendon Press, 1999) at 8.

<sup>28</sup> GC Cheshire, *International Contracts: Being the Fifteenth Lecture on the David Murray Foundation in the University of Glasgow* (Glasgow: Jackson, Son & Company, 1948) at 94.

<sup>29</sup> Nygh, *supra* note 27 at 13.

<sup>30</sup> Weintraub, *supra* note 20 at 271.

<sup>31</sup> Thomas M De Boer, “Party Autonomy and Its Limitations in the Rome II Regulation” (2008) 9 YB Priv Intl L 19 at 19.

<sup>32</sup> Erik Jayme, “Identité culturelle et intégration: Le droit international privé postmoderne” (1995) 251 Rec des Cours 147.

<sup>33</sup> Symeon C Symeonides, “Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple” (2014) 39:3 Brook J Intl L 1123 at 1124.

Mathias Lehmann asks why party autonomy continues to gain recognition in different jurisdictions.<sup>34</sup> He observed that state-recognised legislation could not be used to explain the growing influence of party autonomy. To him, party autonomy must be viewed from the perspective of contracting parties, who are at the centre of negotiation, and not the state. Giesela Rühl comparatively studied convergence of the scope of party autonomy in the United States and Europe.<sup>35</sup> He points out that, if viewed from an economic perspective, there is convergence between the scope of party autonomy in Europe and the United States of America. However, Symeonides, who examined various limitations of party autonomy in different jurisdictions, noted that varying factors affect the scope of party autonomy in most jurisdictions and that wide divergence still exists.<sup>36</sup> Felix Maultzsch also examined the general scope of party autonomy in European international instruments. He agrees with Symeonides that there is a varying scope.<sup>37</sup> Helena Carlquist reviewed some of the rules for determining the scope of party autonomy and argued that the closest connection test is the best rule.<sup>38</sup> However, she also agrees that there is no universal rule for determining the scope of party autonomy.

Commentators have also examined various regional instruments that seek to unify the scope of party autonomy. For example, Francisco Alférez examined provisions of the *Rome I Regulation*<sup>39</sup> and argued that its provisions are inadequate because: it does not lay down a uniform and consistent regime of international contracts; it does not solve the problems of interaction between the *Rome I Regulation* and the unilateral conflict rules contained in some Directives on consumer contracts; and it does not determine the law applicable to the property

---

<sup>34</sup> Matthias Lehmann, "Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws" (2008) 41:2 Vand J Transnat'l L 381.

<sup>35</sup> Giesela Rühl, "Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency" (2007) 3:1 CLPE Research Paper 4/2007 1.

<sup>36</sup> Symeonides, *supra* note 33; see also Symeonides, *supra* note 12.

<sup>37</sup> Felix Maultzsch, "Party Autonomy in European Private International Law: Uniform Principle or Context-Dependent Instrument?" (2016) 12:3 J Priv Intl L 466. (He argues that there is no convergence in the doctrine yet because of the peculiarities of the different fields which private international law applies to).

<sup>38</sup> Helen Carlquist, *Party autonomy and the Choice of Substantive Law in International Commercial Arbitration* (LLM Thesis, School of Business, Economics and Law Göteborg University, 2006) [unpublished].

<sup>39</sup> *Regulation (EC) No 593/2008 of the European Parliament and of the Council on 17 June 2008 on the Law Applicable to Contractual Obligations*, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008R0593>>.

effects of the assignments of credits.<sup>40</sup> Friedrich K. Juenger also compared the provisions of the *Inter-American Convention on the Law Applicable to International Contracts 1994 (Mexico Convention)* with other regional instruments.<sup>41</sup> He highlighted the improvements in the Convention against the backdrop of the existing instrument (*Convention on the Law Applicable to Contractual Obligations, with Protocol, and Joint Declaration – Rome Convention*).<sup>42</sup> Despite these improvements, Maria Mercedes Albornoz pointed out that the *Mexico Convention* is “a categorical failure of an international treaty” because of the low signatures that it commands.<sup>43</sup> The Hague Conference’s introduction of the *Principles* to provide uniform provisions on the scope of party autonomy has been welcomed by scholars.<sup>44</sup> However, this instrument, especially the provision for the application of non-state law, has generated controversies among scholars. For example, Ralf Michaels<sup>45</sup> and Andrew Dickinson<sup>46</sup> argue that the provision of non-state law is problematic and unnecessary in the *Principles*, but

---

<sup>40</sup> Francisco J & Garcimartín Alférez, “The Rome I Regulation: Much Ado About Nothing?” (2008) 2 Eur Leg F 61 at 79; see also Davor Babic, “Rome I Regulation: Binding Authority for Arbitral Tribunals in the European Union?” (2017) 13:1 J Priv Intl L 71 (He argues that Rome I Regulation is not suitable for regulation of arbitral proceedings).

<sup>41</sup> Friedrich K Juenger, “The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons” (1994) 42:2 Am J Comp L 381.

<sup>42</sup> *Convention on the Law Applicable to Contractual Obligations, with Protocol, and Joint Declaration – Rome Convention*, 19 June 1980, 19 ILM 14.

<sup>43</sup> Albornoz, *supra* note 10 at 26.

<sup>44</sup> See e.g. Symeon C Symeonides, “The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments” (2013) 61:3 Am J Comp L 29 (he hopes for positive outcomes); see also Andrew Dickinson, “A Principled Approach to Choice of Law in Contracts” (2013) *Butterworths J Intl Ban & Fin L* 159; Thomas Kadner Graziano, “Solving the Riddle of Conflicting Choice of Law Clause in Battle of Forms Situations: The Hague Solution” (2013) 14 *YB Priv Intl L* 71; Brooke Adele Marshall, “Reconsidering the Proper Law of the Contract” (2012) 13:1 *Melb J Intl L* 1; Moreno Rodriguez & M Albornoz, “Reflections on the Mexico Convention in the Context of the Preparation of the Future Hague Instrument on International Contract” (2011) 7:3 *J Priv Intl L* 491; Brooke Adele Marshall, “The Hague Choice of Law Principles, CISG and PICC: A Hard Look at a Choice of Soft Law,” *Max Planck Private Law Research Paper no 16/27*, (2018) *Am J Comp L* 1(forthcoming); Jürgen Basedow, “The Hague Principles on Choice of Law: Their Addressees and Impact” (2017) 22:2 *Unif L Rev* 304; Peter Makowski, “Article 3 of the Hague Principles: The Final Breakthrough for the Choice of Non-State Law?” (2017) 22:2 *Unif L Rev* 369.

<sup>45</sup> Ralf Michaels, “Non-State Law in the Hague Principles on Choice of Law in International Commercial Contracts” in Kai Purnhagen & Peter Rott, eds, *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Gewerbstrasse, Switzerland: Springer International Publishing, 2014) at 46.

<sup>46</sup> Dickinson, *supra* note 44.

Geneviève Saumier argues that the provision permits parties to freely choose their governing law without restricting them to a state law.<sup>47</sup>

This thesis contextualizes these scholars' views to unravel the controversy surrounding the doctrine of party autonomy and, more importantly, to provide another perspective to the argument – that the application of party autonomy and its scope is determined by historical, colonial, economic, and religious factors. It uses this as a background to examine the new Hague Conference's *Principles* and to argue that the Hague Conference may have neglected these factors in some of the *Principles*' provisions. To this end, it examines the likely reactions of states, particularly developing ones, to some of the *Principles*' provisions, and proposes better ways to persuade countries to adopt the *Principles*.

## **1.5. Research Questions**

This thesis asks why there is an existing differing scope of party autonomy and why the recent Hague Conference's legislative effort (*Principles*) may not signify a new dawn in the global application of the scope of party autonomy. Indeed, Yntema accepts that the scope of party autonomy “deserve[s] further and intensive comparative investigation.”<sup>48</sup> This thesis answers this call, and recommends better ways to unify the scope of party autonomy, especially within the new instrument on the subject. To answer these research questions in light of its aim, this thesis employs some relevant research methodologies.

## **1.6. Research Methodologies**

### **1.6.1. Historical Method**

---

<sup>47</sup> Genevieve Saumier, “The Hague Principles and the Choice of Non-State ‘Rules of Law’ to Govern an International Commercial Contract” (2014) 40:1 Brook J Intl L 1.

<sup>48</sup> Yntema, *supra* note 20 at 345; see also Symeonides, *supra* note 33 at 1143 (he urges a comparative investigation in a more detailed manner).



It has been noted that “what [historians] do ... is a commitment to conscious and careful scrutiny of the past.”<sup>49</sup> In order to understand the basis of the doctrine of party autonomy as contained in national statutes, cases, and international instruments, it is necessary to examine the history of party autonomy. This is in line with Danzig’s opinion that doctrines must be understood in the light of their historical developments.<sup>50</sup> It is also pertinent to examine the history of party autonomy in this thesis because “a page of history may illuminate more than a book of logic.”<sup>51</sup> Thus, the legal history of party autonomy is important because it tells us not just the source of party autonomy, but its development in various countries over the years. It also allows us to reflect on the treatment of party autonomy in the past and to see whether we could treat it differently presently,<sup>52</sup> especially as it relates to the scope of party autonomy proposed in the Principles.<sup>53</sup> This thesis relies more on “external” legal history than on “internal” legal history. Gordon succinctly described these concepts as follows:

The internal legal historian stays as much as possible within the box of distinctive-appearing legal things; his sources are legal, and so are the basic matters he wants to describe or explain, such as changes in pleading rules, in the jurisdiction of a court, the texts assigned to beginning law students, or the doctrine of contributory negligence. The external historian writes about the interaction between the boxful of legal things and the wider society of which they are a part, in particular to explore the social context of law and its social effects, and he is usually looking for conclusions about those effects.<sup>54</sup>

The external history of party autonomy shows the social and economic effects on the growth of the doctrine. As Gordon remarked, this thesis draws inferences from this history to argue that the social and economic influences on the

---

<sup>49</sup> Catherine L Fisk & Robert W Gordon, “Law as...”: Theory and Method in Legal History” (2011) 1:3 U C Irvine L Rev 519 at 526.

<sup>50</sup> R Danzig, “Hadley v. Baxendale: A Study in the Industrialisation of the Law” (1975) 4:2 J Leg Stud 249 at 250.

<sup>51</sup> Justice Brian Dickson in *R v Wetmore*, [1983] 2 SCR 284.

<sup>52</sup> Friedrich K Juenger, “A Page of History” (1984) 35:2 Mercer L Rev 419.

<sup>53</sup> Jim Phillips, “Why Legal History Matters” (2010) 41:3 VUWLR 293 at 295.

<sup>54</sup> Robert W Gordon, “Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography” (1975) 10:1 Law & Soc’y Rev 9 at 11.

doctrine in different countries accounts for the varied scope of party autonomy in international contracts.

However, the historical method utilized in this thesis is different from an in-depth historical account that only “historians” may lay claim to. My foray into the historical method utilizes an approach which Brown called “progressive evolutionary functionalism.”<sup>55</sup> The basic idea of this approach is that law develops with society. To this extent, this thesis seeks to show that before the 19<sup>th</sup> century, party autonomy was not recognized or established in most countries but because of the increase in transnational contracts, especially from the 19<sup>th</sup> century onwards, there was need for countries (society) to accept or recognize party autonomy. This is because the doctrine ensures certainty in transnational transactions, especially as it relates to choice of law.<sup>56</sup> In other words, the need for smooth economic interactions accounted for the development of the doctrine.<sup>57</sup> However, due to social and economic factors, not all countries recognized party autonomy during this period.<sup>58</sup>

Also, this thesis shows, through this approach, that despite wide acceptance of the doctrine, countries developed various methods for limiting its scope because, as the doctrine grew, they realized that parties may “manipulate” the doctrine to evade the mandatory laws of a state or to gain economic advantage over one another. This historical account shows that the growth of the doctrine was limited differently by countries. Under this account, national statutes and case law from some countries are examined to show the development of various limitations.<sup>59</sup> Different countries’ criteria on the scope of the doctrine create uncertainty in choice of law in international contracts. In response to this uncertainty, regional legislative bodies proposed some provisions through Conventions that seek common criteria

---

<sup>55</sup> R Blake Brown, “A taxonomy of Methodological Approaches in Recent Canadian Legal History” (2004) 34:1 *Acadiensis: Journal of the History of the Atlantic Region* 146 at 147. He relied on Fisher’s description of the term. See William W Fisher III, “Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History” (1997) 49:5 *Stan L Rev* 1065.

<sup>56</sup> Juenger, *supra* note 52 at 423.

<sup>57</sup> I am aware that I rely on external legal history in this approach. Indeed, Brown says “Scholars keen to avoid the dangers of internal legal history often turn towards functional explanations.” See Brown, *supra* note 73 at 147.

<sup>58</sup> Juenger, *supra* note 52 at 423.

<sup>59</sup> For example, close connection tests and public policy tests. This historical account takes the form of an “internal” legal history.

for determining the scope of the doctrine. It is the aim of these Conventions in ensuring uniformity of the scope of party autonomy against which this thesis assesses the new instrument on the subject – the Principles.

From the standpoint of this historical account of the doctrine, this thesis shows that the doctrine developed from a need for economic efficiency and, since then, it has grown with society in different jurisdictions. Generally, the aim of using the historical method is to speak to such matters as: (1) that the historical development of the principle, which differs from country to country, accounts for the divergence in its scope; (2) that the Hague Conference’s reaction through its uniformity-inducing formulations or suggestions via the *Principles* may not be enough to secure the much-desired uniformity. This is because the history/development of the party autonomy doctrine in most countries is neglected in the attempt to secure a uniform scope for the doctrine.

### **1.6.2. Doctrinal Research**

Doctrinal research is described as the analysis of a legal principle or doctrine through texts, cases, and legislation which usually result in suggesting better ways of treating an established principle.<sup>60</sup> Due to the type of analytical process that this doctrinal method requires, it is described as a “black letter law” method.<sup>61</sup> This thesis analyzes the decisions of national courts, especially in relation to international commercial contracts. The exercise relies on case law and the statutes of some jurisdictions,<sup>62</sup> to show that national courts have differently interpreted national private international rules which limit the scope of party autonomy in international commercial contracts. While some have liberally interpreted the statutes, others employ a strict interpretation.<sup>63</sup>

---

<sup>60</sup> Terry Hutchinson & Nigel Duncan, “Defining and Describing what we Do: Doctrinal Legal Research” (2012) 17:1 Deakin L Rev 83 at 105.

<sup>61</sup> *Ibid.*

<sup>62</sup> Case law and statutes have been accepted as sources of conflict of laws. See Morris & Dicey, *supra* note 1 at 8, para 1-015. Indeed, “the core business of legal doctrine is interpretation” of these sources. See Mark Van Hoecke “Legal Doctrine: What Method (s): For what kind of Discipline?” in eds Mark Van Hoecke & Francois Ost, *European Academy of Legal Theory Monograph Series* (Oxford: Hart Publishing Ltd, 2011) at 3.

<sup>63</sup> John F Coyle, “The Canons of Construction for Choice-of-Law Clauses” (2017) 92 :2 Wash L Rev 631.

On another level, this thesis, through the “black letter law” approach, analyzes some provisions of some regional instruments and, more importantly, the new soft law – *Principles*. The analysis seeks to show that, apart from the regional instruments, the *Principles* may not yet yield a uniform scope for party autonomy by any acceptable convergence of the rules set out by national statutes and case law. In effect, this thesis argues that the *Principles* may still not provide the needed convergence if some pivotal national interests and interpretational issues are reconsidered. Thus, it recommends an amendment of the *Principles* to accommodate the issues raised in this thesis.

### 1.6.3 Theory as Method

Theories explain the underpinnings or rationale of an event, a doctrine or legal rule. They usually seek to answer/respond to “why” in this quest. It is noted that through theoretical exercises, “reality is described, ordered and created.”<sup>64</sup> In effect, theory, adds meaning to life.<sup>65</sup>

Party autonomy is enmeshed in the world of theories.<sup>66</sup> For example, scholars who argued against the recognition of party autonomy is based on the positive theory of law – a theory which proposes that law is “given’ by the State.<sup>67</sup> Those scholars who argue for the recognition of party autonomy are based on the liberal theory of law – one that “recognizes and respects the power of individuals to effect changes in their legal relations.”<sup>68</sup> Even after the “triumph” of party autonomy, scholars continue to advance theories on why party autonomy should be limited and the extent of such limitation. For example, the local law theory propounded by Walter Wheeler Cook, a conflict of law scholar, states that a

---

<sup>64</sup> Hoecke, *supra* note 62 at 16.

<sup>65</sup> See generally Terry Eagleton & Michael Payne, *The Significance of Theory* (Hoboken, New Jersey: Wiley Blackwell, 1992).

<sup>66</sup> See generally Louise Weinberg, “Theory Wars in the Conflict of Laws” (2005) 103:6 Mich L Rev 1631.

<sup>67</sup> See generally, Hans Kelsen, *Pure Theory of Law* (Berkeley, California: University of California Press, 1967).

<sup>68</sup> Thomas Gutmann, “Theories of Contract and the Concept of Autonomy” (Paper delivered at the Shibolet Private Law Theory Workshop at Tel-Aviv University Faculty of Law / The Zvi Meitar Center for Advanced Legal Studies, March 6, 2013) [unpublished]; See also Robin West, “Law, Rights, and other Totemic Illusions: Legal Liberalism and Freud’s Theory of the Rule of Law” (1986) 134:4 U Pa L Rev 817 at 817.

country or state should only apply its local law and never a foreign law in the determination of cases before it.<sup>69</sup> As such, if the local law does not recognize party autonomy, reference cannot be made to the foreign law to recognize party autonomy. Rühl also explains that an economic theory justifies the scope of party autonomy in international commercial contracts.<sup>70</sup> This theory says that due to the inequality of bargaining power between contracting parties – an economic factor – a state must regulate the scope of party autonomy in order to achieve fairness among contracting parties.<sup>71</sup> According to her, “limitations to party autonomy, especially those in consumer, insurance and employment contracts, can be explained by the presence of market failure, most importantly opportunistic behaviour and information asymmetry.”<sup>72</sup>

This thesis does not engage in the debate as to the merit of these theories. It only contextualizes them for advancing the argument that these theories account for reasons why countries treat the scope of party autonomy differently. Thus, this thesis seeks to critically “think about theories” on the scope of party autonomy. This is what Richard Devlin calls an “explicit”, as opposed to an “implicit” level of theory.<sup>73</sup> The discussion on these theories answers a critical question in this thesis: why do countries limit the scope of party autonomy in the way they do? This gives a complete understanding of the statutes and cases that this thesis analyzes via a doctrinal method.

#### **1.6.4. Comparative Methodology**

Comparative research involves the systematic comparison of two or more legal systems (macro comparison) or parts, branches and aspects of two or more legal

---

<sup>69</sup> Walter Wheeler Cook, “The Logical and Legal Bases of the Conflict of Laws” (1924) 33:5 Yale LJ 457; Cheshire, North & Fawcett, *supra* note 3 at 26.

<sup>70</sup> See generally, Rühl, *supra* note 35.

<sup>71</sup> This is like the contract theory of distributive justice. See generally Anthony T Kronman, “Contract Law and Distributive Justice” (1980) 89:3 Yale LJ 472.

<sup>72</sup> Rühl, *supra* note 35 at 41.

<sup>73</sup> Richard Devlin, “The Charter and Anglophone Legal Theory” (1998) 4:1 Rev Const Stud 19 at 21. He says that while both levels are ways of “doing theory”, the implicit level of theory engages in theoretical debates while the explicit level engages in a critical discussion on the existing theories in a field. This level of theory fits well into what Okafor termed as a broad approach in discussing issues in third world countries. See Obiora Chinedu Okafor, “Critical Third World Approaches to International Law (TMAIL): Theory, Methodology, or Both?” (2008) 10 International Community Law Review 371 at 377.

systems (micro comparison).<sup>74</sup> Therefore, it is the “systematic application of comparison to law.”<sup>75</sup> It has been noted that “the Conflict of laws has long relied on the comparative method as a natural ally.”<sup>76</sup> However, there is controversy on the extent of the contribution of legal comparative scholarship to law reform or legal theory. For example, a writer claimed that:

it is fair to say that comparative law has been a somewhat disappointing field. For the most part, it has consisted of showing that a certain procedural or substantive law of one country is similar to or different from that of another. Having made this showing, no one knows quite what to do next.<sup>77</sup>

But Konrad Zweigert and Hein Kötz contend that comparative law “does not merely provide a reservoir of different solutions; it offers the scholar of critical capacity the opportunity of finding the “better solution” for his time and place.”<sup>78</sup> Zweigert and Kötz’s position can be analogized thus: a society is like a train, with the law as the engine. The comparatist is a mechanic whose job is finding the parts that will make the engine run more smoothly.<sup>79</sup>

From this analogy, it can be deduced that the former argument ignored the function of making the society run “smoothly” that the latter argument presents. In other words, the former argument looks at comparative scholarship from a “dry” perspective with no practical function in society, while the latter views it as a

---

<sup>74</sup> Kamba, *supra* note 13 at 486, 505. My comparative analysis focuses on private international law as a branch of law in national systems. Therefore, it is micro comparison.

<sup>75</sup> *Ibid.*

<sup>76</sup> Maria Hook, *The Choice of Law Contract* (Oxford: Hart Publishing Co, 2016) at 2; see generally B Fauvarque-Cosson, “Comparative Law and Conflict of Laws: Allies or Enemies? New Perspectives on an Old Couple” (2001) 49:3 Am J Comp L 407; AT Von Mehren, “The Contribution of Comparative Law to the Theory and Practice of Private International Law” (1978) 26 Am J Comp L (Supplement) 31 at 31.

<sup>77</sup> Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago, Illinois: University of Chicago Press, 1981) at vii; See also Alan Watson, “Legal Change: Sources of Law and Legal Culture” (1983) 131:5 U Pa L R 1121 quoted in Jonathan Hill, “Review: Comparative Law, Law Reform and Legal Theory: An Introduction to Comparative Law by Konrad Zweigert and Hein Kötz” (1989) 9:1 Oxford J Leg Stud 101 at 102.

<sup>78</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 3rd ed, translated by Tony Weir (Oxford: Oxford University Press, 1998) at 16. It is also said that the use of comparative method “liberates one from the narrow confines of the individual systems.” See Kamba, *supra* note 13 at 492. It should be noted that Hill criticized Zweigert and Kötz’s view on “better solution” as unorganized and subjective. Over the years, comparative law has overcome these criticisms. See generally Michaels Ralf, “The Functional Method of Comparative Law” (2005) Duke Law School Faculty Scholarship Series, Paper 26.

<sup>79</sup> Hill, *supra* note 77 at 106.

practically oriented exercise which seeks to answer a particular legal issue. Thus, while the former argument sees comparative scholarship as an end, the latter sees it as a means to an end.

Indeed, the comparative method has been used over the years by scholars to achieve various objectives/functions. It has been used to: (1) achieve comparability between two or more systems, (2) emphasize or show similarities among legal systems, (3) build a particular system of law by formalizing various systems of law, (4) determine a better system of law by evaluating two or more systems, (5) prepare legal unification by universalizing a particular rule, (6) provide tools for the critique of a law, and (7) understand a legal rule or institution.<sup>80</sup>

This thesis exhibits three functions of comparative law as highlighted above. First, to understand the development of party autonomy in different jurisdictions, it uses a comparative historical method (function 7). This helps to contextualize party autonomy as one of the most important conflict of laws rules developed over the years in most countries. This comparative function works with the historical method discussed above. Through these methods (historical and comparative), the legal rule or doctrine of party autonomy is explicated for better understanding.

Secondly, a comparative analysis of the development of party autonomy and the various limitations developed by countries will be a tool to critique the international instruments which seek to unify the scope of party autonomy, especially the *Principles* (function 6). As opposed to showing similarities between laws (function 2), this thesis seeks to show countries' divergence in the treatment of the scope of party autonomy, which they do for different reasons, including public policy and protection of national interests.<sup>81</sup> This helps to advance the criticism that the *Principles* did not consider the peculiar development/history of party autonomy in some countries. It explains why some countries, especially the developing ones, may not find reason to incorporate the provisions of the *Principles* into their national statutes. As a result, lack of uniformity in the scope of party autonomy may persist.

---

<sup>80</sup> Ralf, *supra* note 78 at 25. See also Zweigert, and Kötz, *supra* note 78 at 16.

<sup>81</sup> Yntema, *supra* note 20 at 358.

Finally, the comparative method utilized in this thesis takes an evaluative form (function 5). In this manner, it evaluates the national statutes and cases on whether disputes relating to the scope of party autonomy are treated uniformly. It should be noted that this comparative analysis is not to show that a country has a better system of law (function 4), but to show the differences between countries' emphases regarding the elements of the principle, a state of affairs which makes it difficult to achieve a uniform scope of party autonomy around the world.

Apart from jurisdictional evaluation, this thesis engages in legislative evaluation. It examines various regional attempts to codify party autonomy in response to the jurisdictional variation in its scope. The aim of this examination is to show why, most likely, they have all failed to achieve a uniform application of the scope of party autonomy. The result of both evaluations (jurisdictional and legislative) is to establish a basis upon which to propose a better unification system or procedure to define and frame the scope of party autonomy in the new international soft private international law – *Principles*.<sup>82</sup>

### 1.6.5. Interdisciplinary Method

It has been noted that interdisciplinary research “combines components of two or more disciplines in the search or creation of new knowledge, operations, or artistic expressions.”<sup>83</sup> This thesis does not boast of “creating new knowledge” through an

---

<sup>82</sup> Indeed, it has been noted that “the objective of many comparative lawyers has been to achieve harmonisation if not unification of laws.” See John Bell, “Legal Research and Distinctiveness of Comparative Law” in eds, Mark Van Hoecke & Francois Ost, *European Academy of Legal Theory Monograph Series* (Oxford: Hart Publishing Ltd, 2011) at 157.

<sup>83</sup> Moti Nissani, “Ten Cheers for interdisciplinarity: The Case for Interdisciplinary Knowledge and Research” (1997) 34:2 Soc Sci J 201 at 203. Critics of this method think that equal knowledge from two different fields is impossible. As such, there must be deficiency in one of the fields. See generally Robert Kramer, “Some Observations on Law and Interdisciplinary Research” (1959) 8:4 Duke Law Journal 563; Harry T Edwards, “The Growing Disjunction between Legal Education and the Legal Profession” (1993) 91:8 Mich L Rev 2191; Brent E Newton, “Preaching What They Don’t Practice: Why Law Faculties’ Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy” (2010) 62:1 SCL Rev 105; Karen Sloan, “Empiricism Divides the Academy” (2011) Nat’l LJ 1. This criticism has been dispelled by other authors who believe that interdisciplinary research is the future of law. For example, Oliver Wendell Holmes Jr opined that “for the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.” See Oliver Wendell Holmes, Jr, “The Path of the Law” (1897) 110:5 Harv L Rev 457 at 469; see also Dave Owen & Caroline Noblet, “Interdisciplinary Research and Environmental Law” (2015) 41:4 Ecology LQ 887.



interdisciplinary method. Rather, it draws on the existing knowledge from interdisciplinary scholarship on party autonomy to drive home the point that the scope of party autonomy has been limited because of the interconnectivity of law with other disciplines. For example, knowledge of the relationship between law and economics is one of the factors that determine the scope of party autonomy in most countries.<sup>84</sup> This is not limited to employment, adhesive, and consumer contracts, but to international contracts generally. This is because some persons are economically weak and need state protection to ensure equal bargaining power when they enter into an international contract. In effect, it is generally believed that some parties may be “forced” to agree to any term proposed by the other, including a clause on choice of law. This thesis points out that the list of contracts which requires regulation because of economic reasons differ from state to state – a factor that the Hague Conference neglected in the drafting of the *Principles*.

Also, this thesis examines the relationship between law and history. The result of this analysis advances the argument that the history of party autonomy in the four different regions examined in this thesis accounts for the varied scope of the doctrine. Without taking into consideration this relationship, it is impossible for the new Hague *Principles* to propose provisions that seek to globally unify the scope of the doctrine. In effect, this interdisciplinary approach accounts for reasons why it may not yet be a new dawn in the achievement of a global uniform scope of party autonomy. Again, it should be noted that this thesis does not lay claim to “do history” as historians do;<sup>85</sup> it only attempts to treat the available texts and documents in a progressive evolutionary manner as discussed above.

## **1.7. Structure of the Thesis**

The substance of the material and argument of this thesis follows in Chapters 2 to 6. Chapter 2 uncovers the meaning, history, and arguments for and against party autonomy. It defines party autonomy in the light of its relevance to international

---

<sup>84</sup> See generally, Ruhl, *supra* note 35.

<sup>85</sup> I acknowledge Robin Fisher’s opinion that “the interface between the discipline of history and the legal system is still a problematic one.” See Robin Fisher, “Judging History: Reflections on the Reasons for Judgment in *Delgamuukw v BC*” (1992) 95 BC Stud 43 at 54.

commerce. Apart from the general English jurisprudence on freedom of contract, and its Hellenistic history, chapter 2 traces the history and development of party autonomy from four different regions: continental Europe, Anglo-America, Latin America, and Africa. The history or development of party autonomy in these regions was characterized by arguments for and against the doctrine. This thesis classifies arguments in favour of recognition of party autonomy as pro-autonomy argument. It classifies arguments against it as anti-autonomy arguments. It points out that, notwithstanding the argument against party autonomy, the rise of international trade in the 20<sup>th</sup> century made it necessary for countries to recognize party autonomy. However, despite its wide recognition, some countries, especially in Latin America and Africa, still, do not recognize party autonomy or fundamentally restrict it. It argues that this is not unconnected with the late development of the doctrine in these regions, the effects of colonialism, their fragile economies, and scholars' arguments against party autonomy.

Chapter 3 examines other choice of law rules associated with party autonomy (express intention rule). This is because the argument against party autonomy necessarily features arguments in favour of other choice of law rules. The analysis seeks to show that the application of other choice of law rules, which include the law of the place of contracting (*lex loci contractus*), law of the place of performance (*lex loci solutionis*), law of the place that validates the contract (*lex validitatis*), and the law of the place domicile (*lex domicilii*), is characterized by uncertainty and absurdity.<sup>86</sup> Juxtaposing these characteristics with party autonomy (express intention rule), it points out that the application of party autonomy ensures certainty and uniformity in choice of law decisions in international commercial contracts. In effect, party autonomy, because of its certainty and uniformity functions in international commerce, is the “least problematic” choice of law rule.<sup>87</sup> However, as advantageous as party autonomy is to international trade, it cannot be unrestricted because parties with superior economic bargaining power may be

---

<sup>86</sup> It should be noted that some scholars see these choice of law rules as express intentions of the parties because the connecting factors for determining the rules are based on the actions or intentions of the parties. For example, it is the parties' intention to execute a contract in a place that activates *lex loci contractus* rule.

<sup>87</sup> Although courts still apply other choice of law, they only resort to them in cases where parties have not made an express choice of law.

placed in an advantageous position over those with less bargaining power. National laws, therefore, restrict the scope of party autonomy to prevent or minimize the inherent abusive trait that the doctrine possesses.

Chapter 4 comparatively examines how and why countries have limited the scope of party autonomy. The comparative analysis shows that (1) party autonomy is essentially a manifestation of national, rather than supranational recognition, (2) absolute or unlimited party autonomy is almost impossible in any legal system, and (3) there are varying degrees or scope of party autonomy in different countries. The scope is determined by political, national and economic interests, legal history, public policy, academic opinion and even, sometimes, religious beliefs, as in the case of the United Arab Emirates; and (4) the relative exceptions and expansion of the doctrine and constraints in most jurisdictions challenge the prospect of achieving a uniform scope of party autonomy. Chapter 5 examines efforts to unify the divergent scope of party autonomy presented in chapter 4. This chapter, which is divided into four sections, focuses on the new soft law instrument – *Principles*.<sup>88</sup> It first examines the efforts of international organizations and regional legislative bodies to unify the scope of party autonomy through different codification approaches or techniques. It then particularly examines the scope of the *Principles* and the Hague Conference’s justifications for using a soft law approach. It concludes that a soft private international law rule, especially on the scope of party autonomy, the first of its kind in choice of law international legislation, is a step in the right direction to unify the divergent scope/limitations of party autonomy. Section 2 argues that, although the *Principles* constitutes a step in the right direction, the Hague Conference did not consider factors for its acceptance in developing countries. These factors mainly relate to the economic imbalance between parties in the developed and developing countries. It points out that it is imperative for the Hague Conference to consider these factors because the acceptance of the *Principles* in different countries depends on its intrinsic values,

---

<sup>88</sup> *Principles*, *supra* note 9. Although this thesis refers to other instrument on the subject, its focus is on the *Principles*.

that is, “on the substantive content of its rules, rather than on external or political factors.”<sup>89</sup>

Section 3 examines the relationship of the *Principles*, as soft law, with two hard law instruments on choice of law – the *Rome I Regulation* and the *Mexico Convention*. It particularly examines the provisions of a choice of non-state law in these instruments. It argues that the choice of non-state law may not be persuasive to countries in continental Europe because the *Rome I Regulation*, which prohibits the choice of a non-state law, is a binding instrument. The *Principles’* conditions for the application of non-state laws in litigation proceedings even make it more problematic, not only for countries in Europe but for developing countries that do not recognize the choice of non-state law. Finally, Section 4 examines the nature of the *Principles* and its relationship with another soft law instrument – the *UNIDROIT-Principles of International Contracts 2010*<sup>90</sup> and non-state law – the *United Nations Convention on Contracts for the International Sale of Goods 1980*.<sup>91</sup> It first explains the scope of the *Principles* and then argues that it cannot normatively empower the choice of another soft law or non-state law because they are either in the same legal normative order, or they outrank the *Principles*. Even if the *Principles* empowers the choice of other soft laws, it cannot do so in areas that the soft laws have not made provisions for or situations where the soft laws are inapplicable. It concludes that, if the *Principles’* provisions are not “creatively” interpreted, their application with other soft laws or non-state law may produce problematic, uncertain and unintended results.

Chapter 6 recommends solutions for some of the challenges identified in this thesis that may yet face the *Principles* – acceptability and interpretational challenges. It proposes that, to achieve a uniform scope of party autonomy in most jurisdictions, the *Principles* must generally protect parties in international contracts, and not employment and consumers contracts alone.<sup>92</sup> It must also inform

---

<sup>89</sup> Albornoz & Martin, *supra* note 8 at 458.

<sup>90</sup> Online: <[www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf](http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf)> [PICC].

<sup>91</sup> *United Nations Convention on Contracts for the International Sale of Goods*, 11 April 1980, 1489 UNTS 3, Can TS 1992 no 2 (entered into force 1 January 1988) [CISG].

<sup>92</sup> This thesis does not cover issues relating the effect of contracts between contracting parties on non-parties. Also, the definition of international contracts, as this thesis show, varies from country to country.

countries, especially countries where party autonomy is prohibited or fundamentally restricted, of the usefulness of applying the *Principles*. The *Principles* must further expatiate on some of its provisions, especially about its relationship with other soft laws or non-state laws. This thesis generally concludes that, although the *Principles* is a step toward global unification of the scope of party autonomy, greater tasks lie ahead.<sup>93</sup>

---

For the purpose of this thesis, an international contract is one conclude between private individuals or companies (commercial as opposed to investment transactions) that has connection with more than one jurisdiction. See generally, Georges Rene Delaume, *supra* note 16.

<sup>93</sup> Scholars are already accepting this task. See generally, Rodríguez, *supra* note 25.

## CHAPTER 2: PARTY AUTONOMY: MEANING, HISTORY, AND ARGUMENTS

### 2.1. Meaning of Party Autonomy

The manner in which parties exercise freedom of contract to choose a law or legal system to govern their transaction is called party autonomy in conflict of laws. In this regard, it is a choice between two or more alternative laws. Therefore, party autonomy is “the entitlement of parties to select the law under which their contractual terms will be interpreted [governed], and the jurisdiction in which those terms will, in the event of a dispute, be enforced.”<sup>1</sup> In other words, party autonomy is a form of freedom of contract as espoused by English philosophical jurisprudence in the 19<sup>th</sup> century.<sup>2</sup> The English jurisprudence is founded on the principle that an individual is “the best judge of his own welfare and of the means of securing it.”<sup>3</sup> Since a contract is a product of the parties’ free will which they exercise by deciding the terms in their contracts, the phrases “party autonomy,” “private autonomy” and “freedom of contract” have often been used interchangeably.<sup>4</sup> Thus, except that party autonomy is used in a conflict of laws context, the three terms exhibit the characteristics of the autonomous will of individuals.<sup>5</sup> Notwithstanding the similarities, the three concepts differ contextually. They differ in the sense that “party autonomy emphasizes the respect of personal rights, private autonomy is opposed to the constraint and or restriction of public law, and the freedom of contract is an extension of the idea of equality and utility with the situation that commodity economy fully developed.”<sup>6</sup>

---

<sup>1</sup> Fluer Johns, “Performing Party Autonomy” (2008) 71:3 Law & Contemp Probs 243 at 249. See also Albert Ehrenzweig & E Jayme, *Private International Law, A Comparative Treatise on American International Conflicts Law, Including the Law of Admiralty*, vol 3 (Leyden: AW Sijthoff, 1977) at 253.

<sup>2</sup> Patrick S Atiyah, “The Classical Law of Contract” ‘in an Introduction to the Law of Contract’ in Richard Devlin ed, *Contracts, Supplement II Contract Law in Politico-Philosophical Perspective* (Halifax: Dalhousie University, 1988) 28 at 33.

<sup>3</sup> F Kessler, G Gilmore & A Kronman, “Contract as a Principle of Order,” *ibid* at 38.

<sup>4</sup> Zhaohua Meng, “Party Autonomy, Private Autonomy, and Freedom of Contract” (2014) 10:6 Can Soc Sci 212 at 215; see also Symeon Symeonides “Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple” (2014) 39:3 Brook J Intl L 1123 at 1130 (“party autonomy is the external side of a domestic law principle of freedom of contract”); see also Stefan Grundmann, “Information, Party Autonomy and Economic Agents in European Contract Law” (2002) 39 CML Rev 269.

<sup>5</sup> Meng, *ibid* at 215 (“[i]n the applicable area of international private law, the following conclusion can be made: Private autonomy equals to party autonomy, and party autonomy includes freedom of contract”).

<sup>6</sup> *Ibid* at 212.

Furthermore, unlike the philosophical freedom of contract, parties can only choose the governing law of a contract if a national system of law or private international law rules of a state permit them to do so.<sup>7</sup> Indeed, “the forum State [national system of law], which ultimately controls the choice of law, has to determine the conditions, the limits and the scope of the parties’ autonomy.”<sup>8</sup> Thus, party autonomy is a function of the conflict of laws rules of every state. It should be noted that party autonomy is not only used in terms of the applicable law in contracts; it has also been applied in other areas of law, including torts, family, succession, and trusts.<sup>9</sup>

## 2.2. History of Party Autonomy

Party autonomy is “almost as ancient as conflicts law itself.”<sup>10</sup> However, the history of party autonomy varies from country to country. Therefore, a holistic history of all countries may be impossible in this chapter. It should be noted that notion of individual rights across states which influences the growth and development of party autonomy in states is outside the scope of this thesis. However, the history of party autonomy in each state cannot be divorced from the history of how they have balanced the right of an individual to enter into contracts and states’ intervention in such contracts.<sup>11</sup> For example, the United States Supreme Court invalidated a New

---

<sup>7</sup> Giuditta Cordero Moss, “International Arbitration and the Quest for the Applicable Law” (2008) 8:3 *Global Jurist (Advances)* Art 2, 1 at 6; Peter Nygh, *Autonomy in International Contracts* (Oxford: Clarendon Press, 1999) at 32.

<sup>8</sup> Frank Vischer, *General Course on Private International Law* (Leiden: Martinus Nijhoff Publishers, 1993) at 139.

<sup>9</sup> Nygh, *supra* note 7 at 14; see *Hague Convention on the Law Applicable to Matrimonial Property Regimes*, 14 March 1978, 16 ILM 14 (entered into force 1 September 1992); Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L199/40 (Rome II); *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (entered into force 1 August 2013), online:<[www.hcch.net/en/instruments/conventions/full-text/?cid=133](http://www.hcch.net/en/instruments/conventions/full-text/?cid=133)>.

<sup>10</sup> Symeon C Symeonides, Wendy Perdue & Arthur Taylor Von Mehren, *Conflict of Laws: American, Comparative, International: Cases and Materials*, 3rd ed (Minnesota: West Publishing Co, 2012) at 338.

<sup>11</sup> See generally, F Kessler, G Gilmore & A Kronman *supra* note 3. See also David P Weber, “Restricting the Freedom of Contract: A Fundamental Prohibition” (2014) 16:1 *Yale Human Rights and Development Journal* 51.

York employment law which limited the daily number of hours a baker could work as unduly “favouring one party to the contract.”<sup>12</sup>

This chapter attempts to give a general account and developments of the doctrine in four major legal systems: continental Europe, Anglo-America, Latin America, and Africa. These historical accounts aim to show that there is an uneven development of party autonomy in these legal systems.<sup>13</sup> While the developments in continental Europe and Anglo-America (The United States and the United Kingdom) vary “in degree rather than in substance,”<sup>14</sup> the same cannot be said of Latin America and Africa because the doctrine developed late in these regions due to many factors, including territorialism and apathy to the development of private international law rules on choice of law. Also, the historical analysis shows that the influence of scholars on the development of the doctrine in these legal systems varies. While scholars in continental Europe in the 16<sup>th</sup> century laid the foundation of the doctrine, scholars in Anglo-American countries espoused the doctrine as developed by courts.<sup>15</sup> Similarly, most scholars opposed the principle in Latin American countries, while their contemporaries in the African region simply showed apathy to conflict of laws issues generally.

### **2.2.1. General History**

The problem of choice of law predates the existence of any nation-state.<sup>16</sup> It is claimed that choice of law issues arose as soon as two individuals from different “matured” legal systems began to deal with one another.<sup>17</sup> However, the history of party autonomy as a conflict rule may be traced, albeit indirectly, to a decree issued

---

<sup>12</sup> *Lochner v New York*, 198 US 45 (1905).

<sup>13</sup> Thus, as Juenger puts it, the aim is to show that there is “an uneven evolution of party autonomy.” See Friedrich Juenger, “The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons” (1994) 42:2 *Am J Comp L* 381 at 388.

<sup>14</sup> Peter Hay, Patrick J Borchers & Symeon C Symeonides, *Conflict of Laws*, 5th ed (Minnesota: West Publishing Co, 2010) at 16.

<sup>15</sup> Ernst G Lorenzen, “Story’s Commentaries on the Conflict of Laws – One Hundred Years After” (1934) 48:1 *Harv L Rev* 15 at 18. (characteristics of Anglo-American law has been its development by courts and not by legal writers).

<sup>16</sup> Friedrich K Juenger, “A Page of History” (1984) 35:2 *Mercer L Rev* 419 at 420.

<sup>17</sup> *Ibid*; It has been noted that “[i]t was the interaction between the laws of the Italian city states emerging after the collapse of the Roman empire that laid the core foundation for the discipline [conflict of laws]” see Richard Oppong, “Private International Law in Africa: The Past, Present, and The Future” (2007) 55:4 *Am J Comp L* 677 at 685.



in Hellenistic Egypt in 120-118 BC. The decree provided that contracts written in the Egyptian language were subject to Egyptian courts which applied the Egyptian law, while contracts written in Greek were subject to the Greek Court which applied the Greek law. Invariably, a choice of language necessarily meant both a choice of court and choice of law.<sup>18</sup> The decree has been criticized as not having any conflict of laws intent, but a political gesture that allows persons to patronize the Egyptian Courts because of the latter's loss of influence to the Greek Courts.<sup>19</sup> However, regardless of its intent, this example remains one of the early cases of history where an individual has a choice to decide the applicable law and court.

### **2.2.2. Continental Europe (Civil Law Countries)**

In Europe, party autonomy can be traced to Roman times.<sup>20</sup> This is because the Roman Empire regarded a law as a peculiar property of persons entitled to it, who can lay claim to it or ignore it. This means that while Roman citizens can claim an entitlement to Roman law anywhere in the world, they could also discard such law by choosing the law of the place where they reside.<sup>21</sup> This influenced the development of party autonomy in Europe because it is said that “it is a prevailing doctrine on the Continent of Europe that in the case of all voluntary obligations, parties, since they have the right to choose whether or not they will be bound, have also the right to choose the law under which they shall be bound.”<sup>22</sup> Thus, the word “autonomy” has its root in two Greek words: “auto-” (self) and “nomos” (law) which is used to describe the rights that certain noble families and incorporations enjoy in Germany to regulate their affairs through private legislations.<sup>23</sup>

However, beyond these concepts, party autonomy in contracts was not recognized. Even early writers like Bartolus, a statutist, did not recognize party

---

<sup>18</sup> Friedrich K Juenger, *Choice of Law and Multistate Justice* (Leiden: Martinus Nijhoff Publishers, 1993) at 7-8.

<sup>19</sup> Hans Julius Wolff, *Das Problem der Konkurrenz von Rechtsordnungen in der Antike* (Heidelberg: Winter Publishing Co, 1979) at 62-64, cited in Friedrich K. Juenger, *supra* note 16 at 421.

<sup>20</sup> SM Richardson, *International Contracts and The Choice of Law* (DCL Thesis, University of Canterbury, 2005) [unpublished] at 18.

<sup>21</sup> Joseph Henry Beale, “What Law Governs the Validity of Contract I” (1909) 23:1 Harv L Rev 1 at 7.

<sup>22</sup> *Ibid.*

<sup>23</sup> Maria Hook, *The Choice of Law Contract* (Oxford: Hart Publishing Co, 2016) at 20.

autonomy as the right of parties to choose the governing law.<sup>24</sup> Instead, he advocated that the national law of the place where the contract was made (*lex loci*) or the law of the place of performance (*lex solutionis*) should be the applicable law.<sup>25</sup> The early predominant view is that a contract is like a child who is subject to the law of the place of birth.<sup>26</sup> In other words, a contract is subject to the law of the place of contract because parties have tacitly acceded to the law of the place of contracting.

It was in the 16<sup>th</sup> century that the French scholar, Dumoulin, posited that the will of the parties, express or implied, should be the determining factor of the governing law of a contract.<sup>27</sup> He thought that the will of the parties is sovereign and that if not expressly made; the governing law must be determined by the surrounding circumstances of the contract, the place of the contract being only one of these circumstances (tacit choice). Thus, he stretched the application of the principle to situations where the choice of law is not expressly made. This “tacit choice” as espoused by Dumoulin may be regarded as a foundation for the “proper law” doctrine which in turn founded the notion of the “reasonable connection test” formula of the *Restatement (second) of the Conflict of Laws* in the United States.<sup>28</sup> His doctrine was given judicial confirmation by the court of cassation in 1836.<sup>29</sup>

Huber, a Dutch scholar, in 1689, also sees the will of the parties as supreme, as opposed to an alternative, because he believes that the place of contract can be dispelled by the wills of parties. He declares that “the place, however, where a contract is entered into, is not to be considered absolutely; for if the parties had in mind the law of another place at the time of contracting the latter will control.”<sup>30</sup>

---

<sup>24</sup> Bartolus de Saxoferatto, *Conflict of Laws* (Beale's translation) (Cambridge: Harvard University Press, 1914) at 18-20.

<sup>25</sup> See Ernst G Lorenzen, “Validity and Effect of Contracts in the Conflict of Laws” (1921) 30:6 Yale LJ 565 at 573; Hay, Borchers & Symeonides, *supra* note 14 at 13.

<sup>26</sup> Armand Lainé, *Introduction Au Droit International Privé: Contenant Une Etude Historique Et Critique De La Théorie Des Statuts Et des rapports de cette théorie avec le Code civil*, vol 2 (Librairie Cotillon, F Pinchon, successeur, 1892) at 189.

<sup>27</sup> See Lorenzen, *supra* note 25 at 574.

<sup>28</sup> Juenger, *supra* note 16 at 431.

<sup>29</sup> Lorenzen *supra* note 25 at 573.

<sup>30</sup> Huber, *De Conflictu Legum*, para 5 quoted in Lorenzen, *ibid* at 574. His idea of recognizing a foreign law based on comity influenced subsequent writers. See generally, Ernest G Lorenzen, “Huber’s De Conflictu Legum” (1919) 13 Ill L Rev 375; See also Hay, Borchers & Symeonides, *supra* note 14 at 19.

His works, as shown later in this chapter, influenced the development of the doctrine in the Anglo-American world.

Savigny, a German jurist, built on this theory in 1849.<sup>31</sup> He posited that the law of the place of performance, the law of the place of contracting and the nationality of the parties should govern the contract unless there is a contrary choice.<sup>32</sup> He explained that every legal relation has a seat, that is, the territorial law on which the legal relation is based, but that the parties' intention may replace the law of the seat through the voluntary submission of parties to the law of another State.<sup>33</sup> It was the Italian jurist, Pasquale Mancini, who in 1851, formulated the doctrine as we know it today as the expression of the will of the parties.<sup>34</sup> He, however, in theory, conceded that autonomy must be exercised within the bounds of law because he believed that "the principle of party autonomy should yield to territorial sovereignty only with respect to matters concerning public policy, sovereignty, and rights in real estate."<sup>35</sup> Laurent, a Belgian jurist, also explained the meaning of "bounds of law" as follows:

It is certain that the contracting parties cannot determine their status and capacity; these matters belong to public order, and as such fall within the exclusive province of the legislator. Still less can they regulate what belongs to the sovereign power. To express myself in the language ordinarily used, everything belonging to status and to the real statute is beyond the autonomy of the individuals.<sup>36</sup>

The development of the doctrine of party autonomy in continental Europe shows a recurrent theme for its history; that is, while the doctrine was erstwhile shackled with the territorial limitations of place of contract and performance, it grew

---

<sup>31</sup> The *lex loci contractus* was formerly applied in Germany. Lorenzen, *supra* note 30 at 567.

<sup>32</sup> *Ibid*

<sup>33</sup> *Ibid* at 575-576.

<sup>34</sup> Giesela Ruhl, "Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency" (2007) CLPE Research Paper 4/2007 1 at 5. Party Autonomy was recognized in the Italian statute as early as 1865 and reiterated in *codice civile*, 1942.

<sup>35</sup> Juenger, *supra* note 16 at 455; see also Y Nishitani, *Mancini und die Parteiautonomie im Internationalen Privatrecht* (Heidelberg: Winter, 2000) at 220-222, 246.

<sup>36</sup> Laurent François, *Le droit civil international* (Bruxelles: Bruylant-Christophe, 1880) at 383-384.

considerably through the works of scholars,<sup>37</sup> and despite some early opposition,<sup>38</sup> it has been accepted as an established doctrine.<sup>39</sup> Also, while the recognition of the doctrine may be traced to the 16<sup>th</sup> centuries (or even earlier),<sup>40</sup> the growth of international trade in the 19<sup>th</sup> and 20<sup>th</sup> century further increased the acceptance of the doctrine because party autonomy was seen as a means of achieving economic efficiency.<sup>41</sup> It could be said that the “final victory” of the doctrine in continental Europe came in 1980 when it was incorporated in the *Rome Convention*.<sup>42</sup> Article 3 of the Convention provides that contracts shall be governed by the law chosen by the parties.

### 2.2.3. Anglo-America (The United States and The United Kingdom)

Compared to the civil law jurisdictions, the doctrine’s acceptance in common law countries was a slower business. Generally, the judicial authority upon which the doctrine of party autonomy is based in Anglo-America is *Robinson v Bland*.<sup>43</sup> The much-quoted Lord Mansfield’s dictum in the case is to the effect that a particular law which would otherwise be applicable may be excluded if parties at the time of making the contract had the law of “another kingdom” in mind.<sup>44</sup> However, this decision did not state the means of knowing when parties have a view to a different law. This leaves room for scholars and latter cases to develop the doctrine, drawing influences from their civil law contemporaries. Indeed, it has been noted that

---

<sup>37</sup> The Court contributed little to the development of the doctrine in continental Europe. See Lorenzen, *supra* note 15 at 17.

<sup>38</sup> Saxoferatto, *supra* note 22.

<sup>39</sup> For example, countries like Greece, Poland, Switzerland, Spain, Hungary, and China have recognized the principle. See Hessel Yntema, “Autonomy’ in Choice of Law” (1952) 1:4 Am J Comp L 341 at 350 -351.

<sup>40</sup> Henri Batiffol, *Form and Capacity in International Contract in Lectures on Conflict of Laws and International Contracts delivered at the Summer Institute on International and Comparative Law University of Michigan Law School 5 August 1949* (Buffalo, New York: Hein & Co, 1982) at 103.

<sup>41</sup> Ruhl, *supra* note 34 at 6.

<sup>42</sup> *Convention on the Law Applicable to Contractual Obligation, with Protocol, and Joint Declarations* 19 June 1980; BTS 2 (1992) (entered into force on 1 April 1991). This has been replaced by the *Regulation (EC) 593/2008 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I)*; Ruhl, *Ibid*.

<sup>43</sup> [1755] 96 Eng. Rep. 129 KB. This decision was followed by *Re Missouri SS Co*, [1889] 42 Ch Div 321 at 340-341; Lorenzen, *supra* note 25 at 577; William J Woodward Jr, “Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy” (2001) 54:2 SMULR 697 at 711.

<sup>44</sup> Lord Mansfield relied on Huber’s view in *De Conflictu Legum*. See also generally, AE Anton, “The Introduction into English Practice of Continental Theories on the Conflict of Laws” (1956) 5:4 ICLQ 534.

Huber's teachings influenced Lord Mansfield's decision and Joseph Story's treatise in the United States.<sup>45</sup>

#### 2.2.4. The United States

Joseph Story is one of the early advocates of party autonomy in the United States who relied on Lord Mansfield's dictum. In 1834, he argued, in his *Commentaries on the Conflict of Laws*,<sup>46</sup> that if the place of contracting is also the place of performance, then the contract is automatically governed by the law of the place of contract (*lex loci contractus*).<sup>47</sup> But where the place of contract is different from the place of performance, then the presumed intention as to the law of the place of performance (*le loci solutionis*) must be recognized and given effect to in the interpretation and validity of the contract.<sup>48</sup> While the United States courts, especially the Supreme Court applied the doctrine,<sup>49</sup> some American scholars, chief among whom is J.H. Beale, an ardent supporter of vested/territorial right theory,<sup>50</sup> opposed the doctrine.<sup>51</sup> He argued that the doctrine as developed in civil law countries should not be adopted in the United States because it enables parties to

---

<sup>45</sup> Woodward Jr, *supra* note 41 at 144. Huber's ideas of comity were quoted to American courts since 1788. See Kurt H Nadelmann, "Introduction to Yntema, The Comity Doctrine" (1966) 65:1 Mich L Rev 1 at 2; Erwin Spiro, *Conflict of Laws* (South Africa: Juta & Co, 1973) at 6.

<sup>46</sup> Joseph Story, *Commentaries on the Conflict of Laws*, 1st ed (reprint) (New Jersey: Lawbook Exchange Limited, 2010).

<sup>47</sup>*Ibid* at 228-230.

<sup>48</sup> *Ibid* at 280. This later became the "intention theory" usually traced to the case of *Pritchard v Norton*, 106 US 124 (1882). See Thomas W Pounds, "Party Autonomy – Past and Present" (1970) 12:2 S Tex LJ 214 at 215.

<sup>49</sup> It has been noted that "American transactional and judicial practice recognized the principle as early as 1825." See Hay, Borchers & Symeonides, *supra* note 14 at 1086; see *Wayman v Southand*, 23 US 148 (1825); *London Assurance v Companhia de Moagens do Barreior*, 167 US 149 (1890); *Mutual Life Insurance Company of New York v Tine Cohen*, 179 US 262 (1900); *Pinney v Nelson*, 183 US 144 (1901); *Mutual Life Insurance Company of New York v Hill*, 193 US 551 (1904); but see *E Gerli and Company v Cunard S S Co*, 48 F 2d 115 (2d Cir 1931) ("[p]eople cannot by agreement substitute the law of another place . . . an agreement is not a contract, except as the law says it shall be, and to try to make it one is to pull on one's bootstraps. Some law must impose the obligation, and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crime").

<sup>50</sup> A theory which argues that rights accrued outside a forum should be recognised by the forum regardless of the fact that the forum does not have an equivalence of such right. See the classic formulation of the doctrine by Justice Holmes in *Slater v Mexican Nat'l Railroad Co*, 194 US 120 (1904).

<sup>51</sup> Pounds, *supra* note 48 at 215. Juenger, says that Beale adopted a "narrower perspective from which American conflicts law has suffered ever since." See Juenger, *supra* note 16 at 445. Beale's view dominated American landscape for 50 years. For an assessment of his work, see Symeon Symeonides, "The First Conflicts Restatement Through the Eyes of Old: As Bad as its Reputation" (2007) 32:1 S Ill ULJ 39.

legislate themselves out of the reach of the territorial law.<sup>52</sup> Much of his arguments will follow in the next section, but suffice to say that Beale was successful in convincing the American judiciary and scholars to omit the principle from America's *First Restatement of the Conflict of Laws (the Restatement)*.<sup>53</sup> He was able to do this because of his position as the Reporter for the proposed *Restatement of Conflict of Laws* discussed at the 1927 American Law Institute conference which considered chapter 8 (contract) of the *Restatement*. He was directed to prepare a revision of the chapter on contract. He did this without including party autonomy or the intention theory.<sup>54</sup> Thus, section 322 of the final version on contract in the *Restatement* did not acknowledge that parties to an international contract could depart from the law of the place of contract. At best, parties could only incorporate the provisions of a foreign law as terms of their contract.<sup>55</sup>

This omission drew criticism from American scholars who argue that parties should be allowed to contract out of the law of the place of contract, with the exception that they may not do so where the law mandates its compulsory application – mandatory laws.<sup>56</sup> Since this omission in the *Restatement*, the development of the doctrine was described as “erratic.”<sup>57</sup> This is because there was no uniform application of the doctrine by American courts. However, contrary to Beale's prediction that the doctrine is a dying one, case law continued to recognize the doctrine after *the Restatement*, although they acknowledged that the doctrine ought to be restricted for the protection of the forum state.<sup>58</sup>

The first major step of the “uniform” acceptance of the doctrine was the enactment of the *Uniform Commercial Code* in 1952, drafted with the support of

---

<sup>52</sup> Beale, *supra* note 19.

<sup>53</sup> *Restatement of the Law of Contracts* (St. Paul, Minnesota: American Law Institute, 1932); Nygh, *supra* note 7 at 10.

<sup>54</sup> Richardson, *supra* note 20 at 23.

<sup>55</sup> See *Louis-Dreyfus v Paterson Steamships Ltd*, 43 F 2D 824 at 827 (2D Cir 1930).

<sup>56</sup> See e.g. Arthur Nussbaum, “Conflicting Theories of Contracts: Cases versus Restatement” (1942) 51:6 Yale LJ 893; Walter Wheeler Cook, “The Logical and Legal Bases of The Conflict of Laws” (1924) 33:5 Yale LJ 457; Walter Wheeler Cook, “Jurisdiction of Sovereign States and the Conflicts of Laws” (1931) 31:3 Colum L Rev 368; Ernest G Lorenzen, “Territoriality, public policy, and the Conflict of Laws” (1924) 33:7 Yale LJ 736; Hessel E Yntema, “The Hornbook Method and the Conflict of Laws” (1928) 37:4 Yale LJ 468; David F Cavers, “A Critique of the Choice-of-Law Problem” (1933) 47:2 Harv L Rev 173; Max Rheinstein, “Review of Essays on the Conflict of Laws by John D Falconbridge, *Essays on the Conflict of Laws*” (1947) 15 U Chicago L Rev 478 at 484.

<sup>57</sup> Pounds, *supra* note 48 at 220.

<sup>58</sup> *Ibid* at 223; Woodward Jr, *supra* note 43 at 712.

the American Law Institute.<sup>59</sup> This was followed by the *Restatement (Second) of the Conflict of Laws* in 1968. These statutes, in section 105-1 and 187, respectively, recognize the doctrine of party autonomy with qualifications.<sup>60</sup> Courts have, therefore, applied these statutes together with their qualifications. For example, in 1972, the Supreme Court of the United States held in *The Bremen v Zapata Off-Shore Co*<sup>61</sup> that parties in a “freely negotiated private international law agreement, unaffected by fraud, undue influence, or overweening bargaining power” can freely choose the applicable law to their contract.<sup>62</sup> Thus, while party autonomy is now recognized in the United States, the qualifications may be different in the 50 states of the United States because states adopt the statutes differently.

### 2.2.5. The United Kingdom

As stated earlier, the doctrine in the Anglo-American jurisdictions can be traced to the English decision of *Robinson v Bland*.<sup>63</sup> Briefly, the fact of the case is that an action was instituted in the English Court to enforce a gambling debt incurred in France. Despite similarities of French and English law on whether such debt is recoverable, the King’s Bench considered a situation where the laws of both countries were different. The three judges: Chief Justice Lord Mansfield, Denison and Wilmot JJ applied different tests to deny enforcement of the gambling debt in England. Denison J believed that since the case was instituted in England, English law will govern the contract (law of the forum). Wilmot J stated that since the debt was to be paid in England, English law is the most appropriate (law of the place of performance). Lord Mansfield added that since the parties intended to apply English law, the English law was applicable (the law intended by parties – party autonomy). The latter judge also stated that since the place of payment of the debt was in England, the security was in England, and the parties had intended to apply

---

<sup>59</sup> Pounds, *supra* note 48 at 223.

<sup>60</sup> For example, that the contract must bear reasonable relation to the United States. See *Seeman v Philadelphia Warehouse Co*, 274 US 403 (1927) for the interpretation of a “reasonable connection.”

<sup>61</sup> 407 US 1(1972).

<sup>62</sup> *Ibid* at 12.

<sup>63</sup> *Supra* note 43. Although there is an earlier decision of the English Court in *Foubert v Turst*, (1703),1 Eng. Rep. 464 at 465 where it was held that “all lawful contracts as well as of marriage, as well as anything else, ought to be fully performed between the parties and their representatives, according to the apparent intent of such contracts.”

English law, English law must be applied (the law of the place of performance as that presumably intended by the parties).<sup>64</sup>

Notwithstanding that the first two dicta have been overruled in latter cases,<sup>65</sup> Lord Mansfield's "intention dicta" has been accepted as the rule by which to determine the validity of contracts in England.<sup>66</sup> Some judicial authorities, including *P. & O. Steam Navigation Co. v Shand*,<sup>67</sup> *Lloyd v Guibert*,<sup>68</sup> and *Jacobs v Crédit Lyonnais*<sup>69</sup> also established that parties' intention could be made either expressly or impliedly, and the court can decipher parties' intention by examining the surrounding circumstances. In effect, these cases held that the court is at liberty to construe the intention of parties and give effect to it.<sup>70</sup> These decisions established the doctrine of "proper law" that was distinctly developed in the United Kingdom.<sup>71</sup> One of the judicial authorities which explains this doctrine is *Vita Food Products v Unus Shipping Co.*,<sup>72</sup> where Lord Wright, delivering the opinion of the Judicial Committee, said that:

It is now well settled that by English law (and the law of Nova Scotia is the same) the proper law of the contract "is the law which the parties intended to apply." That intention is objectively ascertained, and, if not expressed, will be

---

<sup>64</sup> He relied on the works of Huber and Paul Voet who espoused the doctrine in civil countries. See Joseph Henry Beale *supra* not 21 at 6.

<sup>65</sup> See e.g. *Quarrier v Colston*, [1842] 1 Phillips 147;41 Eng. Rep. 587 (Ch.) (the Court refused to apply the law of the forum); *Stapleton v Conway*, 3 Atk R 727 (the court refused to apply the law of the place of subject matter of the contract).

<sup>66</sup> See *In Re Missouri 2*, [1889] 42 Ch Div 321 at 340-341.

<sup>67</sup> [1865] 3 Moo PCC NS 272.

<sup>68</sup> [1865] LR LQB115 at 120-1.

<sup>69</sup> [1884] 12 QBD 589 at 600.

<sup>70</sup> Richardson, *supra* note 19 at 30.

<sup>71</sup> The doctrine propose that commercial contracts are governed by the legal system which the parties have impliedly or expressly chosen. See Frederick Alexander Mann, "The Proper Law of the Contract" (1950) 3:1 ILQ 60 at 60. The earliest cited judicial authority of this doctrine is *R v International Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] LJKB 236 at 238.

<sup>72</sup> [1939] AC 277 at 289. See Lord Wright's dictum a year before this decision in *Mount Albert Borough Council v Australian Temperance and General Mutual Society*, [1938] AC 224 at 240 that "[t]he proper law of the contract means that law which the English court is to apply in determining the obligations under the contract. English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary criteria such as *lex locicontractus* or *lex loci solutionis* and has treated the matter as depending on the intention of parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding circumstances."



presumed from the terms of the contract and the relevant surrounding circumstances.<sup>73</sup>

Two scholars, Westlake<sup>74</sup> and Dicey,<sup>75</sup> espoused the theoretical basis of this doctrine.<sup>76</sup> Westlake thinks that the proper law means that English courts would take into consideration the close connection of the contract (subjective theory). He puts his view as follows:

In the circumstances it may be said that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has the most real connection, and not to the law of the place of the contract as such.<sup>77</sup>

Dicey's concept of proper law emphasized the intention of the parties (objective theory) rather than the close connection test. He thinks that proper law means the "law, or laws, by which the parties intended, or may fairly be presumed to have intended, the contract to be governed."<sup>78</sup> These theories, which interpreted case law, developed the doctrine of party autonomy in English jurisprudence.

In sum, the development of party autonomy in the United Kingdom relied on case law and contribution from scholars. It avoided the early rigid approach of civil law countries which is based on the place of contract or place of performance; instead it embraced the elastic criteria of the "close connection test" or "proper law."<sup>79</sup> Like the continental European experience, party autonomy was further recognized in the 19<sup>th</sup> century in the United Kingdom.<sup>80</sup> Indeed, it has been noted that "until the nineteenth century, the idea of proper law was hardly distinguished from that of the proper jurisdiction. The questions of choice of law and choice of jurisdiction were confused."<sup>81</sup> This is because, hitherto, English courts in the 17<sup>th</sup> and 18<sup>th</sup> centuries held that a litigant who institutes an action in England

---

<sup>73</sup> *Ibid.*

<sup>74</sup> John Westlake, *Private International Law*, 7th ed (London, UK: Sweet & Maxwell, 1925) at 21.

<sup>75</sup> Albert Venn Dicey, *Conflict of Laws*, 7th ed (London, UK: Sweet & Maxwell, 1958) at Rule 148.

<sup>76</sup> Ronald Harry Graveson, *The Conflict of Laws*, 5th ed (London, UK: Sweet & Maxwell 1965) at 346.

<sup>77</sup> Westlake, *supra* note 74 at 21.

<sup>78</sup> Dicey, *supra* note 75 at Rule 148.

<sup>79</sup> Ronald Harry Graveson, *The Proper Law of Commercial Contracts as Developed in the English Legal System*, *supra* note 40 at 33.

<sup>80</sup> It has been noted that the laissez-faire philosophy of freedom of contract in the 19<sup>th</sup> century influenced this recognition. See Richardson, *supra* note 20 at 30.

<sup>81</sup> Graveson, *supra* note 79 at 33.

automatically intended English Law – tacit confusion of choice of forum and choice of law issues.

It should be noted that, just like in the United States, party autonomy has been codified in the United Kingdom. The *Contracts (Applicable) Act 1990*<sup>82</sup> has largely replaced the doctrine of proper law of contract.<sup>83</sup> This statute implements the *Rome Convention* which has been replaced by *Regulation (EC) No 593/2008 on the Law Applicable to Contractual Obligations (Rome I Regulation)*.<sup>84</sup> Notwithstanding the codification, references are still made to case law that establish party autonomy.

### **2.2.6. Party Autonomy in Latin America and Africa**

The development of party autonomy in Latin America and Africa was slower than their counterparts in continental Europe and Anglo-America. The history of party autonomy in Latin America and Africa is characterized by territorialism and uneven treatment of the doctrine by different countries in the same region. The history of the doctrine in Latin America is discussed first, followed by that of Africa.

### **2.2.7. Latin America**

It has been noted that “in the Americas, the question of what law applies to contracts that cross national frontiers may charitably be described as unsettled.”<sup>85</sup> It has also been particularly noted that “in Latin America, the road towards recognition of the principle of party autonomy has been arduous and long.”<sup>86</sup> The

---

<sup>82</sup> *Contract (Applicable Law Act) 1990* C 36.

<sup>83</sup> JJ Fawcett & JM Carruthers, eds, *Cheshire, North & Fawcett: Private International Law*, 14th ed (Oxford: Oxford University Press, 2008) at 667.

<sup>84</sup> *Regulation (EC) No 593/2008 of the European Parliament and of the Council on 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)*, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008R0593>>.

<sup>85</sup> Friedrich Juenger, “The Choice of Law in the Americas” (1997) 45:1 *Am J Comp L* 195 at 195. See also Friedrich Juenger, “The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons” (1994) 42:2 *Am J Comp L* 381 at 386.

<sup>86</sup> Department of International Law, Secretariat for Legal Affairs Organization of American States, “The Inter-American Convention on the Law Applicable to International Contracts and the Furtherance of its

judicial and legislative response to the problem of choice of law in this region was different from the approach in continental Europe and Anglo-America.<sup>87</sup> This is because, until recently, most courts and legislations favoured the law of the place of contract or the place of performance over party autonomy.<sup>88</sup> For example, the Civil Code of Chile (1855) stated that “the effects of contracts made abroad and to be performed in Chile are determined by Chilean laws.”<sup>89</sup> The Supreme Court of Chile held that if a contract is to be performed in Chile, Chilean law would be applied, while a Chilean contract to be performed abroad will be susceptible to a different law.<sup>90</sup> Honduras, Colombia, Panama, Ecuador and El Salvador adopted choice of law rules similar to Chile.<sup>91</sup> This nationalistic tendency is premised on the theory that the state is entitled to dictate the *lex obligationis* to its subjects.<sup>92</sup> Indeed, it has been noted that “the territorialism of the Latin American continent has caused the assimilation of party autonomy to be slow.”<sup>93</sup> The nationalist tendencies of countries in this region did little to promote transnational trade within and outside the Americas.<sup>94</sup>

The late development of this doctrine in Latin America may also be attributed to the fact that most countries saw no need for transnational trade. As a

---

Principles in the Americas” (Paper prepared by the Department of International Law, Secretariat for Legal Affairs Organization of American States, 15 March 2016) OEA/SG/DDI/doc. 3/16 [unpublished] at 8.

<sup>87</sup> *Ibid.*

<sup>88</sup> See e.g. *Civil Peruvian Code*, 1936 art VII of the preliminary title. It states that “[t]he nature and effects of the obligation are governed by the law of the place of where it was contracted.”

<sup>89</sup> Art 16(3).

<sup>90</sup> *Chilean S Ct (June 8, 1911) Hoffman v Fisco*, 9 *Revista Der Jur. y Ciencias Soc.* [1914] I, 358.

<sup>91</sup> Ernst Rabel, *The Conflict of Laws, A Comparative Study*, vol 2 (Chicago: Callaghan & Co, 1947) at 371.

<sup>92</sup> *Ibid* at 372. See also Delia Revoredo De Bakey, “The Law Applicable to International Contracts in the Peruvian Civil Code” (1977) 397 *Peruvian Case L* 349.

<sup>93</sup> María Mercedes Albornoz, “Choice of Law in International Contracts in Latin American Legal Systems” (2010) 6:1 *J Priv Intl L* 23 at 23.

<sup>94</sup> Juenger *supra* note 85 at 196.

result, there was a reluctance to develop choice of law rules which govern transnational contracts.<sup>95</sup> Coupled with the foregoing is also the need to protect the economy of Latin American countries from foreign manipulation or intervention.<sup>96</sup> Allowing party autonomy in international commercial contract was believed to encourage the choice of a foreign law over and above the national law of the Americas.

The “premature attempts at regional codification of choice-of-law rules [also] bear some responsibility for the underdeveloped state of the law on contract conflicts.”<sup>97</sup> Even the *Montevideo Civil International Law Treaty* of 1889 rejected party autonomy.<sup>98</sup> Instead, the treaty instead emphasized the place of performance as a connecting factor for choice of law in international contracts.<sup>99</sup> The Additional Protocol to the treaty declared that “jurisdiction and law applicable according to the respective treaties cannot be modified by the intention of the parties, except to the extent this law authorizes them so to do.”<sup>100</sup> It is arguable that the “victory” of

---

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.* see also Nygh, *supra* note 7 at 9 where he noted that “[i]n South America, which due to unfortunate past experiences at the hands of North American and European creditors, was anxious to maintain territorial sovereignty, the doctrine of autonomy was firmly rejected.”

<sup>97</sup> Friedrich Juenger, *supra* note 83 at 196. On Latin-American regional codifications, see generally Diego P Fernandez Arroyo, *La codificación del derecho internacional privado en América Latina: ámbitos de producción jurídica y orientaciones metodológicas*, vol 6 (Madrid: Beramer, 1994); Jurgen Samtleben, *Internationales Privatrecht in Lateinamerika: Allgemeiner Teil* (Tubingen: Mohr Siebeck, 1979); Maekelt, Tatiana B De “General Rules of Private International Law in the Americas: New Approach” (1982) 177 *Rec des Cours* 193 at 221-236. It has been noted that “the most comprehensive conflict of laws Conventions are those to be found among Latin-American nations... they have not been put to use often and today, they appear to be in an advanced stage of obsolescence.” See David F Cavers, *Choice of Law Process* (Ann Arbor, Michigan: University of Michigan Press, 1965) at 253.

<sup>98</sup> *Convention on the Rights and Duties of States*, 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934), art 33.

<sup>99</sup> Rabel, *supra* note 91 at 373.

<sup>100</sup> *Treaty on International Civil Law*, 12 February 1889, 18 Martens (2d) 443 (Sp) (entered into force 3 September 1889). See *Argentino de Derecho Internacional Segundo Congreso Sudamericano de Derecho Internacional Privado de Montevideo 1939-1940* (Imprenta de la Universidad) at 211. This additional

party autonomy came through the enactment of *the Inter-American Convention on the Law Applicable to International Contracts (Mexico Convention)*<sup>101</sup> which, in most respects, similar to the provisions in *Rome I Convention* 1980.<sup>102</sup> Article 7 of the Convention provides that “[t]he contract shall be governed by the law chosen by the parties.”<sup>103</sup> Although American countries participated in the preparation of the draft text, only Mexico and Venezuela ratified it. Because of the low ratification that the Convention commanded, it has been described as a “categorical failure.”<sup>104</sup> Indeed, some countries in Latin America still do not recognize party autonomy because they are neither signatories to the Convention nor persuaded by it.<sup>105</sup>

Finally, a reason for the late development of the doctrine in Latin America may be because of the “hostility” of the region’s scholars towards the doctrine. While some Latin American scholars favoured the doctrine, most scholars disapproved of it on “positivist and conceptualistic grounds.”<sup>106</sup> For example, Ildefonso Garcia Lagos, an Uruguayan jurist, argued that party autonomy should be the general rule to determine the choice of law, and that the law of the place of

---

protocol further states that “the law of the place or performance or the other laws prescribed in particular cases by the treaty govern the freedom of the parties.”

<sup>101</sup> *Inter-American Convention on the Law Applicable to International Contracts*; 17 March (1994) 33 ILM 732, 733 [*Mexico Convention*]. Apart from this international instrument, other instruments that recognize party autonomy include; *Hague Convention on the Law Applicable to Agency*, 14 March 1978, 16 ILM 775 art 5 (entered into force 1 May 1992); *The Buenos Aires Protocol on International Jurisdiction in Contractual Matters* concluded on 5 August 1994, online:<[www.sice.oas.org/trade/mrcsrs/decisions/AN0194\\_e.asp](http://www.sice.oas.org/trade/mrcsrs/decisions/AN0194_e.asp)>.

<sup>102</sup> Justin P Fletcher, “An Argument for Ratification: Some Basic Principles on the 1994 Inter-American Convention on the Law Applicable to International Contracts” (1999) 27:3 Ga J Intl & Comp L 479 at 481.

<sup>103</sup> Art 7. This provision may have been inspired by the *Rome I Regulation* in continental Europe. See Albornoz *supra* note 93 at 25.

<sup>104</sup> *Ibid* at 24.

<sup>105</sup> Brazil and Chile are examples.

<sup>106</sup> Juenger, *supra* note 85 at 197.

performance should only be a subsidiary/secondary rule.<sup>107</sup> But another scholar argued that “party autonomy amounts to an alien element in the conflict of laws and, in spite of its venerable history, merits censure rather than approbation.”<sup>108</sup> Notwithstanding these arguments, “hostility” towards party autonomy generally waned after 1950<sup>109</sup> but controversy over the doctrine still exists among Latin American scholars.<sup>110</sup> This is why some Latin American countries still do not accept party autonomy. As Juenger puts it, there is “an uneven evolution of party autonomy in our continent.”<sup>111</sup>

### 2.2.8. Africa

Generally, private international law in Africa has been described as “underdeveloped” or one with stunted development.<sup>112</sup> This is because conflict of laws is an area of law that, until recently, scholars have given little or no attention to.<sup>113</sup> To this end, conflict of laws issues, including party autonomy, were isolated from development in Africa’s civil and common law countries.<sup>114</sup> One jurist noted

---

<sup>107</sup> Albornoz, *supra* note 93 at 31.

<sup>108</sup> Quintín Alfonsín, *Regimen internacional de los contratos* (1950) Montevideo at 20-27, cited in Friedrich Juenger, *supra* note 85 at 197. See also Cecilia Fresnedo De Aguirre, “La autonomia de la voluntad en la contratación internacional” (1991) Basado en mi tesis publicada con este mismo título en Montevideo, FCU, y en la 2ª edición (actualizada), que se encuentra en preparación 323, online: <[www.oas.org/es/sla/ddi/docs/publicaciones\\_digital\\_XXXI\\_curso\\_derecho\\_internacional\\_2004\\_Cecilia\\_Fresnedo\\_de\\_Aguirre.pdf](http://www.oas.org/es/sla/ddi/docs/publicaciones_digital_XXXI_curso_derecho_internacional_2004_Cecilia_Fresnedo_de_Aguirre.pdf)>.

<sup>109</sup> The Inter-American Convention on the Law Applicable to International Contracts and the Furtherance of its Principles in the Americas, *supra* note 86 at 8.

<sup>110</sup> See generally, Nadia De Araujo & Fabiola I Guedes de C Saldanha, “Recent Developments and Current Trends on Brazilian Private International Law Concerning International Contracts” (2013) 1:1 *Panorama of Brazilian Law* 73.

<sup>111</sup> Juenger, *supra* note 85 at 388.

<sup>112</sup> George Nnona, “The Choice of Law in International Contracts for the Transfer of Technology: A Critique of the Nigerian Approach” (2000) 44:1 *J Afr L* 78 at 85; see generally, Richard Oppong, “Private International Law in Africa: The Past, Present and the Future” (2007) 55:4 *Am J Comp L* 677.

<sup>113</sup> Richard Oppong, “The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation” in Petar Sarcevic, Paul Volken & Andrea Bonomi eds, *Yearbook of Private International Law* (GMBH, München: Sellier European Law Publishers, 2006) 189 at 192; see also generally Richard Oppong, “Private International Law in Africa (1884-2009)- A Selected Bibliography” (2010) 58:2 *Am J Comp L* 319.

<sup>114</sup> Oppong, *supra* note 112 at 678.

that “one issue that gives occasional problem [in Africa] is the choice of law or choice of the jurisdiction of contracting parties.”<sup>115</sup>

However, British-colonized African countries have applied the doctrine of proper law as developed in the United Kingdom on choice of law issues. This is because the English common law is one of the sources of private international law in these countries.<sup>116</sup> Therefore, unlike their European counterparts, most issues in conflict of laws, including party autonomy, had no theoretical underpinnings.<sup>117</sup> For example, before colonization, “African system of law” applied the *lex fori* to problems involving a foreign element.<sup>118</sup> This is because it is inconceivable to apply any other system of law than the native laws of the land since transnational trade was restricted or unknown during the 15<sup>th</sup> century.<sup>119</sup> Thus, application of the *lex fori* was a result of the dynamics of power and pragmatism, but not a product of legal reasoning inspired by any theory of conflict of laws.<sup>120</sup>

Apart from the implicit choice of law in Egypt discussed above, there is little evidence of the development of party autonomy in Africa.<sup>121</sup> However, in the late 20<sup>th</sup> and 21<sup>st</sup> centuries, there were judicial decisions that have recognized parties’ freedom to choose the applicable law in international contracts.<sup>122</sup> For

---

<sup>115</sup> Olakunle O Olatawura, “The Context and Development of Transnational Law Practice and Policy in Nigeria” (2004) 9:3 Unif L Rev 511 at 517. This problem is not peculiar to Africa. See Russell J Weintraub, *Commentary on the Conflict of Laws*, 2nd ed (Mineola, New York: The Foundation Press, 1980) at 348 (“[i]t is common for American Conflict scholars to refer to contracts as the most complex and confused area of choice-of-law problems”).

<sup>116</sup> Oppong, *supra* note 112 at 692

<sup>117</sup> *Ibid.*, at 687; See also for example, Richard Oppong, “Recognition and Enforcement of Foreign Judgments in Ghana: A Second Look at Colonial Inheritance” (2005) 31:4 Commonwealth L Bull 19.

<sup>118</sup> Oppong, *supra* note 112 at 690.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> There may also be an evidence of choice of law in pre-colonial times through the *Makololo Treaty* of 1889 which states that “the rights of British subjects to build houses and possess property was to be governed by native laws, and differences between the British subjects and the people of Makololo were to be adjudicated by a duly authorized representative of Her Majesty.” See Oppong, *supra* note 110 at 691. See also *Zimbabwe Customary Law and Local Court Act (Act No 2 of 1990 as amended through Act No 9 of 1997)*, Ch 7:05, s 8. It provides that “in any case where customary law is applicable and the parties are connected with different systems of customary law, the court shall apply the customary law by which the parties have agreed that their obligations should be regulated or, in the absence of such agreement, the customary law with which the case and the parties have the closest connection and if that is not ascertainable, the court shall apply any system of customary law which the court considers it would be just and fair to apply in the determination of the case.”

<sup>122</sup> See, for example, *Friendship Container Manufacturers Ltd v Mitchell Cotts, (K) Ltd*, [2001] 2 EA 338 (Kenya); *CILEV v Chiavelli*, [1967] GLR 651, aff’d in [1968] GLR 160 (Ghana); *Commet Shipping Agencies (Nigeria) Ltd. v Panalpina World Transport (Nigeria) Ltd*, [1990] LRC (Comm) 206 (Nigeria).

example, in 1961, a South African Court held that “according to English law and our law[,] the proper law of the contract is the law of the country which the parties have agreed or intended or are presumed to have intended shall govern it.”<sup>123</sup> Also, a Kenyan Court, in *Fonville v Kelly III*,<sup>124</sup> held that “the position in law is that where parties have expressly stipulated that a contract is to be governed by a particular law, that law is the proper law of contract.”<sup>125</sup>

However, in some instances, the application of the doctrine in some countries appears to be unsettled. For example, a Nigerian case law decided in 1987, suggests that the doctrine may be subject to nationalistic and territorial scrutiny. In *Sonnar (Nigeria) Ltd. v Partenreedri M S Nordwind*,<sup>126</sup> a Justice of the Supreme Court, Oputa JSC, while considering the conflict aspect of the case, held that “as a matter of public policy, our courts should not be too eager to divest themselves of jurisdiction conferred on them by the Constitution and by other laws simply because parties in their private contracts choose a foreign forum and a foreign law.”<sup>127</sup> In this case, a Liberian shipowner and a Nigerian shipper chose German law to govern their bill of lading. The court, relying on Australian decisions,<sup>128</sup> held that the choice of law is “capricious and unreasonable” because it has no connection with the parties’ contract. The court further held that “luckily nowadays, a choice of the proper law by the parties is not considered by the Courts

---

<sup>123</sup> *Guggenheim v Rosenbaun*, [1961] 4 SA 21 at 31 (south Africa); see also Christian Schulze, “Legal Aspects of Offshore Transactions” (1994) 27:1 Comp & Intl LJS Afri 27 at 28. But Oppong says “some doubts exist in South Africa.” See Richard Oppong, *Private International Law in Commonwealth Africa* (Cambridge: Cambridge University Press, 2013) at 135. Notwithstanding the doubt, South Africa Supreme Court in 2006 held that “where parties have made an express choice of law to govern such contract, their choice should be upheld.” See *Creutzburg v Commercial Bank of Namibia*, [2006] 4 All SA 327 at 330.

<sup>124</sup> [2002] 1 EA 70.

<sup>125</sup> *Ibid* at 80; see also *Karachi Gas Co Ltd v Issaq*, [2002] 1EA 71; *Raytheon Aircraft Credit Incorporation v Air-Faraj Limited*, [2005] 2 KLR 47 (“section 60 (1) of the Kenyan Constitution does not authorize the High Court to disregard private international law on the status of choice of law and exclusive jurisdiction agreements in international contracts and assume jurisdiction over persons outside Kenya”); but see *Universal Pharmacy (k) Limited v Pacific International Lines (PTE) Ltd & Kenya Railways Corporation*, [2015] eKLR 1 (a Kenyan Court rejected a choice of law and forum agreement).

<sup>126</sup> [1987] NWLR (Pt 66) at 520 [Sonnar]; see also *Fan Milk Ltd v State Shipping Corporation*, [1971] 1 GLR 238 (Ghana). The Ghanaian Court rejected a choice of law and forum. It noted that the English and Ghanaian law are the same on the subject.

<sup>127</sup> *Sonnar*, *ibid* at 210.

<sup>128</sup> *Golden Acres Ltd v Queensland Estates*, [1969] St R Qd 378; *Queensland Estate v Collas*, [1971] St R Qd 75; *Freehold Land Investment Ltd v Queensland Estate Ltd*, [1970] 123 CLR 48.



as conclusive.”<sup>129</sup> Therefore, the Court, in its discretionary exercise, disregarded the parties’ express choice of law.<sup>130</sup> This decision reflects the nationalistic tendencies in Latin America.

It may be safe to conclude that African courts are still hesitant to acknowledge party autonomy in those cases that are not clear cut.<sup>131</sup> This is because private international law rules are underdeveloped in the various jurisdictions. Since there is no treaty regulating choice of law issues in Africa, instances where the doctrine may be disregarded depend on the discretion of the judge, applicable local statutes, application of the common law doctrine (proper law), and the type of contract in issue.<sup>132</sup> Indeed, as shown in subsequent chapters, African countries generally restrict or prohibit party autonomy through local statutes to protect their national interests from foreign economic exploitation. This is not unconnected to their fragile economies and their colonial experiences. Just like in the Americas, it is believed that allowing parties to contract on choice of law in contracts of national interest exposes African parties to monopolistic tendencies by parties in developed countries.

### **2.3. Arguments for and against Party Autonomy**

As the history shows, the quest for the recognition of party autonomy globally has been controversial, and even presently there are still controversies over the recognition of the doctrine.<sup>133</sup> As discussed above, the disapproval of party autonomy in international commercial contracts in some Latin American and African countries has been largely influenced, among others, by this controversy. There are two positions on the doctrine: some scholars believe parties should not be

---

<sup>129</sup> Sonner, *supra* 126 at 543.

<sup>130</sup> See also *Funduk Engineering Ltd v McArthur*, [1995] All NLR 157 at 165 (“the fact that an agreement states that it shall be interpreted in accordance with English law, or any particular variety of law, does not in any way amount to an ouster of Nigerian Courts to interpret or enforce the provision of the said document”).

<sup>131</sup> See generally Olatawura, *supra* note 115 at 518; see also Richard Oppong, “Choice of Law and Forum Agreements Survives a Constitutional Challenge in the Kenya Court of Appeal” (2007) 33:1 Commonwealth L Bull 158.

<sup>132</sup> See e.g. Nnona, *supra* note 112 at 85.

<sup>133</sup> This controversy still exists in Brazil. See generally, Araujo & Saldanha, *supra* note 110 at 72; See also The Inter-American Convention on the Law Applicable to International Contracts and the Furtherance of its Principles in the Americas, *supra* note 86 at 16 (the majority view is that “the principle exists despite silence in the Brazilian Code because “fundamental principles cannot disappear by the simple omission of the law,” but a school of thought maintains that party autonomy does not exist in Brazilian law).

allowed to choose a law that governs their transaction, while other scholars are of the view that a choice of law is like any other clause or term in the contract which should be left for the parties to decide. This thesis briefly captures the reasons for arguments on both sides here. The arguments are tagged “anti-autonomy” and “pro-autonomy,” respectively.

### **2.3.1. Anti-Autonomy Arguments**

The main argument of the anti-autonomists is that recognizing party autonomy “makes a legislative body of any two persons who choose to get together and contract.”<sup>134</sup> Lorenzen adds that “the validity or invalidity of a legal transaction should result from fixed rules of law which are binding upon the parties. Allowing the parties to choose their governing law in this regard involves a delegation of sovereign power to private individuals.”<sup>135</sup> The reason for this argument is that the choice given to parties to determine the contract’s governing law is in itself an act of making law. Pillet<sup>136</sup> and Niboyet<sup>137</sup> argue that parties’ choice of law in a contract enables them to evade domestic legal obligations which are closely connected to their contract. They think that the sovereign nature of a state prevents parties from choosing an extra-territorial law. This view suggests that contracts are born into a certain law and that if parties cannot modify this law in a domestic sphere, they cannot do so by an agreement that another law should govern their contract.<sup>138</sup>

Furthermore, anti-autonomists assert that it is impossible to predict how the court will view the intention of the parties on their choice of law. For this reason, parties cannot make an advanced valid contract through a choice of law until the applicable law is decided by the court.<sup>139</sup> Therefore, individuals do not have freedom to choose the law that may govern their contracts. This argument suggests that it is the law of the place where the contract is made or performed that dictates

---

<sup>134</sup> Joseph Henry Beale, *A Treatise on the Conflict of Laws*, vol 2 (New York: Baker, Voorhis & Co, 1935) at 1079-1080.

<sup>135</sup> Lorenzen, *supra* note 25 at 572.

<sup>136</sup> Antoine Pillet, *Principes de Droit International Privé* (Paris: Imprimerie J. Allier, 1903) at 430; Antoine Pillet, *Traite Pratique de Droit International Privé*, vol 2 (Imprimerie J. Allier, 1924) at 261.

<sup>137</sup> JP Niboyet, “La théorie de l'autonomie de la volonté” (1927) 16 Rec des Cours 1.

<sup>138</sup> Rabel, *supra* note 91 at 394.

<sup>139</sup> Beale, *supra* note 134 at 1086.

the applicable law.<sup>140</sup> A very similar argument is that a choice of law is like any element/clause in the contract which “localizes” the contract within a specific legal system and that the court is not bound by the will of the parties since other clauses/elements may point to another legal system.<sup>141</sup> Although this argument agrees that parties could agree on a law, it still denies a complete autonomy in choice of law.<sup>142</sup>

Reflecting on these arguments, it is safe to conclude that anti-autonomy arguments are based on the positive theory of law.<sup>143</sup> This is because they suggest that the law regulates human conduct, and not vice-versa. In other words, their arguments reflect a positivist territorial approach to regulatory legitimacy. The pith of their view is that the law of the place of performance or place of execution of the contract determines the applicable law and not the will of the parties. In sum, parties cannot determine the law that governs/validates their contracts because it is the law that performs this function.

### 2.3.2. Pro-Autonomy Arguments

On the other side of the divide, some scholars have advocated recognition of the doctrine. The theme of their argument is that parties to a contract should be allowed to choose its governing law.<sup>144</sup> They argue that notwithstanding the law of the place of a contract, or performance, parties should be allowed to choose a different law to

---

<sup>140</sup> *Ibid* at 1081.

<sup>141</sup> Henri Batiffol, Subjectivisme et Objectivisme dans le Droit International privé des Contrats [Subjectivism and Objectivism in the Private International Law of Contracts], in ed, Faculte droit et des Sciences économiques Toulouse, *Mélanges Offerts À Jacques Maury: T. 1-2* (Paris: Paris Press, 1960) 53 at 39 [translated by author], cited in Mathias Lehmann, “Liberating the Individual from Battles between State: Justifying Party Autonomy in Conflict of Laws” (2008) 41 Vand J Transnat’l L 380 at 392.

<sup>142</sup> See Oppong, *supra* note 123 at 144.

<sup>143</sup> A theory that advocates that law must be prescribed by the sovereign and enforced by the threat of punishment. See generally, Wilfred E Rumble, “Legal Positivism of John Austin and the Realist Movement in American Jurisprudence” (1981) 66:5 Cornell L Rev 986.

<sup>144</sup> *Quinimo ius est in tacita et vetisimili mente contrahentum: Conclusiones de Statutis et Consuetudinibus localibus*, reproduced as Appendix II in Savigny, *A Treatise on the Conflict of Laws*, [Guthrie translation], 2nd ed (London, UK: Stevens & Sons, 1869) at 354; Huber, *De Conflictu Legum* translated by EG Lorenzen (New Haven: Yale University Press, 1947) at 165-166; Joseph Story, *Commentary on the Conflicts of Laws, Foreign and Domestic: In Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Succession, and Judgment* (Boston: Hilliard Gray, 1834) at 280.

govern a contract.<sup>145</sup> In contrast to the argument that a contract is born into a certain law, pro-autonomists see a contract as a creation of the human mind which is not fixed to any locality.<sup>146</sup> These scholars see the will of the parties as the basis of legal obligation in contracts. Although they acknowledge that law may set the limit, they believe that legal obligations flow from the choice of the parties. Thus, the law may only regulate parties' freedom to choose a law where public policy demands that party autonomy be rejected.<sup>147</sup>

A scholar has even argued that the principle of party autonomy is protected by international human rights instruments,<sup>148</sup> for example, the Universal Declaration of Human Rights.<sup>149</sup> According to her, since the Universal Declaration of Human rights protects the liberty of individuals, such liberty should not just be exercised in the personal and political sphere, but also in the economic sphere by allowing parties to "liberally" choose the legal system which governs their contracts.

In response to the anti-autonomists' argument that party autonomy is synonymous with party legislation, pro-autonomists argue that parties are not legislating by choosing a legal system to govern their contracts. Rather, they are exercising a power conferred on them by the law of the place where the contract is executed.<sup>150</sup> The law of the place where the contract is litigated (forum state) may, therefore, choose to ignore their choice or accept it.<sup>151</sup> In a related argument, pro-autonomists argue that there is a difference between the operative fact and legal

---

<sup>145</sup> See e.g. Huber, *ibid* at 165-166 ("the place, however, where a contract is to be entered into is not to be considered absolutely; for if the parties had in mind the law of another place at the time of contracting the latter will control"); see also Story, *supra* note 144 at 280 ("[b]ut where the contract is either expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance").

<sup>146</sup> See O Lando, "The Proper Law of a Contract" (1964) 8 Scand Stud L 107. He summarizes Gamillscheg's writings in English at 144.

<sup>147</sup> Mancini, "De l'utilité de rendre obligatoires pour tous les Etats, sous la forme d'un ou de plusieurs traits internationaux, un certain nombre de règles generals du droit international privé pour assurer la decision uniforme des conflits entre les differentes legislations civiles et criminelles" (1974) Clunet I at 221-239, 285-304, cited in Nygh, *supra* note 7 at 8.

<sup>148</sup> Erik Jayme, "Identité Culturelle et integration; le droit international privé postmoderne" (1995) 251 Rec des cours 9 at 147-148, cited in Nygh, *ibid* at 36.

<sup>149</sup> *Universal Declaration of Human Rights*, GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948).

<sup>150</sup> Lehmann, *supra* note 141 at 384.

<sup>151</sup> Nygh, *supra* note 7 at 33.

consequences of a contract. Since the law allows parties to choose the applicable law, they are only exercising that power by altering the operative facts of their contracts to which the law attaches legal consequence.<sup>152</sup> For example, whether a contract is in writing or not depends on the choice of the parties which has a legal consequence for their contract. Similarly, parties' choice of law clause may alter the otherwise applicable legal consequences in the conflict of law rules. Thus, parties do not alter the provisions of a statute, but only facts, that, in turn, alter the legal consequences of their contracts.<sup>153</sup>

Pro-autonomists further argue that assuming that parties are, indeed, legislating through party autonomy, such legislations are made only for the parties and no other person.<sup>154</sup> They argue that, in any event, party autonomy is not the only circumstance where parties "legislate."<sup>155</sup> They conclude that "party legislation" does not transcend into a "crime."<sup>156</sup> Also, they argue that in an international contract where the contract is associated with more than one law, no national law has the right to exclusively govern the contract.<sup>157</sup> Therefore, if we remove one national law in preference to the other, we should be able to remove all of them in preference for a third law.<sup>158</sup>

In sum, pro-autonomy arguments resonate a common theme – that parties should be autonomous in choosing the law that governs their contract. These

---

<sup>152</sup> "Conflict of Laws, 'Party Autonomy' in Contracts", Note, (1957) 57:4 Colum L Rev 553 at 572.

<sup>153</sup> This argument also responds to the "evasion of the applicable law" argument. In so far parties can "evade" legal consequences of not having their contracts in writing, parties can also "evade" the otherwise applicable law to their contracts. *Ibid* at 573.

<sup>154</sup> Walter Wheeler Cook, *The Logical and Legal Basis of Conflict of Laws* (Cambridge, Massachusetts: Harvard University Press, 1949) at 393 ("the first thing to be noted is that if the parties 'legislate,' they do so only for themselves; they are seeking to determine primarily what rights each shall have as against the other, and are not seeking to 'make law' for other persons").

<sup>155</sup> Bailment and shipping are other examples of cases where parties legislate. The bailee and hirer can alter their rights and obligations, albeit to a reasonable extent. This alteration is regarded as a form of autonomy. See Cook *supra* note 154 at 393-394; see also Louis C James, "Effects of the Autonomy of the Parties on Conflict of Laws Contracts" (1959) 36:1 Chicago-Kent L Rev 34 at 46. Interestingly, anti-autonomists also argue that there are various transactions where parties do not have autonomy and it will be anomalous to grant autonomy in contracts. See generally, Yntema, *supra* note 39 at 343.

<sup>156</sup> Cook, *supra* note 154 at 432 ("[w]hat is needed is not a completely static system--even if such a system were possible--but a set of guiding principles which make provision for as much certainty as may reasonably be hoped for in a changing world, at the same time providing for not only needed flexibility but also continuity of growth").

<sup>157</sup> Rabel, *supra* note 91 at 427.

<sup>158</sup> Alina Oprea, "Observations on the Principle of Autonomy of the Will in the Private International Law of Contracts" (2012) 1:5 Rom Rev Priv L 90 at 103.

arguments reflect a liberal theory of contract which “recognizes and respects the power of individuals to effect changes in their legal relations inter-se.”<sup>159</sup> Pro-autonomists claim that the will of the parties dictates the applicable law that must govern the contract, as opposed to the positivist contention that the choice must be made by the sovereign.

#### **2.4. Conclusion**

Generally, the history of party autonomy shows that the development of the doctrine is uneven in the legal systems of the world. While Anglo-America and Continental Europe share similarities in the early development of the doctrine, Latin America and Africa share similarities in the late/underdevelopment of the doctrine and even presently, it is still not recognized in some countries in these regions. The slow development in these regions may be attributed to their colonial experiences and fragile economies. Sometimes, they see party autonomy in international commercial contracts as a threat to their national and economic interests. Therefore, territorialism and nationalism have shackled, and still shackle, the development of party autonomy in Latin America and Africa.

The arguments against the doctrine as a conflict rule further reflect the reasons for the hostility toward the doctrine, especially in Latin America and Africa. Although anti-autonomist arguments started from the Anglo-American and Continental regions, they reflect the positivistic and territorial tendencies in Latin America and Africa towards party autonomy. However, the responses to these arguments show that anti-autonomists’ objections to party autonomy may not be based on sound theoretical footings – anti-autonomist arguments do not reflect the realities of transnational trade in the 21<sup>st</sup> century. Notwithstanding the debate, and

---

<sup>159</sup> Thomas Gutmann, “Theories of Contract and the Concept of Autonomy” (Paper delivered at the Shibolet Private Law Theory Workshop at Tel-Aviv University Faculty of Law / The Zvi Meitar Center for Advanced Legal Studies, 6 March 2013) [unpublished] at 3; See also Robin West, “Law, Rights, and other Totemic Illusions: Legal Liberalism and Freud’s Theory of the Rule of Law” (1986) 134 U Pa L Rev 817 at 817.

some Latin American and African countries' resistance, party autonomy has been globally recognized as an important conflict rule from the 19<sup>th</sup> century.<sup>160</sup>

From the historical account and arguments against party autonomy, it is gleaned that there are different rules on choice of law, of which party autonomy is one. The next chapter describes and analyzes these rules and argues that, because of the advantages that party autonomy brings to bear in private international law, it is the best choice of law rule for resolving conflict issues in international commercial contracts. The next chapter also points out that, notwithstanding these advantages, there are various limitations to party autonomy. It briefly discusses these limitations with a note that, just like the history of party autonomy, the tests for determining the limitation or scope of the doctrine vary from country to country.

---

<sup>160</sup> Russell J Weintraub, "Functional Developments in Choice of Law for Contracts" (1984)187 Rec des Cours 239 at 271.

## CHAPTER 3: CHOICE OF LAW RULES IN CONTRACT

### 3.1. Introduction

The obligations and validity of a contract rely exclusively on the contract's connection with a law.<sup>1</sup> In other words, for a contract to be enforceable, a legal system must recognize the validity of the contract, as well as the obligations arising from it.<sup>2</sup> It is a truism that states usually (whether consciously or not) determine a contract's connection to a legal system based on their choice of law rules. A choice of law rule, therefore, is a "rule for choosing the [applicable] law."<sup>3</sup> This is because the rules only select the applicable legal system without determining the legal obligations of the parties; the chosen law performs this function.<sup>4</sup> Thus, choice of law rules as discussed in this chapter relate to rules that determine the validity and, in appropriate instances, construction of a contract.<sup>5</sup>

It has been argued that the determination of the applicable law in a contract should not be made subject to any rule or principle but should be based on the "juridical conscience" of the forum judge in each case.<sup>6</sup> By this, the judge is free to choose the applicable law based on his appreciation of the facts of the case. Advocates of this position argue that this will free a judge from the shackles of choice of law rules, and allows him to do justice in each case.<sup>7</sup> A flaw in this argument is that it unwittingly proposes a generalized rule itself. It proposes a shift from "rigid" rules to "no rule," thereby creating an individualized choice of law

---

<sup>1</sup> Richard Oppong, *Private International Law in Commonwealth Africa* (Cambridge: Cambridge University Press, 2013) at 134; Lord McNair, "The General Principles of Law Recognized by Civilized Nations" (1957) 33 Brit YB Intl L 1 at 7.

<sup>2</sup> Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, 3rd ed (London, UK: Sweet & Maxwell, 2003) at 76.

<sup>3</sup> John Swan, "Choice of Law in Contracts" (1991) 19 Can Bus LJ 213 at 213.

<sup>4</sup> Erwin Spiro, *Conflict of Laws* (South Africa: Juta & Co, 1973) at 33.

<sup>5</sup> For the difference between choice of law rules on the interpretation of validity and construction of contracts, see Russel J Weintraub, *Commentary on the Conflict of Laws* (Mineola, New York: Foundation Press, 1971) at 263.

<sup>6</sup> Josephus D Jitta, *La Substance Des Obligations Dans Le Droit International Privé*, vol 2 (The Hague: Hague Librairie Belinfante Frères, 1907) at 515, cited in Ernest Rabel, *The Conflict of Laws, A Comparative Study* vol 2 (Chicago: Callaghan & Co, 1947) at 442

<sup>7</sup> Harburger, "Rapport a L'Inst. de dr Int sur les Conflits de Lois en Matiere d'obligations, Annuaire" (1902) Ann inst dr int 148 at 148-149.



rule that focuses on the peculiarities of each contract type.<sup>8</sup> This proposition leaves the outcome of a decision at the mercy of the conscience of a judge. It also breeds uncertainty in the outcome of a decision because parties do not know the opinion of a judge about their dealings prior to a dispute. No matter how insufficient or narrow the choice of law rules may be, it is better than no rule because a “no rule system” breeds international judicial anarchy. For example, in a case that has a foreign element, a judge is free to neglect the rules of both the *lex fori* and the law of the foreign country, since he is at liberty to decide a case based on his intuition or personal appreciation of the case.<sup>9</sup> In sum, this rule is “anti-judicial” because it is against every principle of structural judicial decision making.<sup>10</sup> Indeed, the importance of choice of law rules cannot be over-emphasized. Choice of law rules create coordination or symmetry between states, a state of affairs which is “essential” in international litigation.<sup>11</sup> It also helps parties to evaluate the rules applicable to their actions and make adjustments, if need be.<sup>12</sup>

The choice of law rules discussed in this chapter are the law of the place of contract (*lex loci contractus*), the law of the place of performance (*lex loci solutionis*), the law of the domicile of parties; the law that validates the contract, the law that is closely connected with the contract (center of gravity rule), and the express intention of the parties (party autonomy). This analysis shows, among other things, that all but one of the rules (the party autonomy rule), suffers from a common defect – they do not promote the objectives of the choice of law theory which include certainty and uniformity of decisions.<sup>13</sup> In other words, the

---

<sup>8</sup> Henri Rolin, 32 *Annuaire* (1925) 96 at 117, 513, cited in Rabel, *supra* note 6 at 442; Mathias Lehmann, “Liberating the Individual from Battles between State: Justifying Party Autonomy in Conflict of Laws” (2008) 41 *Vand J Transnat’l L* 381 at 384.

<sup>9</sup> Sherman Chang, “The Validity of Contract in the Conflict of Laws” (1934) 7:1 *China L Rev* 33 at 41-42.

<sup>10</sup> *Ibid.*

<sup>11</sup> Michael Whincop & Mary Keyes, “Towards an Economic Theory of Private International Law” (2000) 25:1 *Austl J Leg Phil* 1 at 16; Robert A Leflar, “Conflicts Law: More on Choice- Influencing Considerations” (1966) 54:4 *Cal L Rev* 1584 at 1586.

<sup>12</sup> Whincop & Keyes, *ibid* at 17.

<sup>13</sup> Professor Yntema listed some of the objectives as including “uniformity of legal consequences, minimizing of conflict of laws, predictability of legal consequences, the reasonable expectation of the parties, uniformity of social and economic consequences, validation of transactions, relative significance of contacts, recognition of the “stronger” law, co-operation among states, respects for interests of other states, justice of the end results, respect for policies of domestic law, internal harmony of the substantive rules to be applied, location or nature of the transaction, private utility, homogeneity of national law, ultimate

application of these rules, except the party autonomy rule, sometimes, produces uncertainty and arbitrary results; hence the preference for the party autonomy rule.<sup>14</sup>

Generally, a comparison of the party autonomy rule with other choice of law rules may be likened to comparing “apples and oranges.” This is because most countries usually apply party autonomy and other choice of law rules in different contexts. While the party autonomy rule is applicable where parties have made, or intended to make a choice of law, other rules apply where parties have not made such choice.<sup>15</sup> However, it should also be noted that some countries still rely on some of these rules regardless of the parties’ choice.<sup>16</sup> This thesis does not seek to make a parallel comparison of the rules, but to point out reasons why parties may prefer to make an express choice of law in their contract, and why courts usually give preference to this choice. It does this by examining the rules one after the other.

### **3.1.1. The Law of the Place of Making (*Lex loci contractus*)**

This choice of law rule connects the law of a territory to contracts made within that territory.<sup>17</sup> It is rooted in the territorial or vested right theory supported by Beale

---

resource of the *lex fori*, and the like.” See Hessel E Yntema, “The Objectives of Private International Law” (1957) 35 *Can Bar Rev* 721 at 734-735.

<sup>14</sup> Louis C James, “Effects of the Autonomy of the Parties on Conflict of Laws Contracts” (1959) 36:1 *Chicago-Kent L Rev* 34 at 45.

<sup>15</sup> See e.g. *Spanish Civil Code* 1899, §10 (5) as amended in 1974 which provides that “[t]he law to which the parties have expressly submitted shall apply to contractual obligations, provided that it has some connection with the transaction in question; in the absence thereof, the national law common to the parties shall apply; in the absence thereof, that of their common habitual residence and, lastly, the law of the place where the contract has been entered into.”

<sup>16</sup> For example, Brazil relies on the personal law of parties and the law of the place of contracting to determine capacity of parties and validity of contracts respectively. See Brazil’s *Civil Code’s introductory law* 1942, art 9; see also María Mercedes Albornoz, “Choice of Law in International Contracts in Latin American Legal Systems” (2010) 6:1 *J Priv Intl L* 23 at 44; Rodrigo Octavio, “Conflict of Laws in Brazil” (1919) 28:5 *Yale LJ* 463 at 467.

<sup>17</sup> Joseph Henry Beale, *A Treatise on the Conflict of Laws*, vol 2 (New York: Baker Voorhis & Co, 1935) at 1044-1045; See also Ernst G Lorenzen, “Territoriality, Public Policy and the Conflict of Laws” (1924) 33 *Yale LJ* 736 at 743-744; *Milliken v Pratt*, 125 *Mass Jud Sup Ct* 374 (1878); *Creutzburg v Commercial Bank of Namibia Ltd*, [2006] 4 *All SA* 327 at 331 (“if a contract is formally valid in terms of the *lex loci contractus*, one need look no further”).

and his followers.<sup>18</sup> Indeed, it is a time-honoured principle that parties in a given territory ought not to violate the law of the territory, lest their contract be invalidated by the law of that territory.<sup>19</sup> This theory proposes that a contract is born into a legal system and that rights are “vested” in a contract through its “place of birth.”<sup>20</sup> This vested territorial right is inherent in the contract, no matter where it is interpreted or enforced.<sup>21</sup> Courts and writers favour the application of this rule when in doubt about the application of other choice of law rules.<sup>22</sup> They justify it on the basis that the territoriality principle is similar to the one applicable to crime and tort cases – territorial principle and *lex loci delicti*.<sup>23</sup> Proponents of this rule conclude that it gives certainty in choice of law issues because the place where a contract is “made” is usually established and certain.<sup>24</sup>

However, this rule has some inherent weaknesses. First, because of different modes and rules of creating contracts, it sometimes produces uncertain and absurd results.<sup>25</sup> This is evident in international or interstate contracts where contracts are concluded by correspondence.<sup>26</sup> If a Canadian and a Norwegian enter into a contract via electronic communication, telegram or mail without meeting in a

---

<sup>18</sup> Joseph Henry Beale, *A Treatise on the Conflict of Laws*, vol 1 (New York: Baker Voorhis & Co, 1935) at 63-74; Albert Venn Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (London, UK: Stevens and Sons, 1896) at 660; see also Herbert F Goodrich, *Conflict of Laws*, 3rd ed (Minnesota: West Publishing Co, 1949) at 323; Raleigh C Minor, *Conflict of Law; or Private International Law* (Boston: Little, Brown & Co, 1901); Arthur Nussbaum, “Conflicting Theories of Contracts: Cases versus Restatement” (1942) 51:6 Yale LJ 893 at 899. For an analysis of this theory see Fowler V Harper, “Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays” (1947) 56:7 Yale LJ 1155.

<sup>19</sup> Nussbaum, *ibid* 18 at 908.

<sup>20</sup> Dicey, *supra* note 18 at 660; See also Ernst Lorenzen & Raymond J Heilman, “The Restatement of the Conflict of Laws” (1935) 83:5 U Pa L Rev 555 at 558.

<sup>21</sup> Beale, *supra* note 18 at 63-74; Dicey, *supra* note 18 at 660; Lorenzen, *supra* note 17 at 573.

<sup>22</sup> Nussbaum, *supra* note 18 at 894.

<sup>23</sup> Chang, *supra* note 9 at 34; See also *Restatement (Second) of Contracts S 90* (St. Paul, Minn: American Law Institute 1981) §§ 425-28, 377-79.

<sup>24</sup> Chang, *supra ibid* at 37 (“[i]t is much more certain in application since according to this theory there will be only one law that governs the validity of contract. Even if the parties may not know the law of the place where the transaction is done, they can very easily consult a lawyer there: he will know the law of his state better than that when he is asked to advise on some foreign law that he may not know”); see also Goodrich *supra* note 18 at 321; Rabel, *supra* note 6 at 460.

<sup>25</sup> George Wilfred Stumberg, *Principles of Conflict of Laws*, 3rd ed (Brooklyn: The Foundation Press, 1963) at 229, 231 (“[a]pparently, the proper use of the place of the making, place of the principal event rule, as a mechanical device for deciding cases, requires a full pattern or chart to which the lawyer or the judge must constantly refer if he is not to go astray”).

<sup>26</sup> Rabel, *supra* note 6 at 459 (“the truth of the matter is that the *lex loci contractus* is a fallacious device wherever the making of a contract is substantially connected with two states”).

particular territory, it is difficult to determine the law of the place of contract. Dicey and Morris say that the rule is “useless” in this instance.<sup>27</sup> An attempt to explain away this weakness by referring to the last place of correspondence (place of acceptance – mailbox rule),<sup>28</sup> in the course of negotiation, as the place of contract, is an arbitrary and artificial refinement and may not even be applicable in oral electronic contracts.<sup>29</sup> Indeed, the last place of acceptance is usually “accidental” or “fortuitous” because it has no connection with the contract.<sup>30</sup> If a Canadian and a German, traveling from Egypt to Brazil, while on a train passing through Spain, agreed and executed a contract, should Spanish law govern their contract just because the contract was executed on Spanish soil?<sup>31</sup> Advocates of this rule argue that so far as they were not dragged into the train by fraud or by force, there is no reason why Spanish law should not be the governing law.<sup>32</sup> This argument is weak because parties may not be aware that they are on Spanish soil, or of the effect of Spanish law on their agreement and contract. This scenario shows that the place of contract may be fortuitous and irrelevant to the contract because the rule attaches importance to unintended actions. It is safe to conclude that the law governing a contract requires more spatial connection than the one that the *lex loci contractus* rule offers.<sup>33</sup>

---

<sup>27</sup> Albert Venn Dicey & John Humphrey Carlie Morris, *Dicey and Morris on The Conflict of Laws*, 9th ed (London, UK: Stevens & Sons, 1973) at 726.

<sup>28</sup> See Victor M Javitch, “Conflict of Laws – Tests Determining What Law Governs a Contract” (1961) 12:4 Case W Res L Rev 801 at 802.

<sup>29</sup> “Conflict of Laws, ‘Party Autonomy’ in Contracts”, Note, (1957) 57:4 Colum L Rev at 568 [Note on Conflict of Laws].

<sup>30</sup> Stumberg, *supra* note 25 at 231; See *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd*, [2000] (1) SA 162 at 172 (“there could be valid objections to the rule that the *lex loci contractus* determines a person’s capacity to enter into ordinary contracts since the place where a contract is concluded could be a matter of pure chance, especially if it is made by letter or telefax or over the telephone”); See also James *supra* note 14 at 42 (he describes it as law by chance).

<sup>31</sup> Chang argues that Spanish law should be applied in this instance. He made an analogy thus “[o]ne may contract on board a train through the tunnel from England to France or he may conclude the contract on board a train running through the Hudson tunnel, but as long as he does his last act of the contract there, he does it under that sovereign law. To deny this is no different in principle than to deny that a, child born on board a train of foreign parents in the United States is not a United States national.” See Chang, *supra* note 9 at 38.

<sup>32</sup> *Ibid.*

<sup>33</sup> See Friedrich Carl von Savigny, *Private International Law, and the Retrospective Operation of Statute: A Treatise on the Conflict of Laws, and the Limits of Their Operations in Respect of Place and Time* [Guthrie’s Translation], 2nd ed (Edinburgh: T & T Clark, 1880) at 370; Arthur Nussbaum, *supra* note 18 at 894; Walter Wheeler Cook, “Contracts’ and the Conflict of Laws: ‘Intention’ of the Parties” (1937) 32:8 Ill L Rev 143 at 157, 174-5. This objection is in response of the “mail box” theory to justify the application of

This rule is also problematic in unilateral contracts where parties agree that the contract be performed in different states to establish it.<sup>34</sup> Since the contract has different places of establishment, it may be difficult to ascertain the governing law. This is because there are differences in the contract laws of states regarding the place of contract.<sup>35</sup> While the forum court may regard an “event” as done in a particular place, it may not be regarded as such by the law of the place where the contract was purportedly made.<sup>36</sup> For example, at common law, a contract is deemed executed as soon as the addressee of an offer dispatches his acceptance; but some civil law countries only recognize acceptance when it is declared, or when it arrives at the offeror's address, or received by the addressor, or even when it comes to the addressor's knowledge.<sup>37</sup> On this basis, the differences in the theory of acceptance in different countries make the *lex loci contractus* impracticable in some instances.<sup>38</sup> Indeed, Rabel says that “[i]t [*lex loci contractus*] defies common sense every time when it makes the fate of a contract dependent on the legalistic fitness determining at what place the deal was completed in the juristic sense.”<sup>39</sup>

Despite its shortcomings, this rule is not completely useless in determining an applicable law in most countries. In the absence of the parties' express choice of law, courts usually consider the place of the making of a contract as one of the factors for determining a tacit or implied choice of law.

### **3.1.2. The Law of the Place of Performance (*Lex Loci Solutionis*)**

This rule shares a theoretical underpinning with the *lex loci contractus* rule – the vested right theory or territorial principle. The difference is that, while *lex loci*

---

the rule. The mail box rule posits that in a correspondence contract, the place of the last correspondence is the place of contract.

<sup>34</sup> GC Cheshire, *International Contracts: Being the Fifteenth Lecture on the David Murray Foundation in the University of Glasgow* (Glasgow: Jackson, Son & Company, 1948) at 10.

<sup>35</sup> Stumberg, *supra* note 25 at 232; Russel Weintraub, *supra* note 5 at 266.

<sup>36</sup> But see a Canadian decision in *Cloyes v Chapman* (1876), 27 UCCP 2 at 31 (“the question as to what country is the *locus contractus* in each particular case is not a question of foreign law; it is a question of fact.”) I believe that it is a question of both foreign law and fact because facts do not exist in vacuo.

<sup>37</sup> Rabel, *supra* note 6 at 453. For a comparative analysis of these countries, see Ernst Rabel, *Recht Das Warenkaufs*, vol 2 (Berlin: Walter De Gruyter & Co, 1958) 69-108.

<sup>38</sup> For an analysis of the differences in countries, see Rabel, *supra* note 6 at 455. Belgian, Italian and Swiss courts employ their theories of acceptance different from English or Canadian courts.

<sup>39</sup> Rabel, *supra* note 6 at 461.

*contractus* rule makes the law of the place of execution the connecting factor, *lex loci solutionis* rule makes the place of performance the connecting factor for determining the applicable law. This rule attaches significance to the “mode and incidents” or modalities of payment or other performance of a contract.<sup>40</sup> Proponents, therefore argue that this rule is based on express intention rule (party autonomy) because the performance of a contract is usually based on the intention and agreement of the parties.<sup>41</sup> Although the *lex solutionis* rule usually answers questions regarding the performance, discharge, and breach of a contract,<sup>42</sup> opponents of this rule argue that it cannot be used to determine the validity of a contract.<sup>43</sup> This is because the vested rights theory only refers the question of the validity of a contract to the place of execution and not the place of performance.<sup>44</sup>

Just like the *lex loci contractus* rule, it is also difficult to determine the place of performance in cases of multiple places of performance, unless the contract is divisible and each is treated as a separate contract.<sup>45</sup> For example, it is difficult to know the exact place of performance in a case of a freight contract that obligates a party to distribute goods to different destinations or countries. Advocates of this rule try to explain away this weakness by postulating that in the event of a breach of a contract that requires multi-state performance, the law of the place where the breach occurred will be the applicable law.<sup>46</sup> This postulation ignores the fact that multiple actions, occurring in different places and times, may culminate into a breach. In such an instance, it may be difficult to determine the place of the action that materially caused the breach of performance. Advocates of this rule also neglect the fact that a contract may not involve a breach to activate a conflict of law issue. Matters involving validity and the formalities of a contract do not involve breach, but they are matters that require the application of a choice of law rule.

In another attempt to solve this multi-state performance problem, proponents of this rule rely on the most connected place of performance or the

---

<sup>40</sup> Rabel, *supra* note 6 at 464.

<sup>41</sup> Chang, *supra* note 9 at 35.

<sup>42</sup> Stumberg, *supra* note 25 at 264.

<sup>43</sup> Note on Conflict of Laws, *supra* note 29 at 569.

<sup>44</sup> *Ibid.*

<sup>45</sup> Rabel, *supra* note 6 at 470; see e.g. *Jacobs v Crédit Lyonnais*, [1884] 12 QBD 589 (CA); see also Joseph M Cormack, “California Conflict of Laws in Regard to Contracts” (1939) 12:4 S Cal L Rev 335 at 337.

<sup>46</sup> See Javitch, *supra* note 28 at 802.

place of contract making.<sup>47</sup> But courts' reliance on the most connected place of performance, without any criteria for determining the "most connected place," usually results in "nebulous evaluations" which breed uncertainty in the application of the rule.<sup>48</sup> In the event that the place of performance is ascertainable, it may bear little or no relation to the contract, or may even be accidental, just like the *lex loci* rule.<sup>49</sup> The most connected place supposition offers no explanation to argue away the uncertainty and absurdity that the *lex loci solutionis* generates.

The rule also becomes problematic where a contract is silent on the place of performance; or where it is difficult to determine performance in the contract; or where there is no place of performance at all.<sup>50</sup> Also, it is difficult to know the law of the place of performance where the performance of a contract is optional, that is, where a party may perform in one or several places that he deems fit; or where the performance of a contract is to be agreed upon at a later date which never happened.<sup>51</sup> In these instances, advocates argue that the contract is performable in the place of its making, or at some other superficial place.<sup>52</sup> The weakness of this argument has been pointed out above – it is difficult to ascertain the place of contract making. The rule also creates an unfair and absurd result in a bilateral contract where both parties are required to perform obligations. The law of one party may exempt him from performance, but he may still be able to demand performance from the other party because the law of the place of performance of the other party enforces performance.<sup>53</sup>

Conflicts of law cannot schematically rely only on the *lex solutionis* rule to solve choice of law problems. This rule does not only, sometimes, produce unfair results; it breeds uncertainty in the application of choice of law rules.<sup>54</sup>

### **3.1.3. Personal Law of the Parties (*Lex Domicilii*)**

---

<sup>47</sup> Stumberg, *supra* note 25 at 233; Ernst Rabel, *supra* note 6 at 461.

<sup>48</sup> Note on Conflict of Laws, *supra* note 29 at 570.

<sup>49</sup> Rabel, *supra* note 6 at 472.

<sup>50</sup> Oppong, *supra* note 1 at 147; Chang, *supra* note 9 at 36.

<sup>51</sup> Oppong, *ibid.*

<sup>52</sup> Stumberg, *supra* note 25 at 233.

<sup>53</sup> *Ibid* at 236.

<sup>54</sup> Rabel, *supra* note 6 at 472.

This rule proposes that matters concerning an individual should be governed by the system of law mostly connected to the individual.<sup>55</sup> It connects the law of the domicile of parties to their contracts.<sup>56</sup> This rule stems from Mancini's theory that the law of domicile should be applied to a contract, subject to the *ordre public* of the *lex fori*.<sup>57</sup> The application of this rule appears straight-forward because parties can only have one domicile at a time.<sup>58</sup> However, it becomes problematic in a contract where parties possess different domicile – an unavoidable situation in international contracts.<sup>59</sup> The difficulty arises from choosing the domicile that prevails. For example, the rule proposes that the debtor's domicile should determine rights and obligations arising from the debt. As a result, he cannot promise more than what his domicile allows.<sup>60</sup> This makes the domicile of the debtor more important than that of the creditor. This means that the debtor's domicile governs the performance of a debt in another country – an unintended extra-territorial effect. The application of this rule could have produced an absurd result in *Milliken v Pratt*.<sup>61</sup> Here, Mrs. Pratt, who was domiciled and resident in Massachusetts, agreed with a supplier, who was resident in Maine, that she would stand surety for her husband, who was buying goods on credit from the supplier. Mr. Pratt defaulted, and the supplier sued Mrs. Pratt in Massachusetts. Under the Massachusetts law as it stood at that time, a married woman could not bind herself as surety; but under Maine law, she could do this. The court rejected the arguments on the law of domicile because this means that the surety would not be liable for her actions. The Court relied on the “place of acceptance”, which is Maine, to hold that Mrs. Pratt was liable. This decision avoids the absurdity that could arise from a situation where a surety is absolved from responsibilities. Indeed, the development of personal laws is more advanced in some countries than in others. It is, therefore, not uncommon to see that sometimes, the law of the domicile of a country may lose

---

<sup>55</sup> Trevor C Hartley, *International Commercial Litigation* (Cambridge: Cambridge University Press, 2009) at 507.

<sup>56</sup> Although law of personal nature includes nationality, residence and domicile, this thesis focuses on the latter (domicile) because of constraint of space and time.

<sup>57</sup> Spiro, *supra* note 4 at 7.

<sup>58</sup> *Ibid* at 15.

<sup>59</sup> *Ibid*.

<sup>60</sup> Rabel, *supra* note 6 at 473.

<sup>61</sup> *Supra* note 17.



touch with current developments in the world.<sup>62</sup> If the objective of conflict of laws is to do justice in private matters, the domicile law of some countries, as depicted in *Milliken v Pratt*, may not reflect this justice.

Relying on the law of domicile as a connecting factor also means that parties have the “onerous” task of investigating each other’s domicile, as well as ascertaining the law of that domicile, however remote.<sup>63</sup> This investigation involves discovering the parties’ intention as to domicile.<sup>64</sup> It is difficult to determine the scope of the law of the debtor’s domicile because the contract of the debtor may not have any factual connection to his domicile.<sup>65</sup> Even if this is successfully done, a party may abandon his domicile after the execution or performance of the contract.<sup>66</sup> This results in absurdities because parties, during negotiation, may have executed the contract based on the law of the domicile of each other.<sup>67</sup> Therefore, it is not an overstatement to conclude that, because of these weaknesses, *lex domicilii* law does not play a significant role as a connecting factor in choice of law issues.<sup>68</sup>

#### **3.1.4. Center of Gravity or Close Contact Rule**

This choice of law rule proposes that the terms of a contract, including a choice of law clause, must be weighed together in determining the applicable law of a contract.<sup>69</sup> It is believed that the validity of a contract must be weighed

---

<sup>62</sup> JJ Fawcett & JM Carruthers, eds, *Cheshire, North & Fawcett: Private International Law*, 14th ed (Oxford: Oxford University Press, 2008) at 181.

<sup>63</sup> See *Milliken v Pratt*, *supra* note 17 at 382.

<sup>64</sup> Fawcett & Carruthers, *supra* note 62 at 181 (“the ascertainment of a person’s domicile depends to such an extent on proof of intention, the most elusive of all factors, that only too often it will be impossible to identify it without recourse to the courts”).

<sup>65</sup> James, *supra* note 14 at 46; Cheshire, *supra* note 34 at 46. He argues that “it is no doubt true that a person who is subject to a disability by his *lex domicilii* cannot in general confer capacity upon himself by choosing a more favorable law. Yet it is neither heretical nor inconsistent to say that the disability may be disregarded if he makes a contract that has no factual connection with the country of his domicile. This disregard is not necessarily an evasion of the *lex domicilii*, since it does not follow that an incapacity imposed by that law is intended to affect transactions of a substantially foreign character.”

<sup>66</sup> Oppong, *supra* note 1 at 145.

<sup>67</sup> Indeed, Castel noted that the rule of domicile may not correspond to social reality. See Jean-Gabriel Castel, *Canadian Conflict of Laws*, 3rd ed (Toronto: Butterworths, 1993) at 75.

<sup>68</sup> Elsabe Schoeman, *Domicile and Jurisdiction as Criteria in External Conflict of Laws with Particular Reference to Aspects of the South African Law of Persons* (DCL Thesis, University of South Africa, 1997) [unpublished] at 96.

<sup>69</sup> Henri Batiffol, *Form and Capacity in International Contract* in *Lectures on Conflict of Laws and International Contracts delivered at the Summer Institute on International and Comparative Law*

independently of the intention of the parties.<sup>70</sup> Thus, this rule seeks to weigh or group the terms of a contract to determine the applicable law or validity of the contract.<sup>71</sup> It seeks to choose the law that has the closest connection or contact with the contract. It is believed that this will produce an “equitable result” in determining the “proper law.”<sup>72</sup> As stated in *Auten v Auten*,<sup>73</sup> this rule “gives control to the place having the most interest in the case, enables the court to give effect to the probable intention of the parties, and provides courts with an opportunity to give consideration to the states offering the best practical result.”<sup>74</sup>

There are two levels of contact under this rule – policy consideration level and the contract counting level. The first considers the policy of states connected to a contract –jurisdiction-selecting theory and government interest analysis.<sup>75</sup> United States scholars usually advocate policy considerations for determining the contact of the contract and, by extension, the applicable law of a contract.<sup>76</sup> These theories remove the application of conflict of laws rules from the realm of individual will and fix it between state policies. This jurisdiction-selecting theory particularly encourages the development of “narrow rules” that enable courts to determine the contact of the contract through an “objective [state] approach.”<sup>77</sup> These theories poses challenges to the autonomy of parties.

---

*University of Michigan Law School 5 August 1949* (Buffalo, New York: Hein & Co, 1982) at 144; see also *Restatement (second)*, *supra* note 23, §188.

<sup>70</sup> Cheshire, *supra* note 34 at 19.

<sup>71</sup> Richard Bauerfeld, “Effectiveness of Choice-of-Law Clause in Contract Conflicts of Law: Party Autonomy or Objective Determination?” (1982) 82:8 Colum L Rev 1659 at 1678. Other factors usually taken into consideration includes: (1) place of contracting; (2) place of performance; (3) place of negotiation; (4) parties' place(s) of business; (5) place of incorporation; (6) place of loading or discharging of the goods; (7) nature and location of the subject matter of the contract; (8) parties' domicile(s); (9) parties' place(s) of residence; (10) parties' nationality or nationalities; (11) currency designated as that in which payment is to be made. See Luo Junming, “Choice of Law for Contracts in China: A Proposal for the Objectivatization of Standards and their Use in Conflict of Law” (1996) 6:2 Ind Intl & Comp L Rev 439 at 448.

<sup>72</sup> Javitch, *supra* note 28 at 802.

<sup>73</sup> 308 NY 155 (1954).

<sup>74</sup> *Ibid*; see also Javitch, *supra* note 28 at 804.

<sup>75</sup> B Currie, *Selected Essays on the Conflict of Laws* (Durham, UK: Duke University Press, 1963); Bauerfeld *supra* note 71 at 1690.

<sup>76</sup> Currie, *ibid*.

<sup>77</sup> *Ibid*.

A choice of law based on the theoretical underpinnings of “state interest” is problematic because parties are at the center of contracts and not states.<sup>78</sup> In fact, the origin of contract disputes starts with parties. It is the individuals, and not states, who bear the consequences of their actions.<sup>79</sup> Parties should be able to fashion their relationships the way they like, because they must have considered how their choice of law will affect their controversy.<sup>80</sup> The jurisdiction-selecting theory and government interest analysis advocate for the recognition of state policies, but states themselves recognize the autonomy of parties to choose the applicable law.<sup>81</sup> It is not surprising that the “government interest” theory has been the subject of theoretical criticism since its introduction by Currie.<sup>82</sup> Currie’s analysis has been tagged irrelevant in the determination of choice of law rules.<sup>83</sup>

The second level of contact – contact counting – considers other choice of law rules, including the place of contract, performance, domicile of parties or place intended by the parties.<sup>84</sup> While this level of contact counting seeks to avoid criticisms against anti-autonomy by acknowledging that a choice of law clause is one of the “contacts” in a contract, its application is characterized by uncertainty.<sup>85</sup> This is because it is conjectural to determine the applicable law of a contract by deciding the contracts’ contact with a legal system.<sup>86</sup> It is difficult to determine the most vital and substantial contact in cases of competing or evenly balanced clauses in a contract.<sup>87</sup> Thus, a judge may attach significance to the most trivial connection,

---

<sup>78</sup> Lehmann, *supra* note 8 at 413-417.

<sup>79</sup> Cavers added that “choice of law rules do not work well when the connecting factors they prescribe are based on broad criteria which ignore the special facts of the cases, the purposes of the conflicting laws, and the results produced by the laws they choose.” See David F Cavers, “A Critique of the Choice of Law Problem” (1933) 47:2 Harv L Rev 173 at 189.

<sup>80</sup> *Ibid.*

<sup>81</sup> Lehmann, *supra* note 8 at 417.

<sup>82</sup> See generally, Lea Brilmayer, “Government Interest Analysis: A House Without Foundations” (1985) 46:3 Ohio St LJ 459; Larry Kramer, “More Notes on Methods and Objectives in the Conflict of Laws” (1991) 24:2 Cornell Intl LJ 245; Alan Weinberger, “Party Autonomy and Choice-of-Law: The Restatement (Second), Interest Analysis, and the Search for a Methodological Synthesis” (1976) 4:3 Hofstra L Rev 605.

<sup>83</sup> Janet Walker, *Canadian Conflict of Laws*, 6th ed (Toronto: LexisNexis 2005) at 1-53.

<sup>84</sup> For a complete list of the factors, see Bauerfeld, *supra* note 71 at 1678.

<sup>85</sup> Walker, *supra* note 83 at 1-69; Note on Conflict of Laws, *supra* note 29 at 571.

<sup>86</sup> Note on Conflict of Laws, *ibid* at 571.

<sup>87</sup> James, *supra* note 14 at 42; See Javitch, *supra* note 28 at 802; Weintraub, *supra* note 5 at 272-273; “Commercial Security and Uniformity Through Express Stipulations in Contracts as to Governing Law”, Note, (1949) 62:4 Harv L Rev 647 at 657 [Note].

which may be the forum law, because the trivial connection may be the best law for some judges.<sup>88</sup>

Also, it is common for parties to select different laws to govern different areas in their international contracts. In this instance, it is difficult to group different choice of law clauses to determine an applicable law of the contract because chosen laws apply to different individual contract terms. Realizing that the application of this rule may sometimes be futile, advocates argue that where it is impossible to group contacts in a contract, party autonomy should be applied.<sup>89</sup> This argument paradoxically accords a subsidiary role to party autonomy, instead of making it the main rule.

Finally, contract counting encourages parties to engage in “contact building.”<sup>90</sup> This means that parties, because of an impending litigation, may intentionally tie the events of a contract to a particular legal system, such that the intended legal system becomes the center of gravity or the closest connection to the contract.<sup>91</sup> The wisdom in the dissenting opinion of Judge Desmond in *Dym v Gordon* sums up the weaknesses of this rule as follows:

Contacts,’ ‘interest,’ ‘center of gravity,’ etc... are catchwords representing at best not methods or bases of decision but considerations to be employed in setting up the new rules of law required by changing times. Counting up ‘contacts’ or locating the ‘center of gravity’ or weighing the respective ‘interests’ of two states can never be a satisfactory way of deciding actual lawsuits.<sup>92</sup>

In sum, the center of gravity rule depends on some sort of logic on the part of the court and parties to determine the applicable law. But it is a truism that the life of the law is not dependent on logic but on experience.<sup>93</sup>

### **3.1.5. The Law of the Place Which Validates the Contract (*Lex Validitatis*)**

---

<sup>88</sup> James, *supra* note 14 at 47.

<sup>89</sup> Bauerfeld, *supra* note 71 at 1689.

<sup>90</sup> Weintraub, *supra* note 5 at 280.

<sup>91</sup> See *Haag v Barnes*, 9 N Y 2d 554 (1961).

<sup>92</sup> 16 NY 2d 120 (1965) at 134-135.

<sup>93</sup> Oliver Wendell Holmes, *The Common Law*, ed by Mark Dewolfe Howe (Boston: Little Brown, 1963) at 5; Fawcett & Carruthers, *supra* note 62 at 37 (“[p]rivate International Law is no more an exact science...it is not scientifically founded on the reasoning of jurists, but it is beaten out on the anvil of experience”).

This rule is usually applied when a court is faced with the question of the validity of a contract. The rule seeks to select from two competing rules – the law that invalidates and that which validates the contract. It ignores the law that invalidates the contract and selects that which validates it.<sup>94</sup> It is based on the theoretical presumption that the parties have intended that their contract be governed by the law under which it is legally effective.<sup>95</sup> It presumes that individuals do not act in folly or dishonesty but “rather that they intended in good faith that their acts shall be valid and what they purport it to be.”<sup>96</sup> It has also been pointed out that the application of this rule “better serve[s] business convenience... by making their [parties’] acts an enforceable promise.”<sup>97</sup> This is because it is only practical and sensible that parties should be held to their bargains<sup>98</sup> and that, in any event, parties’ “true intent is not so much that a particular law governs, but that their contract be binding.”<sup>99</sup> Therefore, proponents of the *lex validitatis* rule argue that regardless of the chosen law, the only practical thing to do is to uphold the validity of a contract.<sup>100</sup>

Just like other rules, the justifications for this rule also suffer from some weaknesses. First, as to the argument that it is the intention of parties that their contracts be valid, it is difficult to decipher the intention of parties in the absence of a choice of law clause or in cases where the choice is one that is not inferable. Thus, this rule relies on presumptions.<sup>101</sup> Also, parties may be genuinely mistaken as to the effect of their intended applicable law, such that the law invalidates the

---

<sup>94</sup> Albert Ehrenzweig, *Conflicts in a Nutshell*, 2nd ed (Boston: St Paul, 1970) at 165; See Chief Justice Parker’s dicta in *Etlar v Kertes*, (1961) 26 DLR 2d 209 (On CA) at 222.

<sup>95</sup> John Prebble, “Choice of Law to Determine the Validity and Effect of Contracts a Comparison of English and American Approaches to the Conflict of Laws” (1973) 58:4 Cornell L Rev 635 at 658; *Kossick v United Fruit Co* 365 US 731 (1961) at 741 (“[i]t must be remembered that we are dealing here with a contract, and therefore with obligations, by hypothesis, voluntarily undertaken .... This fact in itself creates some presumption in favor of applying the law tending toward the validation of the alleged contract”).

<sup>96</sup> *Arnold v Potter*, 22 Iowa 194 (1867); *Pritchard v Norton* 106 US 124 (1882) (“the parties cannot be presumed to have contemplated a law which would defeat their engagements”).

<sup>97</sup> Stumberg, *supra* 25 at 239. (“[t]o apply the law which will uphold the contract... would ... in carrying out the purposes which the parties had in view in their negotiations, better serve business convenience by making their acts legally, that which they purport to be; i.e. an enforceable promise”).

<sup>98</sup> Prebble, *supra* note 95 at 659.

<sup>99</sup> Bauerfeld, *supra* note 71 at 1666.

<sup>100</sup> Russell J Weintraub, “Choice of Law in Contract” (1968) 54:3 Iowa L Rev 399 at 406. (“[u]nless [the parties] are engaged in some ridiculous charade, their intention is that every promise they have made in the contract be enforceable”).

<sup>101</sup> Prebble, *supra* note 95 at 658.

contract.<sup>102</sup> In this instance, the parties' choice of law invalidates their contract and, because of this, the purpose of the rule is defeated. However, it may be argued that the court will search for another law to validate the contract. Clearly, an application of another law to "save the day" is not a manifestation of parties' intention in this instance. In effect, the application of the *lex validitatis* rule in some instances may, like preceding rules, lead to absurdity or uncertainty.<sup>103</sup>

### 3.1.6. The Law of the Place of Litigation (*Lex Fori*)

This choice of law rule dictates that, regardless of the contract's contact with another state's law or the intention of the parties, the law of the place where the matter is litigated should be applied (forum law).<sup>104</sup> The party who argues for the application of a foreign law must show reasons for its application. The *lex fori* rule is based on the theory that "if the forum and a foreign state each have a domestic rule, the underlying policies of which are applicable to the interstate case in issue, it is improper for a court to give effect to the policies of another State in preference to those of its own State."<sup>105</sup> Therefore, the forum's policy interest trumps the application of any foreign law.<sup>106</sup> By this rule, the notion of justice to a case is based on the superiority of a state policy rather than the human conduct which is at the center of the dispute

Thus, the forum state, which may be fortuitous to hear a case, is portrayed as a depository of just laws.<sup>107</sup> While this rule promotes the forum state's policies, it encourages forum shopping because a plaintiff that is aware of a favourable estate policy on an issue may litigate in that forum as opposed to the "appropriate" or

---

<sup>102</sup> *Ibid* at 659. This is one of the reasons Cheshire, Battifol and Oppong argue that the validity of the contract should not be decided by the intention of the parties; see also Weintraub, *supra* note 5 at 271 ("one obvious difficulty with relying on a choice-of-law clause for validation, is that the parties may inadvertently choose a jurisdiction whose laws will invalidate the contract in whole or in part"). This is also applicable to express choice of law too.

<sup>103</sup> For a critique of the validating rule, see generally, Aaron Twerski, "Choice of Law in Contracts: Some Thoughts on the Weintraub Approach" (1972) 57:5 Iowa L Rev 1239.

<sup>104</sup> See generally Albert Ehrenzweig, "The Lex Fori – Basic Rule in the Conflicts of Laws" (1960) 58 Mich L Rev 637.

<sup>105</sup> Weintraub, *supra* note 5 at 370, citing B Currie, "Survival of Actions: Adjudication in the Conflict of Laws" (1958) 10 Stan L Rev 205 at 245.

<sup>106</sup> *Lilienthal v Kaufman*, 239 OR Sup Ct 1 395 P 2d 543 (1964).

<sup>107</sup> James, *supra* note 14 at 42.

agreed forum. Also, because of different state policies, similar facts will lead to different results in different states. This necessarily results in a lack of uniform decisions on the same facts. This rule also creates a tension between states because it fixes the choice of law issue among states instead of individuals.<sup>108</sup> In effect, the application of this rule results in a lack of uniformity on the one hand, and breeds conflict between states on the other hand. Conflict between states means that the decision of a state is based on how its citizens are treated in another state – reciprocity. For example, if a Nigerian court, based on Nigerian state policy, refuses to enforce a loan contract between a German creditor and Nigerian debtor, German courts and legislature would, as a matter of reciprocity, necessarily deny Nigerian creditors such an opportunity in Germany. This hinders international or transactional contracts because citizens of these countries would avoid doing business with each other.

### **3.1.7. Express Intention of the Parties (Party Autonomy)**

The discussion in chapter 2 above explains the meaning and development of party autonomy. So here, it suffices to say that the application of parties' will through choice of law clauses has "sprinted ahead" of other choice of law rules.<sup>109</sup> It has been noted that "within its realm, it [party autonomy] trumps all other conflict rules... thus, [party autonomy] prevails over other conflicts rules, which are denigrated to mere default rules."<sup>110</sup> In effect, other choice of law rules have been treated as "subsidiary" rules when courts make choice of law decisions.<sup>111</sup>

Party autonomy has grown in many dimensions over the years. It has been described as "one of the fundamental principles of private international law;"<sup>112</sup> and a "master" of all rules in conflict of laws.<sup>113</sup> It has also been characterized as

---

<sup>108</sup> See generally, Lehman, *supra* note 8.

<sup>109</sup> Weintraub, *supra* note 5 at 355.

<sup>110</sup> Lehmann, *supra* note 8 at 389.

<sup>111</sup> Rabel, *supra* note 6 at 440-441.

<sup>112</sup> Institute of International Law, "Resolution on the Autonomy of the Parties in International Contracts Between Private Persons or Entities" (1992) 64 II YB 383.

<sup>113</sup> Lehmann, *supra* note 8 at 389.

“perhaps the most widely accepted private international rule of our time,<sup>114</sup> a “fundamental human right”<sup>115</sup> and an “irresistible principle that belongs to the common core of the legal systems.”<sup>116</sup> The doctrine has also been likened to “motherhood and the proverbial pie: virtually nobody is against it and most commentators enthusiastically endorse it.”<sup>117</sup> In effect, party autonomy is described as a “universal approach which has also been a success in practice.”<sup>118</sup> The last characteristic is an overstatement because there is no universal rule for all situations.<sup>119</sup> Indeed, it is impossible to have just one approach to all circumstances because there are many variables that prevent this possibility.<sup>120</sup> Thus, other choice of law rules still co-exist with the party autonomy rule, albeit in different circumstances.

Those rules may be applied symmetrically with the party autonomy rule to determine the applicable law of a contract. But countries usually begin the choice of law process by looking for the will of the parties before considering other rules.<sup>121</sup> Therefore, the application of other choice of law rules is treated as dependent on an absence or presence of the parties’ intention. Lord Wright explained that “English law in deciding these [choice of law] matters has refused to treat as conclusive rigid or arbitrary criteria such as *lex loci contractus* or *lex loci solutionis* and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract...”<sup>122</sup>

---

<sup>114</sup> Russell J Weintraub, “Functional Developments in Choice of Law for Contracts” (1984) 187 *Rec des Cours* 239 at 271

<sup>115</sup> Erik Jayme, “Identité Culturelle et integration; le droit international privé postmoderne” (1995) 9 *Rec des cours* 251 at 147 (characterizing party autonomy as a fundamental right).

<sup>116</sup> Symeon Symeonides, “Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple” (2014) 39:3 *Brook J Intl L* 1123 at 1124; Ole Lando, “The EEC Convention on the Law Applicable to Contractual Obligations” (1987) 24:2 *CML Rev* 159 at 169.

<sup>117</sup> Symeonides, *ibid* at 1124.

<sup>118</sup> Giesela Ruhl, “Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency” (2007) 3:1 *CLPE Research Paper* 4/2007 1 at 8.

<sup>119</sup> Hartley, *supra* note 55 at 519.

<sup>120</sup> *Ibid* at 311-312.

<sup>121</sup> Provisions of *Restatement (Second)*, *supra* note 23, serve as an example.

<sup>122</sup> *Mount Albert Borough Council v Australasian Temperance and General Mutual Life Assurance Society Ltd*, [1938] AC 224 at 240.



However, a German scholar described party autonomy as a “stopgap” that is only applicable to choice of law issues where there is no other satisfactory rule.<sup>123</sup> By this, party autonomy is a make-shift rule. This proposition is oblivious to the fact that party autonomy possesses inherent traits which endear both parties and courts to recognize choice of law clauses in contracts. This proposition does not reflect the importance and advantages of party autonomy in choice of law theories, especially in international or multi-state contracts. This thesis has shown that the inadequacies of other choice of law rules have been most evident in international or multi-state contracts.<sup>124</sup> Party autonomy fulfils the objectives of choice of law rules in multi-state contracts.<sup>125</sup> Some of the objectives which the party autonomy rule fulfils are as follows:

### **3.1.7.1. Certainty and Predictability**

A major advantage that party autonomy has over other choice of law rules is that it enables parties to predict the applicable law to their contracts.<sup>126</sup> This means that the governing law of a contract is not left to circumstances outside the reach of the parties; it is controlled by the parties through a choice of law clause.<sup>127</sup> This function is important because parties are unable to claim opportunistically the protection of contractual rights which they did not envisage as applicable in their contract.<sup>128</sup> Therefore, party autonomy enables the parties to plan their transaction according to the proposed chosen law.<sup>129</sup>

---

<sup>123</sup> Gerhard Kegel & Klaus Schurig, *Internationales Privatrecht*, 9th ed (Munich: Beck'sche CH Verlagsbuchhandlung Oscar Beck, 2004) 310-11 at 653, cited in Matthias Lehman, *supra* note 8 at 394.

<sup>124</sup> Note, *supra* note 87 at 647.

<sup>125</sup> For explanations on the objectives of choice of law rules, see Janet Walker, *supra* note 83 at 1-63 to 1-1-65; See also Yntema, *supra* note 13 at 734-735.

<sup>126</sup> See the comment to the *Restatement (Second)*, *supra* note 23 § 187(2) (“[p]rime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may be best attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way certainty and predictability of results are most likely to be secured”).

<sup>127</sup> Willis Reese, “Contracts and the Restatement of Conflict of Laws, Second” (1960) 9:4 ICLQ 531 at 534 (“[t]he best way of achieving certainty and predictability in the area of multi- State contracts is to give the parties power within certain limitations to choose the governing law”).

<sup>128</sup> Whincop & Keyes, *supra* note 11 at 15.

<sup>129</sup> Yeo Tiong Min, “The Effective Reach of Choice of Law Agreements” (2008) 20:3 Sing Ac LJ 723 at 726.

Also, through party autonomy, contractual parties are sure of their legal choices, especially on issues relating to the choice of the governing law.<sup>130</sup> Thus, persons of different nationalities or regions are able to enter into a contract without the fear that the law of the country of one party will “override” the other.<sup>131</sup> This gives security to contractual parties.<sup>132</sup> The need for certainty is important in international contracts where more than one national law may equally be applicable to the contract because:

An international contract, like any other contract, requires certainty. Where several fora are available and several laws potentially applicable, the parties should be able to avert such uncertainties through an agreed choice of law and/or forum. To leave that determination to a court invites uncertainty since national choice of law rules ...differ and even if they involve similar non-rule statements, such as the ‘centre of gravity’ or ‘close connection’ test, they are open to judicial chauvinistic manipulation.”<sup>133</sup>

To this end, parties can avoid a fortuitous application of other choice of law rules which may, sometimes, yield uncertain and unexpected results. Because of this advantage over other choice of law rules, some writers have argued that party autonomy promotes the reasonable expectation of parties.<sup>134</sup> For example, a writer stated that “The theory [party autonomy] provides, in general, for the fulfillment of the ‘actual’ reasonable expectations of the parties to the contract.”<sup>135</sup> However, it should be noted that the satisfaction of parties’ reasonable expectation is limited to instances where such expectations deserve satisfaction.<sup>136</sup> As the next section

---

<sup>130</sup> Maria Mercedes Albornoz & Nuria Gonzalez-Martin, “Towards the Uniform Application of Party Autonomy for Choice of Law in International Commercial Contracts” (2016) 12:3 J Priv Intl L 437 at 438-439. However, parties may sometimes be mistaken as to the validity of their contract.

<sup>131</sup> Gilles Cuniberti, “The International Market for Contracts: The Most Attractive Contract Laws” (2014) 34:3 Nw J Intl L & Bus 455 at 466.

<sup>132</sup> Walker, *supra* note 83 at 1-65.

<sup>133</sup> Nygh, *supra* note 8 at 2; see also Magdalena Pfeiffer, “Legal Certainty and Predictability in International Succession Law” (2016)12:3 J Priv Intl L 566 at 568 (“legal certainty is attained predominantly by clear and accurately determined conflict-of-laws and jurisdiction rules. A coherent and comprehensible legal framework is significant not only for parties to such legal relations, but also for judges who might not necessarily deal with cross-border cases routinely and are often challenged by the international dimension of a case”).

<sup>134</sup> See e.g. James, *supra* note 14 at 57; Leflar, *supra* note 11 at 1586.

<sup>135</sup> Peter Nygh, “The Reasonable Expectations of the Parties as a Guide to Choice of Law in Contract and in Tort” (1995) Rec des Cours 251 at 268.

<sup>136</sup> Walker, *supra* note 83 at 1-64.

shows, parties' expectations are curtailed or limited in certain cases to satisfy national interests and also to protect weaker parties.

### 3.1.7.2. Commercial Convenience/Flexibility

Party autonomy promotes international or transnational commerce. This is because parties can choose laws outside their respective domestic legal systems. This encourages “internationalization” of choice of law rules. As a result, parties are able to choose a “neutral law” that has no connection with their contract.<sup>137</sup> Indeed, the growth of various types of contract laws in the 21<sup>st</sup> century makes the application of the party autonomy rule inevitable.<sup>138</sup> Through party autonomy, parties enjoy the freedom to choose any “sophisticated” contract law of any country to suit their commercial need.<sup>139</sup> In international contracts, there are usually various motives for selecting the law of a country, one of which is the “attractiveness” of the law of the chosen country.<sup>140</sup> For example, English law has enjoyed patronage from contractual parties in international insurance and maritime contracts because of its development in these areas of law.<sup>141</sup> The ability of parties to choose these laws or venues, regardless of geographical location of the contract or nationality of the parties, promotes legal commercial convenience. It is arguable that parties will be able to settle their disputes with ease if a contract is governed by the law of the country which has “best practices” in that area of law and in which there are settled judicial precedents and robust legislative frameworks.

Finally, to achieve commercial convenience in an international contract, there is a need for flexibility in the choice of law rules. Party autonomy ensures that parties enjoy flexibility in their choice of law rules, such that they can satisfy their peculiar transactional needs by choosing the best applicable choice of law rule most suited to their transactions.

---

<sup>137</sup> *Ibid* at 484. It should be noted that choosing a neutral law may be because of a statement in negotiation of the applicable law.

<sup>138</sup> James *supra* note 14 at 57.

<sup>139</sup> SM Richardson, *International Contracts and The Choice of Law* (DCL Thesis, University of Canterbury, 2005) [unpublished] at 155.

<sup>140</sup> Craig M Gertz, “The Selection of Choice of Law Provisions in International Commercial Arbitration: A case for Contractual Depeçage” (1991) 12:1 Nw J Intl L & Bus 163 at 176.

<sup>141</sup> Cuniberti, *supra* note 131 at 489.

### 3.1.7.3. Uniformity

Generally, uniformity of decisions in different national courts is one of the aims of choice of law theory.<sup>142</sup> Indeed, one of the reasons for applying choice of law rules is to ensure uniform decisions.<sup>143</sup> For example, advocates of the *lex situs* rule argue that the reason for applying the law of the place of a contract is that such a place is certain. But because of developments in contract law, as well as different national contract laws, it is difficult to achieve uniformity by this rule.

The application of the autonomy rule fulfills this important objective for choice of law because it proposes that, regardless of: the national court; domicile of the parties; the center of gravity; or place of performance, parties' choice of law is accepted as the applicable law. In the "ticket case" of *Siegelman v Cunard White Star Limited*,<sup>144</sup> an agent of the defendant issued tickets which contained a choice of law clause (English law) to persons of different nationalities on board a ship. It was held that the rationale for including the choice of law clause in the ticket is that, regardless of the forum, there will be a uniform applicable law.<sup>145</sup> Indeed, this example shows that the recognition of party autonomy is a way to achieve uniform decisions.

Uniformity in the application of a choice of law rule also encourages easy enforcement of judgments because, if countries recognize the power of individuals to choose the applicable law in their contracts, arguments on the applicable law are eliminated during enforcement of the judgment.<sup>146</sup> Related to the foregoing is the fact that party autonomy discourages forum-shopping because parties would have agreed on the applicable law and, sometimes, court.<sup>147</sup> Thus, a party may object to the jurisdiction of a court based on agreement of a choice of law or forum clause.

### 3.1.7.4. Less Burden on National Courts and parties

---

<sup>142</sup> Leflar, *supra* note 11 at 1586.

<sup>143</sup> Whincop & Keyes, *supra* note 11 at 15.

<sup>144</sup> 221 F 2d 189 (2d Cir 1995).

<sup>145</sup> *Ibid*, Judge Harlan at 194.

<sup>146</sup> Whincop & Keyes, *supra* note 11 at 15.

<sup>147</sup> Leflar, *supra* note 11 at 1586.

Other choice of law rules, apart from party autonomy, share a common characteristic – they, sometimes, involve the consideration of different factors to arrive at an applicable law. For example, the application of the center of gravity rule involves a “preliminary test” of every occurrence connected to the contract. This may not be an enviable task for judges who listen to counsel arguments from divergent views. First, the judge collates the facts (characterization); decides which facts are relevant to the determination of the applicable law and those that are not; examines the applicable laws to justify each state policy; and most onerously, determines the law of the country that is closely connected to the contract.<sup>148</sup> This process is just a preliminary decision which is exclusive of the trial. In an extreme situation, a dissatisfied party, after the preliminary decision on the choice of law, may apply for a stay of proceedings to appeal the decision. In countries with slow judicial process, it may take years before this point is resolved, by which time evidence may be lost and witnesses or the parties may have died.

Party autonomy removes the burden of making decisions on the applicable law from the court to parties.<sup>149</sup> This is because allowing parties’ will to decide the applicable law removes the preliminary judicial inquiries on the applicable law. This simplistic nature of party autonomy is preferred to other “complex” choice of law rules.<sup>150</sup> Indeed Walker says that “conflict of law rules should be easy and simple and easy to apply: they should facilitate the judicial task.”<sup>151</sup> Once a choice of law clause is included in a contract, courts, often-times, do not see the need to inquire about the application of other rules. This was demonstrated in *Siegelman v. Cunard White Star Limited* when Judge Harlan said:

We see no harm in letting the parties' intention control ...  
Instead of viewing the parties as usurping the legislative  
function, it seems more realistic to regard them as relieving  
the courts of the problem of resolving a question of conflict

---

<sup>148</sup> See Hartley, *supra* note 55 at 504-505.

<sup>149</sup> Richardson, *supra* note 139 at 155.

<sup>150</sup> James *supra* note 14 at 58 (“the simplicity in the handling of conflict-of-laws contracts by means of the autonomy theory, which fixes some definite law or laws as the governing law of the contract, is much to be desired over the inflexible and often highly illogical and artificial means used at present by many courts”).

<sup>151</sup> Walker, *supra* note 83 at 1-65.

of laws. Their course might be expected to reduce litigation, and is to be commended as much as good draftsmanship which relieves courts of problems of resolving ambiguities.<sup>152</sup>

The parties' burden of choosing the applicable law does not include analyzing the intricacies of the application of other choice of law rules. The only requirement is that, based on their preferences, parties should agree on the applicable law. Thus, if the parties agree on a law, it will be unnecessary to engage the services of solicitors from different countries to analyze the intricacies of the otherwise applicable rules or laws (although it is sometimes good). This saves the parties' time and energy on the choice of law clause in a contract and allows them to concentrate on other contract clauses. In some cases, the choice of law clause may even be a product of negotiation and compromise.<sup>153</sup> For example, a party may concede to a particular law in exchange for another favourable clause in the contract.<sup>154</sup> This introduces the flexibility that parties need in a contract to strike a "balanced" negotiated contract.

### **3.1.7.5. Sense of Justice between the Parties**

The search for justice between parties is one of the objectives of the application of choice of law rules.<sup>155</sup> Indeed, the desire to do justice in cases involving legally relevant foreign elements is one of the most important objectives of any legal system.<sup>156</sup> In cases where parties are of equal bargaining power and the choice results from the free will of parties, the application of the party autonomy rule gives parties a sense of justice.<sup>157</sup> This is because "the law chosen by the parties may on occasions be more sensitive to fair dealings and moral concepts than even that of the domicile of the parties [or any other choice of law rule]."<sup>158</sup> Parties, therefore,

---

<sup>152</sup> *Siegelman, supra* note 144 at 195.

<sup>153</sup> Larry A Di Matteo, *Law of International Contracting*, 2nd ed (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2009) at 44.

<sup>154</sup> Gertz, *supra* note 140 at 176.

<sup>155</sup> Walker, *supra* note 83 at 1-64.

<sup>156</sup> *Ibid.*

<sup>157</sup> James, *supra* note 14 at 58.

<sup>158</sup> *Ibid.*

become partners in the administration of justice to their disputes. Also, since there may be more than one applicable law in an international contract, it is difficult to justify application of one law over the other because “it is highly unlikely in the mid-twentieth century that any one state is the sole depositary of just laws.”<sup>159</sup> It is difficult to answer the question that: in the case of two applicable laws that seek to do justice, which one should prevail?<sup>160</sup> Party autonomy, therefore, solves this problem by allowing the parties to choose the applicable law. This ultimately creates parties’ sense of belonging and responsibility in the judicial process.

### 3.1.8. Criticism of the Party Autonomy rule

Apart from the early opposition to party autonomy discussed in chapter 2, scholars also criticize it as a conflict of laws rule. The criticism is like Beale’s “party legislation” argument. It is argued that “it [party autonomy] allows the intention of private parties to determine the scope of the legislative jurisdiction of states that have not delegated such power to them.”<sup>161</sup> A writer concluded that “it will be hopeless for one to predict the validity of a contract according to the intention theory.”<sup>162</sup>

This argument is flawed because most states recognize party autonomy.<sup>163</sup> The argument also ignores the fact that a choice of law clause is just a piece of paper with no legal force until the courts “breathe life into it.”<sup>164</sup> In effect, parties’ choice of law is still subject to the forum courts’ scrutiny.<sup>165</sup> In some cases, the choice of law does not even change the risk allocation in a contract which is based on contract

---

<sup>159</sup> *Ibid.*

<sup>160</sup> Walker, *supra* note 83 at 1-57.

<sup>161</sup> Bauerfeld, *supra* note 71 at 1668.

<sup>162</sup> Chang, *supra* note 9 at 35.

<sup>163</sup> Julian Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Oceana Transnational Services) (Dobbs Ferry, New York: Oceana Publications, 1978) at 75 (“despite their differences, common law, civil law and socialist countries have all equally been affected by the movement towards the rule allowing the parties to choose the law that govern their contractual relations”).

<sup>164</sup> Swan, *supra* note 3 at 218. (“[a] governing clause has no more (or no less) effect than any other clause that the parties may include. It neither justifies nor avoids the application of any rule, statutory or common law that is properly applicable to their relation”). This does not affect certainty that party autonomy ensures in international contracts because courts only endorse the contract; they do not make contracts for parties.

<sup>165</sup> Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford: Oxford University Press, 2008) at 426.

law principles. Indeed, regardless of the applicable law, party autonomy does not affect the legislative jurisdiction or interests of states.<sup>166</sup>

Another justification for the party autonomy rule, contrary to what critics say, is that it is not an unruly horse. This is because it operates within a delineated legal limit. This point is discussed next.

### **3.2. Party Autonomy: An Unruly Horse?**

Notwithstanding the advantages of party autonomy, should countries allow parties to choose the applicable law without any restraint? The answer is in the negative. Indeed, it has been noted that “everyone agrees that however desirable party autonomy may be, it cannot be absolute. While individuals and enterprises ought to be free to select any law they please, they should not be able to abuse that freedom to the detriment of one of the contracting parties or society at large.”<sup>167</sup> There are reasons why party autonomy has been limited in some circumstances, and how this has been done. The limitations which vary from country to country, are mainly twofold – unequal bargaining power and public policy.

#### **3.2.1. Unequal Bargaining Power**

As noted in Chapter 2, party autonomy is an exercise of contractual freedom in regard to choice of law. However, there are instances where a party is unable to exercise the freedom to choose the applicable law, because the other party possesses overwhelming bargaining power.<sup>168</sup> This may be because of inequality (asymmetries) of information between the parties.<sup>169</sup> An example of this scenario

---

<sup>166</sup> See e.g. Canada’s Supreme Court’s decision in *Imperial Life Assurance Co of Canada v Colmenares*, [1967] SCR 443; John Swan, *supra* note 3 at 227; Felix Maultzsch, “Party Autonomy in European Private International Law: Uniform Principle or Context-dependent Instrument?” (2016) 12:3 J Priv Intl L 467 at 468 (“the choice of a foreign law by the parties to a contractual usually does not concern the sovereign interests of the states which has enacted the chosen law. consequently, the application of a foreign substantive law does not presuppose an interest of the legislating state in an application of its law to the respective dispute”).

<sup>167</sup> Friedrich Juenger’s letter to Harry C Sigman, reproduced in Patrick Borchers, “The Internationalization of Contractual Conflicts Law” (1995) 28 Vand J Transnat’l L 421 at 448.

<sup>168</sup> Pamela Edwards, “Into the Abyss: How Party Autonomy Supports Overreaching Through the Exercise of Unequal Bargaining Power” (2003) 36:2 John Marshall L Rev 421 at 455.

<sup>169</sup> Whincop & Keyes *supra* note 11 at 14.



exists in adhesion contracts, the types in fine print in standard form containing pre-arranged and offered by a “stronger” party to the other party on a take it or leave it basis.<sup>170</sup> Adhesion contracts include loan agreements, consumer contracts, franchise, employment contracts and transportation contracts.<sup>171</sup> These contracts either completely remove the freewill of the adhering party or fundamentally restrict it. There is, therefore, the need to balance freedom of contract and fairness between parties in these types of contracts.<sup>172</sup>

Generally, party autonomy is a product of two opposing principles. First is the need to assign the judge the role of an umpire with no discretion to interfere with the choice of law clause in a contract. Second is the need for fairness which encourage judges’ “active” participation in determining whether parties are not, by any means, coerced or influenced in a choice of law decision, such that the choice is not autonomous in the true sense of it.<sup>173</sup> In support of the latter principle, Ehrenzweig describes true autonomy as freedom to contract and not freedom to adhere.<sup>174</sup> Thus, courts strive to balance these principles to ensure justice in individual cases.

### 3.2.2. Public Policy

---

<sup>170</sup> See generally, Albert Ehrenzweig, “Adhesion Contracts in the Conflict of Laws” (1953) 53:8 Colum L Rev 1072.

<sup>171</sup> *Ibid*; Christian Kirchner, “Justifying Limits to Party Autonomy in the Internal Market – Mainly Consumer Protection” in Stefan Grundmann, Wolfgang Kerber & Stephen Weatherill eds, *Party Autonomy and the Role of Information in the Internal Market* (Berlin: Walter de Gruyter, 2000) at 165.

<sup>172</sup> Yeukai Mupangavanhu, “Fairness a Slippery Concept: The Common Law of Contract and the Consumer Protection Act 68 of 2008” (2015) 48:1 De Jure LJ 116 at 119.

<sup>173</sup> See the dictum of Judge Weinfeld in *Southern Int’l Sales Co v Potter & Brumfield*, 410 F Supp 1339 (SDNY 1976) at 1342 (“[a] strong legislative policy could easily be circumvented were the court to announce a rule that would allow a manufacturer, by wielding its economic might against a distributor, to exact a stipulation as to governing law compelling the distributor to forsake the protection afforded him by ... [his] legislature”).

<sup>174</sup> Ehrenzweig, *supra* note 170 at 1090; see also Robert J Nordstrom & Dale B Ramerman, “The Uniform Commercial Code and the Choice of Law” (1969) 18:4 Duke LJ 623 at 630-631; but see David F Cavers, “Re-Restating The Conflict of Laws: The Chapter on Contracts” in Kurt Hans Nadelmann, Arthur Taylor Von Mehren & John Newbold Hazard, eds, *Xxth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E Yntema* (Leyden: A W Sythoff 1961) at 349 at 360 (“except where the provision would be harsh on the other party, a court might well accept a choice made by adhesion”); Robert Sedler, “The Contracts Provision of the Restatement (Second): An Analysis and a Critique” (1972) 72:2 Colum L Rev 279 at 292-294 (“[i] see no real objection to allowing the express choice to operate against adherents. So long as we enforce adhesion contracts generally, we may as well be consistent, even as to express choice of law...it certainly seems fair to give the dominant party the ‘fruits of his choice,’ however tart these may prove to be”).

Since party autonomy is a function of the choice of law rules of each state,<sup>175</sup> states, in order to protect their policies, limit the will of the parties to choose the applicable law.<sup>176</sup> These policies seek to protect the interest of the public, third party interests, or even the interests of the parties themselves.<sup>177</sup> Indeed, it has been noted that “appropriate constraints on party autonomy are necessary to protect the autonomy of others.”<sup>178</sup> This why states seek to balance the competing interests at stake in the exercise of party autonomy, with their legitimate protective interests.<sup>179</sup> The protective measures of public policies are, often times, expressed as mandatory rules that limit the right of parties to choose laws that are against the “fundamental values” of the forum state or, otherwise, the applicable law.<sup>180</sup>

A mandatory rule, therefore, “is an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship.”<sup>181</sup> The principles of territoriality and sovereignty are exemplified in the application of mandatory rules because the forum or the country whose law would otherwise be applicable, dictates the scope and manner of application of party autonomy.<sup>182</sup> For example, the insurance, usury, franchise, and consumer laws of most countries contain provisions that protect the national interests, such that parties cannot evade the application of these laws to their contracts.<sup>183</sup> It should be noted that mandatory rules do not just restrict the scope of party autonomy; sometimes they prohibit party autonomy altogether. For example, public policy expressed in the form of mandatory rules may dictate the legality or otherwise of a

---

<sup>175</sup> Helena Carlquist, *Party Autonomy and the Choice of Substantive Law in International Commercial Arbitration* (LLM Thesis, Göteborg University, 2006) [unpublished] at 21.

<sup>176</sup> Reese, *supra* note 127 at 586.

<sup>177</sup> Maria Hook, *The Choice of Law Contract* (Oxford: Hart Publishing Co, 2016) at 45.

<sup>178</sup> Milana Karayanidi, “Party Autonomy to Choose a Forum: Philosophical and Historical Justification” (5 May 2016) *New Private Law* (blog), online: <<https://blogs.harvard.edu/nplblog/2016/05/05/party-autonomy-to-choose-a-forum-philosophical-and-historical-justification-milana-karayanidi/>>.

<sup>179</sup> George Carpinello, “Testing Limits of Choice of Law Clause: Franchise Contracts as a Case Study” (1990) 74:3 *Marq L Rev* 57 at 67.

<sup>180</sup> Sedlar, *supra* note 174 at 297.

<sup>181</sup> Pierre Mayer, “Mandatory Rules of Law in International Arbitration” (1986) 2:4 *Arb Intl* 274 at 274-75; Carpenillo, *supra* note 179 at 65; Mohammad Reza Baniassadi, “Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?” (1992) 10:2 *Intl Tax & Bus Lawyer* 60 at 62.

<sup>182</sup> *Columbia Law Review*, “Party Autonomy Limited by Strong Policy of State of Dominant Interest” (1958) 58:2 *Colum L Rev* 274 at 277.

<sup>183</sup> Carpenillo, *supra* note 179 at 67.

contract. To this end, parties cannot make some contracts because mandatory law deems them illegal. For example, gaming and lottery contracts are prohibited by the law of most countries.

Generally, the limitations of the party autonomy rule discussed in this section produce unpredictable results for its application because the determination of the scope of the rule is left to the discretion of each state.<sup>184</sup> States' balancing of public rights against private ones has never been done according to uniform criteria. More so because "public policy" has not lent itself to an easy definition, nor has it been easy to apply.<sup>185</sup> As the next chapter shows, the scope or limitation of party autonomy is usually determined by political, national and economic interests, legal history, public policy, academic opinion and, even sometimes, religious beliefs. To avoid or reduce this uncertainty, parties must be aware of the specific limitations to party autonomy in the laws of the countries that they choose.<sup>186</sup>

### 3.3. Conclusion

The choice of law rules examined in this chapter show that all but one of the rules cannot satisfy choice of law objectives—certainty, flexibility, simplicity and uniformity. Party autonomy is the only conflict of law rule that satisfies these fundamental objectives. By highlighting the advantages of party autonomy, this thesis seeks to justify its application, especially in international commercial contracts. This discussion in this chapter has portrayed party autonomy as a leading choice of law rule, but points out that it carries limitations, two major reasons for limiting it being unequal bargaining power between contracting parties and public policy. These limitations, however, threaten the certainty and uniformity justifications of the doctrine because they are influenced by varying factors in each states.

The next chapter deals with these limitations in detail. It examines party autonomy in some jurisdictions to exemplify its differing scope in different

---

<sup>184</sup> Bauerfeld, *supra* note 71 at 1677 ("the actual effect of the "fundamental policy" exception as applied by the courts-at best requiring a complicated antecedent analysis, at worst providing a substitute for analysis- robs the autonomy rule of its predictability and simplicity"); Rabel, *supra* note 6 at 550-551.

<sup>185</sup> Bauerfeld, *supra* note 71 at 1675; Swan, *supra* note 3 at 237.

<sup>186</sup> Friedrich Juenger's letter to Harry C Sigman, *supra* note 167 at 448.

countries. The emphasis is on how and why the countries discussed have applied these limitations to party autonomy. The conclusion is that the scope or limitation of party autonomy is usually determined by political, national and economic interests, legal history, public policy, academic opinion and even, sometimes, religion.

## CHAPTER 4: SCOPE OF PARTY AUTONOMY IN CHOICE OF LAW IN CONTRACTS—THE CHALLENGE OF UNIFORMITY

### 4.0. Introduction

It is a truism that an absolute or unqualified party autonomy rule or doctrine is more “mythical than realistic.”<sup>1</sup> Since the party autonomy rule is dependent on its recognition by sovereign states, this chapter analyzes the scope/limitation of the rule and its application in some jurisdictions. This is done through a comparative examination of national private international law rules and cases which apply them. The comparative examination shows that there is no convergence in the application of the doctrine in the world today.

Generally, countries apply differing limitation tests of party autonomy in different circumstances and for different purposes. The purposes range from the economic to the religious.<sup>2</sup> Some countries do not even have a systemized private international law rule that sets out these limitations; the limitations are left to the interpretation of judges and individual national legislation.<sup>3</sup> As a result, decisions on choice of law are based on precedents and judicial discretion.<sup>4</sup> This further deepens the divergence of the scope of party autonomy across jurisdictions.

Though this thesis reflects a textual analysis of some statutes and case law, it does not reflect what courts presently do or what they will do. Therefore, the discussion here constitutes “prophecies” of what courts may do based on what they have done (precedents) and what national statutes contribute to this predictive picture.<sup>5</sup> Also, this thesis does not cover all the limitations and their applications in national private international rules; it selects the ones relevant to its theme. This selective approach is pragmatic, given the limited space this thesis allows. Nonetheless, analysis of the selected national statutes will contribute to the overall goal of this chapter – to show that the application of the party autonomy rule,

---

<sup>1</sup> Mohamed S Abdel Wahab, “The Law Applicable to Technology Transfer Contracts and Egyptian Conflict of Laws: A Triumph of Nationalism over Internationalism?” In eds Adrea Bonomi & Gian Paolo Romano, *Yearbook of Private International Law*, vol 12 (München: Sellier European Law Publishers, 2010) at 462.

<sup>2</sup> *Ibid.*

<sup>3</sup> Most African countries lack in this respect. See chapter 2 above.

<sup>4</sup> For example, Nigeria.

<sup>5</sup> Oliver Wendell Holmes, “The Path of the Law” (1987) 110:5 Harv L Rev 457 at 461.

through its varying national limitations, is far from uniform. Some of the limitations and their applications are now examined.

#### 4.1. The Substantial or Close Connection Test

This limitation requires that a choice of law should possess a territorial connection to the contract.<sup>6</sup> It relies on the theory that a choice of law must be related to a particular place in the contract and not merely a fictitious relation to the contract.<sup>7</sup> Thus, this test “rests in reality upon a compromise between the concept of party autonomy and the principle of territoriality.”<sup>8</sup> This means that parties are not bound to choose the closest connection or vital law of any place connected to their contracts; they are only required to choose the law of a place that is related to the contract, albeit “substantially.”<sup>9</sup> Indeed, the real meaning of party autonomy is lost if parties are compelled to choose the law of the place that is closest or vital to their contracts.<sup>10</sup> This test seeks to prevent contractual parties from evading the laws of the place that is closely connected to their contracts by choosing a “neutral” or totally unrelated law.<sup>11</sup> In other words, as long as they choose the law that has a relation or is connected to their contract, the parties may evade what might otherwise be an applicable law.<sup>12</sup>

---

<sup>6</sup> “Conflict of Laws, ‘Party Autonomy’ in Contracts”, Note, (1957) 57:4 Colum L Rev at 568 at 575 [Note on Conflict o Laws].

<sup>7</sup> Francis Wharton & George H Parmele, *A Treatise on the Conflict of Laws; or, Private International Law*, 3rd ed (Rochester, New York: The Lawyers’ Co-operative Publishing Co, 1905) at S439, n 510a (“[t]he intention of the parties is the ultimate criterion. But such intention, at least so far as it affects the applicable law with respect to the rights and duties of the parties outside the express terms of the contract, must be directed to the law of some place that has a vital, and not merely a fictitious, relation to the contract”).

<sup>8</sup> Note on Conflict of Laws, *supra* note 6 at 575.

<sup>9</sup> This is the difference between the close connection test and the close contact rule discussed in chapter 3—The close connection test does not determine an applicable law by looking for the “most significant relationship” or a policy justification like the close contact rule. See Alan Weinberger, “Party Autonomy and Choice-of-Law: The Restatement (Second), Interest Analysis, and the Search for a Methodological Synthesis” (1976) 4:3 Hofstra L Rev 605 at 613, 616.

<sup>10</sup> Ernest Rabel, *The Conflict of Laws, A Comparative Study*, vol 2 (Chicago: Callaghan & Co, 1947) at 403.

<sup>11</sup> *Seeman v Philadelphia Warehouse Co*, 274 US 403 (1927) at 408 (“[t]he effect of the qualification is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties’ entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject”).

<sup>12</sup> George Carpinello, “Testing Limits of Choice of Law Clause: Franchise Contracts as a Case Study” (1990)74:1 Marq L Rev 57 at 62.

For a choice of law to satisfy the substantial or close connection test, it may be sufficient to show that the chosen law is that of a jurisdiction “where a significant enough portion of the making or performance of the contract is to occur or occurs.”<sup>13</sup> This test may also be satisfied if the choice of law is that of the place of domicile of one of the parties, the place of negotiation, the state of incorporation of the parties, parties’ principal place of business, the *situs* of the property of goods, or the place through which the goods were shipped.<sup>14</sup> It is doubtful that a forum clause is enough to create a substantial or reasonable connection. However, courts may be inclined to treat the forum clause as a connection to the forum because judges will be happy to apply the forum law which they are familiar with. Indeed, it is a natural inclination of every judge to apply the law of his country.<sup>15</sup> Some countries that apply this test are examined briefly.

#### 4.1.1. The United States of America

The United States is one the countries that applies this limitation.<sup>16</sup> Section 187(1) of the *Conflict of Laws Restatement (Second)* generally provides that parties can choose the applicable law “if the particular issue is one which the parties could have resolved by an explicit provision directed at the issues.” Subsection 2 of the same section provides that where such an issue is not one that could be “resolved by an explicit provision in their agreement directed to that issue, the chosen law must bear a substantial relationship to the parties or the transaction and there must be a reasonable basis for the parties’ choice.” The *Uniform Commercial Code*,

---

<sup>13</sup> *Seaman v Philadelphia Warehouse Co*, *supra* note 11.

<sup>14</sup> See Thomas Ryan, “Reasonable Relation and Party Autonomy under the Uniform Commercial Code” (1980) 63:2 Marq L Rev 219 at 229-234; see also Peter Hay, Patrick J Borchers & Symeon C Symeonides, *Conflict of Laws*, 5th ed (Minnesota: West Publishing Co, 2010) at 1091-1095.

<sup>15</sup> Martin Wolff, *Private International Law*, 2nd ed (Oxford, UK: Clarendon Press, 1945) at 421-422.

<sup>16</sup> See generally, John Prebble, “Choice of Law to Determine the Validity and effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws” (1973) 58:3 Cornell L Rev 433 at 501. There are 50 states in the United States with independent choice of law statutes modeled along the *Restatement (Second) of Contracts S 90* (St. Paul, Minn: American Law Institute 1981) and the *Uniform Commercial Code* which regulate party autonomy. For analysis of these choice of law statutes and their scope of party autonomy. See Jack M Graves, “Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C S 1-301 and a Proposal for Broader Reform” (2005) 36 Seton Hall L Rev 59 at 98-99. For example, some states in the United States recognize the right of parties to choose a law that is unconnected to their contracts. See *NY General Obligations Law* §§ 5-1401, 5-1402; see also *UCC* § 4A-507 (wholesale wire transfer may select a law regardless of connection).

2008, also has a similar limitation. This *Code* is a set of non-binding provisions drafted by the National Conference of Commissioners on Uniform States Laws (NCCUSL) and the American Law Institute (ALI). The Code aims to achieve a uniform application of choice of law rules and to facilitate easy commercial transactions through its adoption in the 50 states of the United States.<sup>17</sup> States have therefore adopted it, albeit with variations in detail without any threat of obligation.<sup>18</sup> Section 1-105 (1) of the Code provides that “when a transaction bears a reasonable relationship to [the forum] state and also to another state or nation, the parties may agree that the law of either [the forum] state or of such other state or nation shall govern their rights and duties.” In effect, the Code requires that a choice of law must have a “reasonable relation” to the contract.<sup>19</sup>

Despite some academic comments on these provisions,<sup>20</sup> judicial decisions that apply this test are few.<sup>21</sup> This may not be unconnected to the fact that the test permits courts’ discretion in determining a choice of law that has a “substantial connection,” or a choice of law that is “reasonable.” Indeed, there is no definition

---

<sup>17</sup> Jack Caldwell, Robert Jordan & George Pugh, “Choice of Law under the Uniform Commercial Code” (1950) 10:3 La L Rev 278 at 278; Charles Bunn, “Freedom of Contract under the Uniform Commercial Code” (1960) 2:1 Boston College L Rev 59 at 59.

<sup>18</sup> See Symeon C Symeonides, *American Private International Law* (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2008) at 215.

<sup>19</sup> *Uniform Commercial Code* 1-301 (1) (2008). It should be noted that the *Revised Uniform Code* 2003 had no connection test but it received less support from both the states and academics. See Graves, *supra* note 16 at 59. As a result, the “connection test” was restored in 2008.

<sup>20</sup> Most commentators agree that this provision seeks to prevent parties from evading the applicable local law. See e.g. Eugene F Scoles et al, *Conflict of Laws*, 4th ed (Minnesota: West Group Publishers, 2004) at 947-948, 975; but see Steven N Baker “Foreign Law Between Domestic Commercial Parties: A Party Autonomy Approach with Particular Emphasis on North Carolina Law” (2008) 30:3 Campbell L Rev 437 at 442. (he argues that the words are vague and too restrictive to ensure certainty and predictability in contracts).

<sup>21</sup> See e.g. *Wright v Martek Power Inc*, 314 F Supp 2d 1065 (D Colo 2004) (the court refused to enforce the choice of law clause, both because the chosen state had no substantial relationship with the contract and because the application of the chosen law would violate a fundamental policy of the state whose law would otherwise govern); *Sentinel Indus Contracting Corp v Kimmins Indus Service Corp*, 743 So 2d 954 (Miss 1999) (the court disagreed with a Texas choice of law clause in a contract for dismantlement of a Mississippi ammonia plant and its shipment to and reassembly in Pakistan); *Robinson v Robinson*, 778 2d 1105 (La 2001) (the court found that one spouse’s brief residence in the chosen state was not sufficient connection for upholding the choice of law clause in a marital property contract); *Curtis 1000 Inc v Suess*, 24F 3d 941 (7<sup>th</sup> Cir 1994) (the court disregarded Delaware’s choice of law clause in an Illinois employment contract because Delaware’s only connection was that it was the place of the employer’s incorporation). *Fuller Company v Compagnie De Bauxites De Guinee*, 421 F Supp 938 (WD Pa 1976) (parties chose New York but the court noted that there is no connection of New York to the making or performance of the contract other than the retention by CBG of New York counsel. The court applied Pennsylvania law because it bore a reasonable relationship to the transaction).



of these ambiguous words in the statutes. This means that courts determine the definition of these words and the application of this test on a case by case basis. Practically, it is difficult for a choice of law to fail this test because if the parties fail to satisfy the “connection” requirement, they may be able to show that there is a reasonable justification for the choice of an unconnected law.<sup>22</sup> For example, in *Radioactive, JV v Manson*,<sup>23</sup> a case that involved a music recording contract, the court noted that the choice of law (New York) was connected with the contract, and that even if it were to be unconnected, New York law would have been reasonable because New York courts “have significant experience with music industry contracts.”<sup>24</sup> Indeed, parties may not be short of reasons for choosing a particular law.<sup>25</sup> Such reasons include the developed or neutral nature of the chosen law,<sup>26</sup> or the parties’ familiarity with the chosen law.<sup>27</sup>

A commentator argued that the “close connection” and “reasonable choice” limitations are identical because satisfaction of one necessarily leads to the satisfaction of the other.<sup>28</sup> This may not be so in cases where a law is chosen for its neutrality and commercial convenience. A neutral law may satisfy the reasonable test but not the close connection test.<sup>29</sup> This is because a neutral choice of law is usually unconnected to the contract. Nevertheless, these limitations are not mutually exclusive. The “reasonable” relationship requirement only presents a “lower hurdle” than the “significant connection” test.<sup>30</sup>

#### 4.1.2. Spain

---

<sup>22</sup> P M North, “Choice in Choice of Law” (1992) 3 KCLJ 29 at 36 (“commercial men and women are likely to have good reasons, which should be accepted, for choosing an unconnected choice of law”).

<sup>23</sup> 153 F Supp 2d 462 (SDNY 2001).

<sup>24</sup> *Ibid* at 471.

<sup>25</sup> Frederick Alexander Mann, “The Proper Law in the Conflict of Laws” (1987) 36:3 ICLQ 437 at 447.

<sup>26</sup> *Bremen v Zapata*, 407 US 1 (1972). (choice of a neutral forum, resulting in a neutral choice of law was held to be an adequate basis for upholding the choice of law clause).

<sup>27</sup> Hay, Borchers & Symeonides, *supra* note 14 at 1090.

<sup>28</sup> SM Richardson, *International Contracts and The Choice of Law* (DCL Thesis, University of Canterbury 2005) [unpublished] at 287.

<sup>29</sup> Baker, *supra* note 20 at 443.

<sup>30</sup> Graham A Penn & Thomas W Cashel, “Choice of Law clauses under English and New York law” (1986) I & II J Bus L 333 at 497, 500; Richardson, *supra* note 28 at 287.

Spanish private international law rule also requires proximity of the chosen law with the contract. Article 10(5) of the Spanish Civil Code states that: “The law to which the parties have expressly submitted shall apply to contractual obligations, provided that it has some connection with the transaction in question.”<sup>31</sup> Unlike the United States’ provision, the Spanish Code does not require parties to show the reasonableness of their choice of law. Since the “reasonable choice” condition permits a wider judicial discretion to uphold a choice of law, it may be argued that Spanish courts do not possess as wide a discretion as the United States’ courts.

#### 4.1.3. Panama

Another national legislation that regulates the proximity of the chosen law is the *Panamanian Private International Code*, which came into force on 1 August 2015. Article 75 of the Code expressly provides that “the applicable law must bear a link with the economy of the transaction or derive from a law known by the parties.”<sup>32</sup> The first criterion seeks to protect the economic interest of countries connected with the contract (presumably Panama), while the second criterion seeks to ensure that parties know the choice of law. This provision generally seeks to prevent evasive contracts, as well as protect “weak” domestic parties against economic exploitation in international contracts.<sup>33</sup>

Two authors ask: “what would happen if only one of the parties knows [the] law: would such law be considered to satisfy the proximity requirement?”<sup>34</sup> It is suggested that the word, “parties,” as used by the Code, means mutual, not unilateral knowledge. The more perplexing issue is the scope of the parties’ knowledge. Should parties know all the legal effects of their choice? Is a party under any obligation to disclose adverse legal effects to the other party? It is submitted that the knowledge required is one that will enable the parties to predict

---

<sup>31</sup> *Spanish Civil Code* 1974, art 10(5).

<sup>32</sup> Official version is in Spanish, online: <[www.infojus.gob.ar/docs-f/codigo\\_Civil\\_y\\_Commercial\\_de\\_la\\_Nacion.pdf](http://www.infojus.gob.ar/docs-f/codigo_Civil_y_Commercial_de_la_Nacion.pdf)>.

<sup>33</sup> Chapter 2 of this thesis identified that one of the reasons for late development of the doctrine in the Americas is the notion that party autonomy will encourage parties to choose a foreign law instead of the domestic law. This provision seeks to allay such fear.

<sup>34</sup> Maria Mercedes Albornoz & Nuria Gonzalez-Martin, “Towards the Uniform application of party autonomy for choice of law in International Commercial Contracts” (2016) 12:3 J Priv Intl L 437 at 445-446.

the outcome of their choice; only Courts can determine the legal effect of their choice.<sup>35</sup> On the second question, parties must disclose the adverse legal effect of a choice. This is because non-disclosure may be interpreted to be a misrepresentation made in bad faith.

#### 4.1.4. Nigeria

Although Nigeria does not have a national statute like Panama, Spain, or the United States, the Nigerian Supreme Court decision in *sonnar (Nigeria) Ltd v Panlenreedi MS Nordwind*<sup>36</sup> suggests that Nigerian Courts may limit party autonomy in cases where the choice of law has no relation to the contract—in this case, the parties chose German law. The court found as a fact that the contract was between a Liberian shipowner and a Nigerian shipper. The following are the geographical connections to the contract: (1) Bangkok was the place of the supply (rice), (2) Nigeria was the place of the delivery of the rice (the place of performance), (3) The bill of lading was issued in Liberia. The only connection with Germany was that the shipowner’s agent, who served as a transporter in this case, carried on its business in Germany. The court saw no relevance of German law to the contract. It held that for a choice of law to be effective, it must be reasonable. In this instance, the choice of German law was unconnected with the contract. At the same time, it was unreasonable, since it had little or no connection to the parties’ contract.

Other African countries that require proximity of the chosen law with the contract include Algeria,<sup>37</sup> Cape Verde,<sup>38</sup> Angola,<sup>39</sup> Mozambique,<sup>40</sup> and Guinea-Bissau.<sup>41</sup>

#### 4.1.5. The United Arab Emirates

---

<sup>35</sup> Peter Nygh, *Autonomy in International Contracts* (Oxford: Clarendon Press, 1999) at 33.

<sup>36</sup> [1987] NWLR (Pt 66) at 520 [Sonnar].

<sup>37</sup> *Algerian Civil Code* (2007), art 18 expressly requires a “real connection” between the law chosen and the parties or the contract, online: <[www.joradp.dz/TRV/FCivil.pdf](http://www.joradp.dz/TRV/FCivil.pdf)>.

<sup>38</sup> *Cape Verde Civil Code* (1997), art 41(2) only allows a choice of law “whose applicability corresponds to serious interest of the parties or is connected to the contract,” online: <[www.wipo.int/wipolex/en/text.jsp?file\\_id=202959](http://www.wipo.int/wipolex/en/text.jsp?file_id=202959)>.

<sup>39</sup> *Angola Civil Code*, Law Decree 496 of 25 November, 1977, art 41.2.

<sup>40</sup> *Mozambique Civil Code*, enacted by *Portuguese Ordinance* No 22,869 of September 1967, art 41.2.

<sup>41</sup> *Civil Code of Guinea-Bissau*, re-enacted by *Guinea-Bissau Law* No 1/73 of 27 September 1973, art 41.2.

The United Arab Emirates (UAE) also applies the proximity rule. Section 19 of the *United Arab Emirate Civil Transactions Code (CTC)* provides that:

Contractual commitments in form and context shall be governed by the law of the State where the common residence of the contracting parties is located. Should they have different residences, the law of the State where the contract is made shall apply, unless the parties agree otherwise, or the conditions show that another law is to be applied.<sup>42</sup>

This Code acknowledges the will of the parties to choose an applicable law but the choice of an unconnected law is a source of debate. Some commentators argue that an unconnected choice of law should be recognized because section 23 of the CTC permits an Emirati court to apply general principles of private international law where there is no express provision in the Code. They conclude that reliance on private international law principles justifies the recognition of an unconnected choice of law.<sup>43</sup> Other commentators argue that an unconnected choice of law should not be recognized “because the applicable law is restricted by the aim of the contract.”<sup>44</sup>

The latter view has judicial support. In a reported case,<sup>45</sup> the Emirati court of appeal rejected the choice of English law in a contract because the payment of four promissory notes was made in Abu Dhabi. The contract had no connection with English law. The court, relying on article 20-23 of the *Civil Procedure Law (CPL)*,<sup>46</sup> held that notwithstanding the choice of English law, Abu Dhabi courts had an “international jurisdiction” to entertain the claim. It relied on section 21 of the

---

<sup>42</sup> *Federal Law of No (5) of 1985 On the Civil Transactions Law of the United Arab Emirates*, Amended by *Federal Law No (1) of 1987*.

<sup>43</sup> See e.g. Aoudallah Shaiba Alhmad (تنازع القوانين واحكام التنازع القضائي في القانون المماراتي) *Conflict of Laws and the Conflict of Internal Jurisdiction in the Emirati Law* (Dubai Police Academy, 2001) at 297 (in Arabic).

<sup>44</sup> Hamad Ibrahim Ahmed Ali Alustath, *Choice of Law in Respect of contracts in the United Arab Emirates and the European Union; and Related Aspects of Private International Law in Relation to the Dubai International Financial Centre* (DCL Thesis, University of Essex School of Law, 2015) [unpublished] at 53.

<sup>45</sup> Reported in Ahmad Al Awamleh, “Abu Dhabi Court: Choice of Law May not be a Choice” (6 March 2011) AL Tamimi & Co (blog), online: <[www.tamimi.com/en/magazine/law-update/section-7/march-6/abu-dhabi-court-choice-of-law-may-not-be-a-choice.html](http://www.tamimi.com/en/magazine/law-update/section-7/march-6/abu-dhabi-court-choice-of-law-may-not-be-a-choice.html)>; see also Christopher Mills & Susie Abdel-Nabi, UAE: Choice of Governing Law and Jurisdiction” (6 March 2014) Clyde & Co (blog), online: <[www.clydeco.com/insight/article/uae-choice-of-governing-law-and-jurisdiction](http://www.clydeco.com/insight/article/uae-choice-of-governing-law-and-jurisdiction)>.

<sup>46</sup> *Civil Procedure Code, Federal Law no 11 of 1992*.

*CPL* which states that the UAE courts shall have jurisdiction to hear proceedings against an alien who maintains no residence or domicile in the UAE in the following cases:

- a. If he has elected domicile in the UAE;
- b. If the proceedings concern property in the UAE, inheritance accruing to a citizen or an estate opened therein;
- c. If the proceedings involve an obligation that was made, performed or was supposed to be performed in the UAE, a contract to be attested in the UAE, an event that occurred in the UAE or bankruptcy declared by a UAE court.

The Court specifically relied on the last condition to ignore the English choice of law because article 24 of the *CPL* states that if the parties' choice is contrary to the provision of article 21, it must be struck down.

#### **4.1.6. The Close Connection Test is not a Universal Test**

Not all private international law rules require connection with a chosen law. Most countries in Europe, as well as Canada,<sup>47</sup> and China<sup>48</sup> do not require a substantial connection.<sup>49</sup> The most often cited authority for this proposition is the Privy Council decision in *Vita Food Products Inc. v. Unus Shipping Co.*<sup>50</sup> The dictum of Lord Wright that “connection with English law is not, as a matter of principle,

---

<sup>47</sup> Catherine Walsh, “The Uses and Abuses of Party Autonomy in International Contracts” (2010) 60:1 UNBLJ 12 at 13-14.

<sup>48</sup> See Yongping Xiao & Weidi Long, “Contractual Party Autonomy in Chinese Private International Law” (2009) 11 Year Book of Private International Law 193 at 197 (“[a]lthough the chosen law most often has some connection with the transaction, there is general consensus that Chinese law allows the choice of a law which has no connection with the contract”).

<sup>49</sup> Genevieve Saumier, “The Hague Principles and the Choice of Non-State ‘Rules of Law’ to Govern an International Commercial Contract” (2014) 40:1 Brook J Intl L 1 at 2.

<sup>50</sup> [1939] AC 277 [*Vita Food*].

essential,”<sup>51</sup> has been followed by countries mentioned above. To this end, some national statutes are silent on whether the choice of law requires a connection with the contract.<sup>52</sup> It is presumed that such silence mean that connection with the contract is unnecessary.

#### **4.2. The Choice of Law must be *Bona fide*, legal and not contrary to public policy**

This limitation is evidenced in the dictum of Lord Wright, speaking on behalf of the Judicial Committee of the Privy Council in *Vita Food*. This case arose from damage to a shipment of fish carried on a Canadian ship (The *Hurry On*) from Newfoundland to New York, under bills of lading issued in Newfoundland in 1935.<sup>53</sup> The cargo was damaged off the coast of Nova Scotia, Canada, and the suit was brought in Nova Scotia where the carriers were domiciled. Even though the bill of lading had no connection with English law, both parties expressly stated in the bill of lading that English law is the governing law. This was because an old contract clause was used in error, instead of a new contract clause (paramount clause) that would have reflected provisions of *The Hague Rules*<sup>54</sup> and section 3 of the *Newfoundland Carriage of Goods by Sea Act*<sup>55</sup> that were in force in 1935.<sup>56</sup> Although the trial and Appeal Courts invalidated the contract because it was contrary to the provisions of the statute (Newfoundland Act), the Privy Council, based on the governing clause (English law), upheld the validity of the contract.

---

<sup>51</sup> *Ibid* at 292.

<sup>52</sup> See e.g. *Civil and Commercial Code of the Argentine Republic*, 2015, art 2651, *Chinese Private International Law Act* 2010, art 3, 41; *Cuba Civil Code (Law No 59)* 1998, art 17; *Japanese Act on the General Rules of Application of Laws*, Law No 10 of 1898, amended in 2006, art 7; , Law No. 5718 of *Turkish Code of Private International Law and International Civil Procedure*, 2007, art 24; *Venezuela Act of 6 August 1998 on Private International Law*, art 29; Austrian Federal Statute on Private International Law (1978),s 35; *Estonian Private International Law Act* (2002), s 32; *Lithuanian Civil Code* (2000), art 1.37; *Peruvian Civil Code* (1985) art 2095; *Armenian Civil Code* (1998), art 1284; *German Introductory Law to the Civil Code* (EGBGB) 1986, art 27; *Quebec Civil code*, SQ 1991, c 61, art 3111.

<sup>53</sup> The defendant, a Nova Scotia corporation, was the owner of the ship “Hurry On” which was registered in Nova Scotia. The plaintiff, a New York corporation, was the owner of a cargo of herrings which was loaded on the “Hurry On” for carriage from Newfoundland to New York.

<sup>54</sup> *International Convention for the Unification of Certain Rules Relating to Bills of Lading, with Protocol of Signature, and Proces-Verbal of Deposit of Ratifications of June 2, 1930, 25 August 1924*, 120 LNTS 155.

<sup>55</sup> *Statutes of Newfoundland, 1932, C 18*.

<sup>56</sup> *Ibid*.

One of the issues was whether the parties could choose English law instead of the Newfoundland Act that was closely connected to their contract. Lord Wright answered the question in the positive. He stated that “connection with English law is not, as a matter of principle, essential.”<sup>57</sup> Therefore, an express intention of the parties is conclusive under the common law.<sup>58</sup> His classic dictum is as follows:

It is objected that this is too broadly stated and that some qualifications are necessary...But where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualification are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy.<sup>59</sup>

The *Vita Food* decision generally raises some choice of law issues,<sup>60</sup> but this thesis focuses on the scope of party autonomy as espoused by Lord Wright. This is treated under four headings: *Bona fide*, legality, mandatory laws, and public policy.

#### 4.2.1. *Bona fide* Test

The meaning of “*bona fide*” as used by Lord Wright is a subject of academic comments.<sup>61</sup> One commentator even thinks that it has no meaning.<sup>62</sup> My contrary

---

<sup>57</sup> *Vita Food*, *supra* note 50 at 292.

<sup>58</sup> *R v International Trustee*, [1937] AC 500 at 529; but see the Court decision in *Re Helbert Wagg & Co Ltd*, [1956] Ch 323 at 341, per Upjohn J ([*e*]xpress choice of law will not govern “where the system of law chosen has no real or substantial connection with the contract, looked upon as a whole”).

<sup>59</sup> *R v International Trustee*, *ibid* at 290.

<sup>60</sup> They include: “a) What is the importance of the express intention of the parties in questions of choice of law? b) Must the law chosen by the parties be *bona fide*? c) Must the law chosen by the parties be legal? d) Must the law chosen by the parties conform to public policy? e) May the parties choose a totally unconnected law? f) May the parties choose a law other than the mandatory law of the place of contracting? g) When the parties choose “English law,” may they ignore the mandatory Hague Rules of “English law?” h) Will a contract be construed or interpreted by the *lex loci contractus* or by its proper law? i) May the doctrine of *renvoi* be applied when determining the law of the contract? j) Should not a conflict rule bring uniformity and certainty and the avoidance of forum shopping? k) Is there a distinction between public policy/public order (*ordre public*), force of law and mandatory rules?” see William Tetley, “*Vita Food Products* Revisited (Which Parts of the Decision are Good Law Today?)” (1992) 37 McGill Law Journal 292 at 294-295. It should be noted that Privy Council in *Vita Food* may not actually be making a conscious choice on a party autonomy issue but a demonstration of a natural inclination to recognise the laws of its own jurisdiction.

<sup>61</sup> Gutteridge Harold Cooke, “Case Comment on *Vita Food*” (1939) 55 Law Q Rev 323; Otto Kahn-Freund, “Case Comment on *Vita Food*” (1939) Mod L Rev 61; Tan Yock Lin, “Good Faith Choice of Law

opinion is that words are not used in vain; they usually have a meaning. Tetley thinks that a *bona fide* choice means that the choice of law must be clear, express, made in good faith and innocently.<sup>63</sup> He argues that the choice of law clause in *Vita Food* was based on an “old” standard form which was relied on in error or “innocently.” This interpretation may be inaccurate because the word “good-faith” itself is ambiguous and relatively subjective. Cheshire & North “presumes” that the words “*bona fide*” mean that “parties cannot pretend to contract under one law in order to validate an agreement that clearly has its closest connection with another law.”<sup>64</sup> They think that the fact that the choice of law was made in bad faith is evidenced by a lack of connection between the contract and the law chosen.<sup>65</sup> But if the *bona fide* test is an anti- evasion test, the *Vita Food* case would have failed this test because the choice of law in this case had no connection with the law chosen. Indeed, the essence of party autonomy is to “evade” the otherwise applicable law.<sup>66</sup>

Mann thinks that the word means a choice of law that is reasonable and not arbitrary, capricious, eccentric or fanciful.<sup>67</sup> This is because there are cases where parties have made an unrelated choice of law decision and the choice was upheld

---

to Govern a Contract” (2014) Sing JLS 307; JD Falconbridge, *Essays on the Conflict of Laws*, 2nd ed (Toronto: Canada Law Book, 1954) at 401; 4V; Walter Wheeler Cook, *The Logical and Legal Basis of Conflict of Laws* (Massachusetts: Harvard University Press, 1949) at 426; JHC Morris & GC Cheshire, “The Proper Law of a Contract in the Conflict of Laws” (1940) 56:3 Law Q Rev 320; JHC Morris, “The Proper Law of a Contract: A Reply” (1950) 3:2 Intl LQ 197.

<sup>62</sup> Peter Kincaid, “Rationalising Contract Choice of Law Rules” (1993) 8:1 Otago L Rev 93 at 107 (“[m]y conclusion as to the meaning of Lord Wright’s limitation formula is that *bona fide* has no meaning”).

<sup>63</sup> Tetley, *supra* note 60 at 310.

<sup>64</sup> PM North & JJ Fawcett, eds, Cheshire & North: *Private International Law*, 11th ed (London, UK: Butterworths, 1987) at 454. This interpretation might have been influenced by the dictum of Lord Denning in *Boissevain v Weil*, [1949]1KB 482 at 490-491 (“[i] do not believe the parties are free to stipulate by what law the validity of their contract is to be determined. Their intention is only one of the factors to be taken in to account”).

<sup>65</sup> See Otto Kahn-Freund, *The Growth of Internationalism in English Private International Law* (Jerusalem: Magnes Press, 1960) at 52; Clive Maximilian Schmitthoff “New Light on the Proper Law” (1968) 3 Man LJ 1 at 9; David St L Kelly, “Reference, Choice, Restriction and Prohibition” (1977) 26:4 ICLQ 857 at 870-871; see the Canadian decision in *United Nations v Atlantic Seaways Corporation*, [1979] 2 FC 541 at 519 (“[b]ut the chief qualification of the freedom to choose the proper law of the contract, and the meaning to be attributed to the words ‘bona fide and legal’ in the dictum of Lord Wright, would seem to be that the proper law must not have been chosen to evade a mandatory provision of the law with which the contract has its closest and most real connection”).

<sup>66</sup> Wolff, *supra* note 15 at 419 (“probably the simple intention of eliminating certain compulsory rules which would normally be applicable is necessary nor sufficient to constitute *mala fides*...something more than the desire to escape imperative provisions will be necessary under English law to make an intention *mala fide*”).

<sup>67</sup> Mann, *supra* note 25 at 446.



because they were reasonable.<sup>68</sup> Dicey and Morris, whose definition is similar to that of Cheshire and & North, disagree. They argue that the word “*bona fide*” means more than a “capricious” and “eccentric” choice of law.<sup>69</sup>

These scholars’ definitions may be academic because there is no reported English decision where a choice of law was struck down because it failed the *bona fide* test.<sup>70</sup> Also, though most common law countries recognise this test, they deny its existence because it is rarely applied.<sup>71</sup> Regardless of the academic nature of this definition, my view is that “*bona fide*,” as used by Lord Wright, means that the choice of law must be a genuine one. Parties must have intended or declared to be bound by their choice. It must not be feigned agreement or a mere facade. This interpretation has its root in the intention theory because a choice of law clause must be supported by an intention to be bound by it.

#### **4.2.2. Legality, Public Policy, and Mandatory Law**

These limitations are treated under the same heading in this thesis because laws prohibiting illegal contracts and mandatory laws possess the element of public policy. In effect, similarities in the application of these limitations do not make any differences between them clear cut.<sup>72</sup> Indeed, “every rule of law should be based upon, and reflect policy considerations.”<sup>73</sup> However, there is a difference between statutes prohibiting illegal contracts and public policy. While court decisions that a contract is illegal are usually based on positive laws (statutes), decisions of courts on public policy are based on values so fundamental to the society as to necessitate the courts’ intervention, even though there has been no breach of a legal obligation

---

<sup>68</sup> *Ibid*; see also Janet Walker, *Canadian Conflict of Laws*, 6th ed, vol 2 (Toronto, ON: Lexis Nexis, 2005) at 31.3. She cited *Hunter Engineering Co v Syncrude Canada Ltd*, [1989] 1 SCR 426 (contract between Alberta-based and American-based companies expressly governed by Ontario law).

<sup>69</sup> AV Dicey & JHC Morris, eds, *Dicey and Morris on The Conflict of Laws*, 8th ed (London, UK: Stevens & Sons, 1967) at 699.

<sup>70</sup> *Ibid*; see Canadian decisions in *See Bank of Montreal v Snoxell*, (1982) 143 DLR (3d) 349 (choice of law was upheld because it had connection with the jurisdiction selected –Alberta.); *Skegss v Whissel* [1985] 63 AR 348; *Nike Infomatic Systems Ltd v Avac Systems Ltd*, (1979) 105 DLR (3d) 455 (BCSC).

<sup>71</sup>The countries include Australia and New Zealand.

<sup>72</sup> The similarity is that every mandatory law has an element of public policy. In effect, every mandatory law is an expression of public policy. See Adeline Chong, “The Public Policy and Mandatory Rules of Third Countries in International Contracts” (2006) 2:1 J Priv Intl L 27 at 32.

<sup>73</sup> PB Carter, “The Role of Public Policy in English Private International Law” (1993) 42:1 ICLQ 1 at 1.

in a contract.<sup>74</sup> There is also a difference between mandatory laws and public policy. While public policy operates negatively because it disallows the application of an otherwise applicable law, mandatory rules operate positively because they are super-imposed on the applicable law of the contract.<sup>75</sup> Simply, for purposes of this thesis, it is taken that a limitation imposed by public policy is also deemed to be imposed by mandatory law.

Most jurisdictions limit party autonomy in contracts that are tainted with illegality. However, countries, or even states within a country, classify illegal contracts differently.<sup>76</sup> For example, though the United States' federal statute prohibits the sale of marijuana, its sale is legal in 23 of its states.<sup>77</sup> While Singaporean courts will not enforce a gaming contract because it is illegal under Singaporean law,<sup>78</sup> Canadian courts will enforce it.<sup>79</sup> Therefore, it is necessary to determine the law of the country that defines an illegal contract in an international contract. This is because there is no consensus on the law of the country by which legality is to be determined. Generally, illegality may be determined by the law of the place of performance, the proper law, or the law of the place of contracting.<sup>80</sup> The predominant view is that the proper law of the contract and the law of the place of performance usually determine the legality of a contract in most common law

---

<sup>74</sup> David Friedman, "Bringing Order to Contracts against Public Policy" (2012) 39 Fla St UL Rev 564 at 565 ("[w]hen a party asks a court to refrain from enforcing an otherwise valid bargain on the grounds that it would offend public policy, the party asks the court to do something out of the ordinary"); Brandon Kain & Douglas T Yoshida, "The Doctrine of Public Policy in Canadian Contract Law" In Hon Todd L Archibald & Hon Randall Scott Echlin, eds, *Annual Review of Civil Litigation* (Toronto: Thomson Carswell, 2007) 1 at 16.

<sup>75</sup> While public policy operates negatively in that it disallows the applications of the applicable law; mandatory rules operate positively because they are super-imposed on the applicable law of contract. See generally, Chong, *supra* note 72.

<sup>76</sup> Adam Badawi, "Harm, Ambiguity, and the Regulation of Illegal Contracts" (2010) 17:2 Geo Mason L Rev 483 at 484 ("the determination of whether a contract is illegal-and hence whether non-enforcement may apply- is often an uncertain enterprise"); Juliet P Kostritsky, "Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory" (1988) 74 Iowa Law Review 115 at 116 n 4.

<sup>77</sup> See generally, Luke M Scheuer, "Are 'Legal' Marijuana Contracts 'illegal'?" (2015) 16:1 UC Davis Bus LJ 1.

<sup>78</sup> *Civil Law Act*, Cap. 43, 1999 Rev. Ed. Sing, art 5(2) ("[n]o action shall be brought or maintained in the court for recovering any sum of money ... alleged to be won upon any wager ..."); *Star City Pty Ltd v Tan Hong Woon*, [2002] 2 SLR 22 (C.A.); see generally Yeo Tiong Min, "Statute and Public Policy in Private International Law: Gambling Contract and Foreign Judgments" (2005) 9 SYBIL 133; T M Yeo, "Loans for Extraterritorial Gambling and the Proper Law" (1998) Sing JLS 421.

<sup>79</sup> See *GNLV Corp v Wan*, [1991] 30 ACWS (3d) 1132 (BCSC).

<sup>80</sup> *Kleinwort Sons & Co v Ungarische Baumwolle Industrie AG*, [1939] 2 KB 678; Chong, *supra* note 71 at 45; Jean-Gabriel Castel, *Canadian Conflict of Laws*, 4th ed (Toronto: Butterworths Canada, 1997) at 616.

countries.<sup>81</sup> In effect, if a contract is illegal by the law of the place of performance and the proper law, a choice of law of another jurisdiction will usually not be recognized or enforced.

Just like determining illegality, the definition and scope of the applicable public policy in a multi-state contract is not settled.<sup>82</sup> One view is that the public policy of the forum and its scope is the applicable public policy.<sup>83</sup> Another view is that both the public policy of the forum and the public policy of a country which would have been applicable had the parties not made a choice of law would be the applicable law (mandatory law of the third countries). Countries that fall under this latter category include the Netherlands,<sup>84</sup> the United States of America,<sup>85</sup> and Switzerland.<sup>86</sup>

Determining the scope of party autonomy under these limitations is, therefore, characterised by lack of uniformity and uncertainty in various jurisdictions.

### 4.3. Choice of Mode of Expression

---

<sup>81</sup> *Ralli Bros v Compania Naviera Sota Y Aznar*, [1921] 2 KB 287; Barry Leon & Graham Reynolds, “Canada: A Canadian Perspective: Choice of Law and Choice of Forum,” online: <[www.mondaq.com/canada/x/39956/Contract+Law/A+Canadian+Perspective+Choice+of+Law+and+Choice+of+Forum](http://www.mondaq.com/canada/x/39956/Contract+Law/A+Canadian+Perspective+Choice+of+Law+and+Choice+of+Forum)>; Walker, *supra* note 68 at 31-61.

<sup>82</sup> Nygh, *supra* note 35 at 222-223; the often-quoted dictum of Burrough J. in *Richardson v Mellison*, [1824] 130 Eng. Rep. 294 at 303 on the difficulty of the definition is ever green (“[w]hen they argued this case . . . it was said there was no consideration, and if there was it was illegal. . . If it be illegal, it must be illegal either on the ground that it is against public policy, or against some particular law. I, for one, protest . . . against arguing too strongly upon public policy; —it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail”).

<sup>83</sup> *Vita Food*, *supra* note 50.

<sup>84</sup> See *Van Nievelt, Goudriaan and Co's Stoomvaartmij NV v Hollandsche Assurantie Societeit and Others* [ALNATI case] HR 13 May 1966. *Nederlandse Juresprudentie* 1967 no 3, annotated by LJ Hijmasus van den Bergh, (1967) 56 *Rev crit dr int privé* 522. (“it may be that, for a foreign State, the observance of certain of its rules, even outside its own territory, is of such importance that the courts must take account of them, and hence apply them in preference to the law of another State which may have been chosen by the parties to govern their contract”); *CEP v Sensor Nederland* Rh Den Haag, (1983) 23 *International Legal Matters* 66.

<sup>85</sup> *Restatement (Second) of Conflict of Laws*, *supra* note 16 at § 187 (2) (b) (“[t]he law chosen by the parties will not be applied if 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 . . . would be the state of the applicable law in the absence of an effective choice of law by the parties”).

<sup>86</sup> *Switzerland Federal Act on Private International law* 1989, amended on 1<sup>st</sup> July 2014, art 19(1), online: <[www.andreasbucher-law.ch/images/stories/pil\\_act\\_1987\\_as\\_amended\\_until\\_1\\_7\\_2014.pdf](http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_amended_until_1_7_2014.pdf)>.

There are different modes of expressing the parties' intention. It may be through an express or a tacit (implied) choice.<sup>87</sup> Parties make an express choice through the choice of law clause in a contract, while parties make a tacit choice if the terms or surrounding circumstances of the contract point to a particular system of law.<sup>88</sup> Contract terms that indicate a tacit choice include an exclusive jurisdiction clause,<sup>89</sup> an express choice made in a related transaction or in a previous course of dealing,<sup>90</sup> and a standard form known to be governed by a particular system of law.<sup>91</sup>

The application of an express choice does not pose much threat to the uniform scope of party autonomy because most jurisdictions permit parties to make such choice, but the application of a tacit choice produces such a threat. This is because some countries do not permit or restrict the application of a tacit choice of law because of the fear that such choice may lead to an arbitrary result or a choice unintended by the parties. This arises from the fact that tacit choices are usually inferred based on judges' assumptions from the terms or surrounding circumstances of a contract.<sup>92</sup> To prevent judges from making arbitrary tacit choices, countries either totally prohibit tacit choices or, when they permit it, adopt different approaches to ensure that the inferred choice of law reflects the will of the parties. Some countries infer a choice of law based only on the terms of the contract, while some rely on the surrounding circumstance of the case. Others even rely on both the terms of the contract and surrounding circumstance of the case. Indeed, there is no universal approach as to the indicators of a tacit choice of law.<sup>93</sup>

---

<sup>87</sup> Jan L Neels & Eesa A Fredericks, "Tacit Choice of Law in The Hague Principles on Choice of Law in International Contracts" (2011) 44:1 De Jure LJ 101 at 104.

<sup>88</sup> Garth Bouwers, "Tacit Choice of Law in International Commercial Contracts – A Turkish Study" (paper delivered at the scientific cooperations 2nd International Conference on Social Sciences, Instabul, Turkey, 2-3 April 2016) [unpublished] at 172.

<sup>89</sup> *Oceanic Sun Line Special Shipping Co Inc v Fay*, [1988] 165 CLR 197 at 224–225 (Brennan J).

<sup>90</sup> Brooke Adele Marshall, "Reconsidering the Proper Law of the Contract" (2012) 13:1 Melb J Intl L 1 at 19. Other considerations include the place of contract or performance, the currency and place of payment, the residence of the parties, the language of the negotiation and contract, the nature and purpose of the transaction, the agreed place of arbitration, and reference to national legislation in a contract. See Richard Oppong, *Private International Law in Commonwealth Africa* (Cambridge: Cambridge University Press, 2013) at 137- 138.

<sup>91</sup> Mario Giuliano and Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations* [1980] OJ C 282/1 at 17 [Giuliano-Lagarde Report]; An example of such standard form is the Lloyd's Policy of marine insurance or Lloyd's Standard Form of Salvage agreement.

<sup>92</sup> Bouwers, *supra* note 88 at 172.

<sup>93</sup> *Ibid* at 172 ("[t]he determination of tacit choice of law around the world remains highly divergent, with the weight attached to issues like choice of forum, monetary unit and form often at odds... The uncertainty

Lack of uniformity of the scope of party autonomy is further deepened by some countries' stance on the scope of party autonomy generally – they do not set out the modes of exercising the parties' choice of law. This creates uncertainty in the choice of law process because parties are unsure about how to make a choice of law.<sup>94</sup> Thus, parties and courts are enmeshed in the argument as to the proper mode of exercising party autonomy and the validity of the mode adopted by a party.

In the discussion that follows, the divergence in the mode of exercising party autonomy is further exemplified through legislative provisions and judicial practices in some countries.

#### **4.3.1. Countries that do not Recognize a Tacit Choice**

Peru is one of the countries that require parties to make an express choice only.<sup>95</sup> For a choice of law to be valid under Peruvian law, it must be express, not tacit. The *Peruvian Civil Code* provides that “contractual obligations are governed by the law expressly chosen by the parties....”<sup>96</sup> Chinese law also stipulates that a choice of law should be made expressly. Article 3 of the Law of the *People’s Republic of China on the Laws Applicable to Foreign-Related Civil Relations (Chinese PIL Act)* provides that “the parties may explicitly choose the law applicable to their foreign-related civil relation in accordance with the provision of this law.”<sup>97</sup> A commentator noted that this limitation is justified on the basis that “the boundary line that separates reasonable interpretation from arbitrary fabrication is not

---

surrounding its application in conjunction with the conflicting approaches in the determination of tacit choice around the world is a problematic issue in private international law, and one that has to be redressed”).

<sup>94</sup> An example is Venezuela. Venezuela has no specific mode of expressing a choice of law. Article 29 of the Venezuelan Private International Law Act provides that “contractual obligations are governed by the law indicated by the parties,”<sup>94</sup> but it provides no indication for its mode of expression. However, regardless of this lacuna, it is generally agreed that based on the contract law principles, parties can make an express or an implied choice.

<sup>95</sup> Claudia Lucena et al, “Construction 2016: Peru” (3<sup>rd</sup> March 2017), Claudia Lucena (blog), online: <<http://latinlawyer.com/jurisdiction/1003056/peru>>.

<sup>96</sup> *Peruvian Civil Code 1985*, art 2095. The section designates specific conflict rules (e.g. law of the place of contract and law of the place of performance) in the absence of an express will. See Ricardo Fernandini Barreda, “National Report Peru” (2003), online: <[http://212.63.69.85/Database/2003/notarius\\_2003\\_01\\_014\\_en.pdf](http://212.63.69.85/Database/2003/notarius_2003_01_014_en.pdf)>.

<sup>97</sup> See the English translated version in Lu Song, “Law of the People’s Republic of China on the Laws Applicable to Foreign-Related Civil Relations (full-text)” (2013) 1:1 Chinese J Comp L 185-193.

clear.”<sup>98</sup> He concludes that “given the judicial environment in China is far from perfect,” limiting the autonomy of the parties to an express choice of law protects parties from arbitrary results that may arise from an inferred choice of law.<sup>99</sup>

#### 4.3.2. Provision for a tacit choice – divergent indicators

In countries that permit a tacit choice of law, the criteria for determining it are divergent.<sup>100</sup> These criteria run along two lines – determination of the choice of law through contract terms or through the surrounding circumstances of the contract. For example, the national private international law statutes of Armenia,<sup>101</sup> Quebec,<sup>102</sup> and Uruguay<sup>103</sup> determine a tacit choice through the terms of the contract only. On the other hand, the national statutes of Slovakia<sup>104</sup> and Liechtenstein<sup>105</sup> determine a choice of law based on the surrounding circumstances of the contract only. National statutes that combine both criteria, that is, the terms of the contract and the circumstances of the contract, include Turkey, Qatar, and Albania.<sup>106</sup> In fact, Article 116 of Switzerland’s private international law statute provides that “[t]he choice of law must be express or result with certainty from the provisions of the contract or from the circumstances...”<sup>107</sup>

As earlier noted, countries that permit inference from the terms of a contract fear that if decisions are based on the circumstances of the case, it may

---

<sup>98</sup> Zhengxin Huo, “Highlights of China’s New Private International Law Act: From the Perspective of Comparative Law” (2011) 45:3 RJT 637 at 651.

<sup>99</sup> *Ibid.*

<sup>100</sup> Bouwers, *supra* note 88 at 178-179 (“[i]mportant issues like the level of strictness of the criterion for a tacit choice of law, the indicators that have been relied upon and choice of forum often at odds”).

<sup>101</sup> *Civil Code of Armenia* as adopted in 1988, Div 12, art 1284.5 (“choice must be clearly expressed or “directly follow from the conditions of the contract”).

<sup>102</sup> *Quebec Civil Code*, *supra* note 52, art 3111 (“tacit choice to be ‘inferred with certainty from the terms of the act’”).

<sup>103</sup> *Draft General Law of Private International Law* (2009), art 48.3.

<sup>104</sup> *Czechoslovakian Act* 97 (1963), art 9.1.

<sup>105</sup> *Liechtenstein Private International Law Act* 1996, art 39.1.

<sup>106</sup> Turkey: *Turkish Code of Private International Law and International Civil Procedure*, Law No. 5718 (2007), art 24; Albania: *Law No 10428 on Private International Law* (2011); Moldova: *Moldova Civil Code Law* 1107 (2002), art 1611; and *Civil Code of Qatar* as amended by Law 22/2004 of 8 August 2004, art 1162. See also the Zimbabwean court decision in *Cooper v Bros & Co V HWJ Bottriel & Co Ltd*, [1971] (1) SA 22 at 24 where the court considered that the Zambia’s currency exchange laws could have affected the parties’ minds at the time they entered into the contract.

<sup>107</sup> Switzerland’s *Federal Act on Private International Law* 1989, amended on 1<sup>st</sup> July 2014, art 116. See the English translation, online: <[www.andreasbucher-law.ch/images/stories/pil\\_act\\_1987\\_as\\_amended\\_until\\_1\\_7\\_2014.pdf](http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_amended_until_1_7_2014.pdf)>.

cause judges to reach arbitrary decisions.<sup>108</sup> They assume that “justice between the parties will be promoted by the application of a rule of law which leaves only limited scope for judicial discretion.”<sup>109</sup> As a result, they limit the discretion of judges in the determination of tacit choices.

#### 4.4. Internationality of the Contract

Most countries accept that party autonomy should be limited to international contracts and not domestic contracts.<sup>110</sup> This is because “party autonomy” is a doctrine of conflict of laws that applies to a contract that has a foreign element.<sup>111</sup> Wolff accepts that “it is common ground that in the case of contracts with a foreign element foreign domicil, foreign nationality, foreign place of contracting, foreign place of performance—the parties themselves have, within limits, a right to determine what law is to be applied to their contract.”<sup>112</sup>

Limiting party autonomy to international contracts do not only encourage transnational trade because parties from various jurisdictions are free to choose the applicable law, it also prevents domestic parties in a domestic contract from evading the mandatory legislation of a country.<sup>113</sup> Restricting party autonomy to international contracts, therefore, allays parties’ fear of the compulsory application of the law of the place of contract or performance to their contract. It also ensures that parties are certain of the legal effect of their choice. In effect, while most countries recognize the advantages of party autonomy, they prevent parties in

---

<sup>108</sup> Oppong, *supra* note 89 at 138.

<sup>109</sup> See e.g. *Restatement (second)*, *supra* note 16 at § 187, comment (d) (“[t]he rule of this Subsection applies only when two or more states have an interest in the determination of the particular issue. The rule does not apply when all contacts are located in a single state and when, as a consequence, there is only one interested state”); see also Kincaid, *supra* note 62 at 95.

<sup>110</sup> Collins, “Contractual Obligations – The EEC Preliminary Draft Convention on Private International Law” in *Essays in International Litigation and the Conflict of Laws* (Oxford: Clarendon Press, 1994) at 417; Henri Battifol & Paul Largade, *Droit International Privé*, 7th ed (Paris: La Librairie Juridique de reference en Ligne, 1981) at 272.

<sup>111</sup> Prebble, *supra* note 16 at 501.

<sup>112</sup> Martin Wolff, “The Choice of Law by the Parties in International Contracts” (1937) 49:2 *Jurid Rev* 110 at 110; see also Martin Wolff, “Some Observations on the Autonomy of Contracting Parties in the Conflict of Laws” (1950) 35 *Trans Grot Soc* 143 at 147-148.

<sup>113</sup> Kincaid, *supra* note 62 at 98. This also applies to inter-provincial contracts in some countries, for example Canada.

domestic contracts from abusing the principle.<sup>114</sup> This abuse stems from the parties being able to evade the domestic laws which would ordinarily regulate their contracts. Thus, this limitation ensures that “socially undesirable anomalies are not created by having another state’s law applied to persons or activities that are part of its own social or economic system.”<sup>115</sup> However, despite the limitation of party autonomy to international contracts, parties in a domestic contract can incorporate foreign law into their contract.<sup>116</sup> Indeed, incorporation of a foreign law is a matter of construction by the court and not a question of conflict of laws.<sup>117</sup>

There is no universal acceptance of the definition of an international contract, or the criteria for its determination.<sup>118</sup> This prevents the uniform application of the scope of party autonomy in most jurisdictions because parties interpret “internationality” differently. Countries may define domestic contracts broadly, such that categories of contracts regarded as international are limited, that is, they may classify a contract as a domestic one if the proper law of the contract, upon objective consideration, is that of the forum, regardless that the contract has a foreign element. Countries may also strictly define a contract as domestic where the state has an “interest” in the contract.<sup>119</sup> These interpretations depend on how a country defines the connecting or qualifying factors for internationality. Therefore, the meaning of an international contract usually depends on the connecting factors set by each country. These factors include: the fact that the parties have their places of business in different states, the different domiciles or habitual residences of the parties, the fact that the place of performance is abroad, and the fact that payments relating to the contract are in foreign currency or in a foreign place.<sup>120</sup> The application of this limitation in some countries to determine the internationality of a contract in some countries is exemplified below.

---

<sup>114</sup> *Ibid.* Not the interest of a state as a corporate entity but the members of the society as a whole.

<sup>115</sup> Joost Blom, “Choice of Law Methods in the Private International Law of Contract” (Part 2) (1979) 17 *Can YB Intl L* 206 at 218. Also cited in Kincaid, *supra* note 62 at 99.

<sup>116</sup> Prebble, *supra* note 16 at 501.

<sup>117</sup> *Ibid.*

<sup>118</sup> Georges Rene Delaume, “What is an International Contract? An American and a Gallic Dilemma” (1979) 28:2 *ICLQ* 258 at 262-271 (the factors determining the definition are the nationality of the parties, the situs and character of the negotiations and the subject-matter of the contract, and the weight to be attached to each factor or a combination of them); see also Nygh, *supra* note 35 at 47.

<sup>119</sup> Nygh, *ibid* at 47.

<sup>120</sup> *Ibid* at 48- 50.



#### 4.4.1 Broad interpretation of an International Contract

An example of a country that broadly interprets “internationality” is Uruguay. The Uruguayan Draft Code defines an international contract as one in which the parties have their habitual residence or establishments in different states or which has “objective links” with more than one state.<sup>121</sup> This appears broad because “objective links” may be subject to interpretations to suit different purposes. Similarly, Paraguay, in Article 2 of its private international legislation, it is provided that the internationality of a contract should be interpreted in “the broadest way possible.”<sup>122</sup> It is submitted that broad interpretations like these ones permit courts to consider economic factors in determining the international character of a contract. However, this may not protect developing countries’ economies from “external exploitation” because courts, in their discretion, may interpret an otherwise domestic contract to be an international one.

#### 4.4.2. Narrow Interpretation of an International Contract

The Chilean private international law rule is an example of a statute that limits the scope of an international contract.<sup>123</sup> Although the *Chilean Civil Code* does not define an international contract,<sup>124</sup> a joint reading of Article 16 of this Code<sup>125</sup> and Article 113 of the *Chilean Commercial Code*<sup>126</sup> reveals that a contract is not

---

<sup>121</sup> *Proyecto de Ley General de Derecho Internacional Privado* (2009), art 48.

<sup>122</sup> Paraguayan law “*Regarding The Applicable Law to International Contracts*” no 5393 (2015). See the full text online: < [https://assets.hcch.net/upload/contractslaw\\_py.pdf](https://assets.hcch.net/upload/contractslaw_py.pdf)>.

<sup>123</sup> See generally, Vial Undurraga, “La autonomía de la voluntad en la legislación chilena de derecho internacional privado” (2013) 40:3 *Revista Chilena de Derecho* 891. He points out that “national courts vacillate as to upholding choice of foreign law clauses in international contracts performed in Chile due to the strong territorialism of Chilean law.”

<sup>124</sup> *Ibid* at 914.

<sup>125</sup> It provides that “[t]he property located in Chile is subject to Chilean laws, even when the owners are foreigners and reside elsewhere. This provision shall be construed without prejudice to the stipulations contained in the contracts validly executed in a foreign country. But the effects of the contracts executed in a foreign country that are to be performed in Chile, shall conform to Chilean laws.”

<sup>126</sup> It provides that “All the acts concerning the performance of contracts entered into a foreign country that shall be performed in Chile are governed by Chilean law, in accordance with the provisions under article 16, last paragraph, of the Civil Code. So, delivery and payment, the currency in which the latter shall be made, measures of any kind, the receipts and their form, the responsibility imposed in the event of non-performance or imperfect or late performance, and any other act related to the mere performance of the

considered international where the place of execution is abroad and the place of performance is Chile. In other words, a contract entered into in one country to be performed in Chile is not an international contract as far as the Chilean law is concerned.<sup>127</sup> Also, notwithstanding the presence of a foreign element in a contract, section 21 of the *United Arab Emirates' Civil Procedure Law* restricts the international character of such contracts.<sup>128</sup> The *Vietnamese Code* states that “a contract entered into and performed entirely in Vietnam must comply with the law of the socialist Republic of Vietnam.”<sup>129</sup> This strict or limited interpretation was criticized in the decision of the highest South American court, the Venezuela Supreme Tribunal of Justice, in *Embotelladora Caracas C.A et al v Pepsi Cola Panamericana S.A*<sup>130</sup> as insufficient in the realm of international commerce. The court held that all factors should be taken into consideration to arrive at a broad definition of an international contract. However, the provision of the *Code* reflects the history of Latin American countries' hostility to party autonomy. As pointed out in chapter 2, Latin American and African countries restrict or prohibit the choice of a foreign law because they believe that it gives foreign laws, and by extension foreign countries, an economic advantage over their domestic laws. This explains why Article 2(3) of the *Panamanian Private International Law Code 2014*<sup>131</sup> requires courts to make international commerce a consideration in choice of law decisions.<sup>132</sup>

#### 4.4.3 Can Parties' Choice of Law Create an International Contract?

The issue is whether the choice of a foreign law in a contract is enough to turn an otherwise domestic contract into an international contract. Some national private

---

contract, shall be in accordance with the provisions of the laws of the Republic unless otherwise agreed by the contracting parties.” Quoted in Albornoz & Martin, *supra* note 34 at 441.

<sup>127</sup> Albornoz & Martin, *ibid*.

<sup>128</sup> See chapter 3 above.

<sup>129</sup> *Civil Code of the Social Republic of Vietnam* (1995), art 769.

<sup>130</sup> [1997] SPA Tribunal Supremo de Justicia, (Sala Politico administrativa) 1421.

<sup>131</sup> *Panamanian Private International Law Code Law No 7* (2014).

<sup>132</sup> This may not be restricted to only Latin American and African countries. Indeed, article 1504 of the *French Civil Procedure Code*, 1981 also requires that the interest of international trade be taken into consideration. See the online version of the French code at: <[http://codes.droit.org/cod/procedure\\_civile.pdf](http://codes.droit.org/cod/procedure_civile.pdf)>.

international law rules suggest that parties can transform an otherwise domestic contract into a cross-border contract if they choose the law of another state.<sup>133</sup> In effect, parties can choose a foreign law in their domestic contracts. The only limitation is that the choice of law is subject to the mandatory domestic rules of the country. For example, Article 3111 of the *Quebec Civil Code* provides that “[a] juridical act, whether or not it contains any foreign element, is governed by the law expressly designated in the act...where a juridical act contains no foreign element, it remains nevertheless subject to the mandatory provisions of the State which would apply in the absence of a designation.” Article 113 of the *Chilean Commercial Code* also allows parties to choose a foreign law in a domestic contract.<sup>134</sup> Other countries with similar provisions include Albania,<sup>135</sup> Bulgaria,<sup>136</sup> Estonia,<sup>137</sup> Russia,<sup>138</sup> and Serbia.<sup>139</sup>

However, some countries expressly prohibit the internationalization of a contract through a choice of law clause or the will of the parties. For example, the *Ukrainian Private International Law* prohibits the choice of a foreign law if the contract does not have a “foreign element.”<sup>140</sup> The Uruguayan Draft Code is more explicit, it expressly provides that “a contract cannot be internationalized through the sheer will of the parties.”<sup>141</sup>

The differing criteria for determining the internationality of a contract, therefore, accounts for the scope of party autonomy. Countries autonomously determine the criteria that best suit their judicial, economic, social, and political interests.

---

<sup>133</sup> Alborno & Martin, *supra* note 34 at 441.

<sup>134</sup> *Chilean Commercial Code*, *supra* note 126.

<sup>135</sup> *Law No 10428 of 2 July 2011 on Private International Law*.

<sup>136</sup> *Bulgarian Private International Law Code* (Law No. 42 of 2005 as amended by Law No 59 of 2007).

<sup>137</sup> *Private International Law Act* (2002).

<sup>138</sup> *Civil Code of the Russian Federation, Part III, enacted by Federal Law No 146 of 26 November 2001*, art 1210.5.

<sup>139</sup> Serbian Ministry of Justice Draft Code on Private International Law (2012).

<sup>140</sup> *Law No 2709 –IV as amended*, (2005), arts 5(6) & 43.

<sup>141</sup> *Proyecto de Ley General de Derecho Internacional Privado* (2009), art 48. Paraguay’s private international law is silent on this provision. This could be interpreted to mean that parties can create such internationality in a contract. See José Antonio Moreno Rodríguez, “The new Paraguayan Law on international contracts: back to the past?” (2016) vol 2 *Eppur Si Muove: The age of Uniform Law-Essays in Honour of Michael Joachim Bonell to Celebrate his 70<sup>th</sup> Birthday*; see also *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 Regulation), art 3.

#### 4.5. Exclusion of Party Autonomy in certain types of Contracts—Varying Considerations

Generally, through local statutes, states exclude certain contracts from the scope of party autonomy. By this, parties whose bargaining power is weak are protected from other parties who possess strong bargaining power that enables them to choose a “one-sided” unfavourable law to the business interest of the domestic party. A commentator tagged these statutes as “localizing statutes” that co-exist with other statutes. These localizing statutes contain express provisions that make a domestic statute applicable in multi-state situations.<sup>142</sup> In effect, localizing statutes exclude “both the judicial and the contractual choice of another state’s law.”<sup>143</sup> Because localised statutes are specific legislations, they override choice of law or conflict of laws statutes, which usually contain generalized provisions.<sup>144</sup> Although a localising statute may qualify as a mandatory rule, its application is different. A localizing provision expressly declares its application to a multi-state situation with or without expressing a public policy; but for a rule to qualify as a mandatory rule, it must contain an element of public policy.<sup>145</sup>

In enacting localized statutes, most countries seek to strike a balance between enthusiasm for party autonomy and comity on one side, and protection of their citizens, economy and sovereignty on the other side.<sup>146</sup> Common examples of such contracts are employment contracts, insurance contracts,<sup>147</sup> consumer contracts,<sup>148</sup> construction contracts, carriage contracts, charter contracts, franchise

---

<sup>142</sup> Symeon C Symeonides, *Codifying Choice of Law Around the World* (Oxford University Press, 2014) at 294.

<sup>143</sup> *Ibid* at 128.

<sup>144</sup> *Ibid* at 295.

<sup>145</sup> *Ibid* at 300.

<sup>146</sup> Catherine Walsh argues that Canada favours party autonomy and comity over protection of its citizens. See Walsh, *supra* note 47 at 58 (“Canadian jurisprudence...give primacy to party autonomy and international comity even when this comes at the expense of such important domestic policies as facilitating consumer access to justice and the protection of the regulatory standards of local capital markets. Canadian jurisprudence to give primacy to party autonomy and international comity even when this comes at the expense of such important domestic policies as facilitating consumer access to justice and the protection of the regulatory standards of local capital markets”).

<sup>147</sup> Private International law of Uruguay- *Proyecto de Ley General de Derecho Internacional Privado* (2009), art 48; *Quebec Civil Code*, *supra* note 52, art 3119.

<sup>148</sup> Zambia’s *Electronic Communications and Transactions Act No 2* (2009), §§ 38 & 39.

or distributorship contracts,<sup>149</sup> and contracts involving real property or immovable properties.

However, considerations for enacting localised laws that prohibit or restrict party autonomy differ from state to state. Localised laws are influenced by historical, economic, social, political, colonial, and religious factors. As discussed in chapter 2, hostility to party autonomy in Latin America and some parts of Africa is largely influenced by historical, colonial, and economic factors. Latin American and African countries' colonial experience and fragile economies largely dictate that the content of their localised laws must protect their citizens from economic exploitation and foreign political domination. Developing countries do not restrict localised laws to the conventional contracts mentioned above, a situation that largely accounts for the varying scope of party autonomy in the world. While localised laws are affected by a common factor in developed countries – Continental Europe and Anglo- America (asymmetry of information between private individuals); it is affected by different factors in developing countries – Africa and Latin America (national economy and colonial history). Some of the localised laws, especially those in Africa, are examined to illustrate this point.

#### **4.5.1. Localizing contracts in Africa**

Local African laws show that developing countries' statutes prohibit party not be applied. Although there is no uniformity on what type of contract should exclude party autonomy in Africa, some examples exist. A Nigerian judge stated that in maritime and aviation matters, "Nigerian courts ... ma[k]e use of local laws, occasionally English laws and we take into account international [maritime] conventions."<sup>150</sup> Indeed, section 20 of the *Nigerian Admiralty and Jurisdiction Act*<sup>151</sup> precludes parties from making a choice of jurisdiction. In effect, the statute removes the discretion of a judge to enforce forum selection clauses.<sup>152</sup> One of the

---

<sup>149</sup> See e.g. *Paraguayan Law 5393 'on the law applicable to international contracts, (2015), art 1; Symeonides, supra note 142 at 296, 326.*

<sup>150</sup> Olakunle O Olatawura, "The Context and Development of Transnational Law Practice and Policy in Nigeria" (2004) 9:3 Unif L Rev 511 at 517.

<sup>151</sup> *Admiralty Jurisdiction Act* Cap A5 LFN 2004.

<sup>152</sup> See *JFS Investment Ltd v Brawal Line Ltd & Ors* [2010] 18 NWLR (Pt 1225) 495.

objectives of the statute is to protect Nigerian shipping companies from instances where foreign parties or large multinational companies may insist on foreign jurisdictions where Nigerian law may not be applied. Although this statute has been criticized for not allowing parties to autonomously choose their jurisdiction (party autonomy), it remains the law in Nigeria.<sup>153</sup>

Also, in technology transfer agreements, some African countries prohibit the parties' choice. For example, Clause 13 of the *Revised Guidelines on Acquisition of Foreign Technology*, issued in 2003 by the National Office for Technology Acquisition and Promotion (NOTAP), mandatorily prescribes Nigerian law for technology transfer agreements between a foreign investor and a Nigerian.<sup>154</sup> In effect, the statute prohibits both the choice of a foreign law and non-state laws. The objective of the Guideline is to ensure that Nigerians secure the best terms in the contract. This objective is in line with section 4 of the *NOTAP Act*<sup>155</sup> which gives NOTAP the mandate to secure the interest of Nigerians in foreign technology contracts. This Regulation has been criticized on the basis that most Nigerian statutes are not suited to protect the interest of Nigerians and that provisions of foreign laws are better in this regard.<sup>156</sup> Regardless of criticism, the objective of the statute is not in doubt – to protect Nigerians from unequal bargaining power that arises during contract negotiations between them and foreigners or large manufacturing companies.

The Egyptian law on technology transfer agreements contains more stringent provisions against party autonomy. The *Egyptian Competition Law* provides that Egyptian technology transfer provisions shall apply to any agreement for the transfer of technology to be utilized in Egypt, irrespective of whether such

---

<sup>153</sup> See Hakeem Olaniyan, "Conflict of Laws and an Enlightened Self Interest Critique of Section 20 of the Admiralty Jurisdiction Act of Nigeria" (2012) 1:1 Nigerian Institute of Advanced Legal Studies International Journal of Legislative Drafting 22; Adewale Adedam Olawoyin, "Forum Selection Disputes Under Bills of Lading in Nigeria: A Historical and Comparative Perspective" (2005) 29:2 Tul Mar LJ 255; Hakeem Olaniyan, "A Review of Judicial and Legislative Approach of Nigeria to Discretionary Jurisdiction over Foreign Cases" (2012) 13:12 Intl J Bus & Soc Sci 204.

<sup>154</sup> The Egyptian Draft Code in its article 12 also does not recognize a choice of law in a similar situation. See Samir Hamza & Howard Stovall, "Proposed Law to Regulate Technology Transfers in Egypt" (1987) 2 Arab LQ 3 at 10.

<sup>155</sup> *National Office for Technology Acquisition and Promotion Act* Cap 62 LFN 2004.

<sup>156</sup> George Nnona, "The Choice of Law in International Contracts for the Transfer of Technology: A Critique of the Nigerian Approach" (2000) 44:1 J Afr L 78 at 84.

transfer takes place outside or inside Egyptian borders or the nationalities or countries of the parties.<sup>157</sup> The law also applies to internal transfer and a cross-border transfer of technology, as well as arbitration proceedings involving disputes as to such transfer.<sup>158</sup> It applies to both independent contracts for the transfer of technology, as well as contracts involving transfer of technology components. An agreement which stipulates a foreign law is to be struck down.<sup>159</sup> The statute, just like the one in Nigeria, aims to protect the interest of Egyptians from foreign exploitation through unequal bargaining power in contracts with foreigners and large manufacturing companies.<sup>160</sup>

#### 4.6. Other areas of Limitation and Divergence

It is impossible to exhaustively discuss the varying limitations on the scope of party autonomy within the confines of this thesis, but it suffices to mention that other limitations exist. This includes the limitation of parties' choices to state laws as opposed to a non-state law.<sup>161</sup> Indeed, "Courts often do not respect choice of law agreements in which parties have chosen a set of principles without choosing a national law."<sup>162</sup> Although most countries make this restriction, there are national statutes like those of Paraguay<sup>163</sup> and Venezuela<sup>164</sup> that allow parties to choose a

---

<sup>157</sup> *Law No. 3 of 2005 on the Protection of Competition and Prohibition of Monopolistic Practices*, art 72 [ECL].

<sup>158</sup> *Ibid*, Art 87(1).

<sup>159</sup> *Ibid*, Art 87 (2).

<sup>160</sup> Wahab, *supra* note 1 at 464; See generally, Hamzah & Stovall, *supra* note 154.

<sup>161</sup> *Amin Rasheed Shipping Corp v Kuwait Insurance Co*, [1984] AC 50 (UK.) at 67 (Lord Diplock) ("contracts must be "made with reference to some system of private law which defines the obligations assumed by the parties").

<sup>162</sup> Thalia Kruger, Feasibility Study on the Choice of Law in International Contracts—Overview and Analysis of Existing Documents—(Preliminary document No 22, The Hague Permanent Bureau Netherlands 2008) at 14, online: <<https://assets.hcch.net/docs/e7a5badc-b56e-4f94-a859-a07ee858dd71.pdf>>. But some commentators advocate for the application of non-state laws in National Courts. See e.g. Saumier, *supra* note 49; Gunther Teubner, "Breaking Frames: The Global Interplay of Legal and Social Systems" (Review) (1997) 45:1 Am J Comp L 149.

<sup>163</sup> Paraguayan law, *supra* note 146, art 5 provides that "[i]n this law, a reference to law includes rules of law of a non-State origin that are generally accepted as a neutral and balanced set of rules." see Rodríguez, *supra* note 137 at 19-21.

<sup>164</sup> *Venezuelan Private International Law Act*, 1998, arts 30 & 31. See also *Banque Artesia Nederland, NV v Corp Banca, Banco Universal CA*, [2014] (Exp. 2014-000257), online: <[www.unilex.info/case.cfm?pid=2&do=case&id=1867&step=Abstract](http://www.unilex.info/case.cfm?pid=2&do=case&id=1867&step=Abstract)>.

non-state law.<sup>165</sup> Other limitations touch on the validity of the contract,<sup>166</sup> the capacity of parties, and consent of the parties, that is, whether parties have consented or whether such consent was free from error or duress.

#### 4.7. Conclusion

The foregoing comparative analysis of countries' varying application of the limitation of party autonomy shows that the importance of party autonomy which relates to certainty and uniformity, may be "under threat." In essence, it has been established that: (1) party autonomy is, essentially, a manifestation of national will, rather than a matter of supranational recognition; (2) absolute or unlimited party autonomy is almost impossible to find in any legal system; (3) there are varying degrees to which party autonomy exists in different countries. The scope of such autonomy is determined by political, national and economic interests, legal history,<sup>167</sup> public policy, academic opinion and as in the United Arab Emirates, religious convictions;<sup>168</sup> (4) in most jurisdictions, the relative exceptions and

---

<sup>165</sup> Not all recent statutes. The *New Civil and Commercial Code of the Argentine Republic*, 2015, art 2651(d) only permits parties to incorporate non-state laws in their contract terms. See Alejandro M Garro & Alberto L Zuppi, "The New Civil and Commercial Code of Argentina (2015) and the Vienna Convention on Contracts for the Sale of Goods" (2015) at 8, online: <[www.sbm.com.ar/assets/pdf/prensa/nuevo\\_codigo/final\\_the\\_new\\_CCiv\\_com\\_Argentina\\_and\\_the\\_cisg4.pdf](http://www.sbm.com.ar/assets/pdf/prensa/nuevo_codigo/final_the_new_CCiv_com_Argentina_and_the_cisg4.pdf)>.

<sup>166</sup> This relates to whether parties can by their choice of law invalidate their contract. See comments on the *Restatement (second)*, § 187. Commentators have also been divided on this issue with opponents' argument that party autonomy on validity issues allows parties to bootstrap themselves. See generally GC Cheshire, *International Contracts: Being the Fifteenth Lecture on the David Murray Foundation in the University of Glasgow* (Glasgow: Jackson, Son & Company, 1948); A Thompson, "A Different Approach to Choice of Law in Contract" (1980) 43:6 *Mod L Rev* 650 at 657; David G Pierce, "Post-Formation Choice of Law in Contracts" (1987) 50:2 *Mod L Rev* 176 at 190. This thesis argued in previous chapters that such choice is subject to the decision of the forum state. As a result, no bootstrapping scenario arises. See further Kindrad, *supra* note 62 at 102-103 ("[t]he answer seems to be that the parties are not by choosing the law to govern validity making their undertaken obligations legally enforceable. It is the law of the forum which does that"); see also E Maw, "Applicable Law and Conflict Avoidance in International Contracts" (1970) 25 *NY City Bar Assoc Rec* 365 at 374-75; R J Weintraub, *Commentary on the Conflict of Laws* (Minneapolis, New York: Foundation Press, 1971) at 273.

<sup>167</sup> This accounts for the difference in the application of close connection test in the United States and the United Kingdom. See Prebble, *supra* note 16 at 502 ("it will be noticed that when individual limitations upon autonomy are discussed, English courts generally appear to allow more latitude to contracting parties than do American ones. There are historical reasons for this difference. England never passed through the dogmatic vested rights era that beset the United States; consequently, autonomy in England is by no means a fresh idea to be handled gingerly").

<sup>168</sup> *Federal Law No (5) of 1985 On the Civil Transactions Law of the United Arab Emirates*, Amended by *Federal Law No (1) of 1987*, art 27 ("[t]he provisions of the law indicated by the foregoing provisions may not be applied in case they are contrary to the Islamic Sharia, public policy or morals in the United Arab Emirates State").



expansion of the doctrine and its constraints challenge the prospect of realizing a uniform scope for party autonomy.

The next chapter examines regional and international legislative efforts to unify the scope of party autonomy. It looks at it from two international legislative classifications/approaches – hard law and soft law. It points out the advantages and weaknesses of both classifications, and ultimately answers the question of whether the new international soft law instrument on choice of law – *the Principles on Choice of Law in International Commercial Contract*<sup>169</sup> – as it is, can yield an “international uniform scope of party autonomy.” In other words, can the *Principles* harmonize the divergent national scope of party autonomy?

---

<sup>169</sup> Approved on 15 March 2015 by The Hague Conference on Private International Law, online: <[www.hcch.net/en/instruments/conventions/full-text/?cid=135](http://www.hcch.net/en/instruments/conventions/full-text/?cid=135)> [*Principles*].

## CHAPTER 5: INTERNATIONAL CODIFICATIONS OF THE SCOPE OF PARTY AUTONOMY ON CHOICE OF LAW – A NEW DAWN?

### 5.1. Introduction

This chapter, which is divided into four sections, focuses on a new soft law instrument – *Principles on Choice of Law in International Commercial Contracts*.<sup>1</sup> It first examines the efforts of international organizations and regional legislative bodies to unify the scope of party autonomy through different codification techniques.<sup>2</sup> It particularly examines the scope of the *Principles* and the Hague Conference’s justifications for using a soft law approach for this process. It concludes that a soft private international law rule, especially on the scope of party autonomy, is a step in the RIGHT direction to unify the divergent scope/limitations of party autonomy. Section 2 argues that although the *Principles* constitute a step in the right direction, the Hague Conference did not consider factors for its acceptance in developing countries where party autonomy is still viewed with skepticism because of the possibility of its abuse by dominant parties. It is imperative for the Hague Conference to consider these factors because the acceptance of the *Principles* in these countries depends on its collective intrinsic values, that is, “on the substantive content of its rules, rather than on external or political factors.”<sup>3</sup>

Section 3 examines the relationship of the *Principles*, as soft law, with some hard law instruments on choice of law – the *Regulation (EC) No 593/2008 on the Law Applicable to Contractual Obligations (Rome I Regulation)*<sup>4</sup> and the *Inter-American Convention on the Law Applicable to International Contracts (Mexico*

---

<sup>1</sup> Approved on 15 March 2015 by The Hague Conference on Private International Law, online: <[www.hcch.net/en/instruments/conventions/full-text/?cid=135](http://www.hcch.net/en/instruments/conventions/full-text/?cid=135)> [*Principles*].

<sup>2</sup> This thesis is limited to the provisions of the *Principles*. Discussions on other private international instruments are limited in this thesis, references are only made to their provisions where it will enhance the analysis in this chapter.

<sup>3</sup> Maria Mercedes Albornoz & Nuria Gonzalez-Martin, “Towards the Uniform application of party autonomy for choice of law in International Commercial Contracts” (2016) 12:3 J Priv Intl L 437 at 458.

<sup>4</sup> *Regulation (EC) No 593/2008 of the European Parliament and of the Council on 17 June 2008 on the Law Applicable to Contractual Obligations*, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008R0593>>.

*Convention*).<sup>5</sup> It particularly looks at the provisions on a choice of non-state law and on the mandatory choice of law in these instruments. It argues that the choice of non-state law may also be less persuasive in continental Europe because the *Rome I Regulation*, which prohibits the choice of a non-state law, is a binding instrument. The *Principles*' conditions for the application of non-state laws even make it more problematic, not only for countries in Europe but for developing countries. Finally, section 4 examines the nature of the *Principles* and its relationship with other soft laws – *the UNIDROIT-Principles of International Contracts*<sup>6</sup> and non-state law – *the United Nations Convention on Contracts for the International Sale of Goods*.<sup>7</sup> Explaining the scope of the *Principles*, it argues that the *Principles* cannot, normatively, empower the choice of another soft law or non-state law because they are all either in the same legal normative order, or the others outrank the *Principles*. Even if the *Principles* empowers the choice of some soft laws, it cannot do so in areas that those soft laws have not made provision for. The analysis concludes that, if the *Principles* are not “creatively” interpreted, its application with other soft laws or non-state law may produce problematic, uncertain and unintended results.

This analysis points out that the overall intrinsic value of the *Principles*, especially for developing countries, create a new set of debates and problems for the goal of arriving at a uniform scope of party autonomy, a goal which scholars, governments and international organizations must, consequently, find new ways to attain.

## **5.2. Unifying the Scope of Party Autonomy – Regional and International Classification Efforts**

Due to the divergence in the scope of party autonomy in national legal systems, regional and international efforts have been made to unify the scope of the doctrine.

---

<sup>5</sup> *Inter-American Convention on the Law Applicable to International Contracts*; 17 March (1994) 33 ILM 732, 733.

<sup>6</sup> Online: <[www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf](http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf)>.

[PICC].

<sup>7</sup> *United Nations Convention on Contracts for the International Sale of Goods*, 11 April 1980, 1489 UNTS 3, (entered into force 1 January 1988) [CISG].

These efforts are in the form of private international law instruments that set out general general provisions on choice of law. The instruments aim to achieve certainty in decisions of national courts and uniformity in private international law rules.<sup>8</sup> The objective has been to encourage transnational trade, as the growth of transnational trade and commerce is the goal of choice of law international or regional instruments. The instruments are classified here via two codification techniques – hard law and soft law.

Hard laws are binding instruments that command compliance from member states that are signatories to them.<sup>9</sup> Examples of hard choice of law instruments include the *Rome I Regulation* 2008,<sup>10</sup> the *Mexico Convention*, and Convention on the Rights and Duties of States 1933 (Montevideo Convention) 1979.<sup>11</sup> These instruments, as explained in chapter 2, are regional and are intended to apply within their identified geographical areas. Thus, the *Rome I Regulation* is in force in continental Europe, and the Mexico and Montevideo Conventions are in force in Latin America. These choice of law instruments have been the subjects of academic comments,<sup>12</sup> and in some cases, are bedeviled by low ratification.<sup>13</sup> These

---

<sup>8</sup> *Statute of the Hague Conference on Private International Law*, 31 October 1951, 220 UNTS 121, art. 1 (entered into force 15 July 1955). It provides that “[t]he purpose of the Hague Conference is to work for the progressive unification of the rules of private international law ....”

<sup>9</sup> See Hartmut Hillgenberg, “A Fresh Look at Soft law” (1999) 10:3 *Eur J Intl L* 499 at 500. It should be noted that some commentators do not see the difference between the two techniques. See e.g. Andrew T Guzman & Timothy L Meyer, “International Soft law” (2010) 2:1 *J Leg Analysis* 171 at 172-174.

<sup>10</sup> For an application and scope of this instrument, see Francisco J Garcimartín Alférez, “The Rome I Regulation: Much Ado About Nothing?” (2008) 2 *Eur Leg F* 61.

<sup>11</sup> *Convention on the Rights and Duties of States*, 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934). For a list of the regional hard law instruments, see generally, the Feasibility Study on the Choice of Law in International Contracts - Overview and Analysis of Existing Instruments - Preliminary Document No 22 B of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference, online: <<https://assets.hcch.net/docs/e7a5badc-b56e-4f94-a859-a07ee858dd71.pdf>>.

<sup>12</sup> See generally, Volker Behr, “Rome I Regulation A—Mostly—Unified Private International Law of Contractual Relationships Within—Most—Of The European Union” (2011) 29 *JL & Com* 233; Helmut Heiss, “Insurance Contracts in Rome 1: Another Recent Failure of the European Legislator” (2008) 10 *YB Priv Intl L* 261; Michael Wilderspin, “The Rome 1 Regulation: Communitarisation and Modernisation of the Rome Convention” (2008) 9:2 *Journal of the Academy of European Law (ERA Forum)* 259; José Antonio Moreno Rodríguez & María Mercedes Albornoz, “Reflections on the Mexico Convention in the Context of the Preparation of the Future Hague Instrument on International Contracts” (2011) 7:3 *J Priv Intl L* 491 at 526 (“Rome I has failed to progress any further, remaining faithful to its strongly ingrained statism”).

<sup>13</sup> The *Mexico Convention* only has two signatories – Mexico and Venezuela.

comments generally reflect the insufficiency in choice of law issues and, insensitivity to national conflict of laws issues.

There are other hard laws that seek to achieve uniform substantive contract terms. An example is the *United Nations Convention on Contracts for the International Sales of Goods* (CISG). This instrument is acknowledged as the “most successful attempt to unify a broad area of commercial law at the international level.”<sup>14</sup> The CISG seeks to regulate terms in international sale of goods contracts;<sup>15</sup> it does not cover private international law issues, especially the validity of a contract of sale.<sup>16</sup> CISG emerged from the efforts of experts working under the auspices of the United Nations Commission on International Trade Law (UNCITRAL). This treaty, which came into force on 11 April 1980 at Vienna, has been ratified by 84 states from different regions and legal backgrounds.<sup>17</sup> In effect, the CISG is international hard law that is applicable to contracts for the sale of goods among contracting states.

In contrast, a soft instrument is non-binding. It relies on the effectiveness of its contents to persuade countries to adopt it, whether they are members of the drafting organization or not.<sup>18</sup> Their application is not bound by geographical space

---

<sup>14</sup> Harry Flechtner, “Introductory Note: United Nations Convention on Contracts for the International Sales of Goods, Vienna, 11 April 1980” (2009) Audiovisual Library of International Law 1 at 1, online: <<http://legal.un.org/avl/ha/ccisg/ccisg.html>>.

<sup>15</sup> See the *CISG*, art 1. It provides that “[the] Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State.” See also Harry Flechtner, *supra* note 14 at 1 (“the treaty aims to reduce obstacles to international trade, particularly those associated with choice of law issues, by creating even-handed and modern substantive rules governing the rights and obligations of parties to international sales contracts”).

<sup>16</sup> *Ibid*, art 4(2).

<sup>17</sup> See the table of the countries, online: <[www.cisg.law.pace.edu/cisg/countries/cntries.html](http://www.cisg.law.pace.edu/cisg/countries/cntries.html)>; see also Joseph M Perillo, “Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review” (1994) 63:2 *Fordham L Rev* 281 at 282 (“[i]t is striking that this Convention was acceptable to nations from different families of legal systems, such as the United States and France, and such diverse economic backgrounds as China and Germany”).

<sup>18</sup> A commentator noted that “soft law only expresses a preference for certain behaviour.” See Cynthia Crawford Lichtenstein, “Hard law v. Soft law: Unnecessary Dichotomy?” (2001) 35:4 *Intl Lawyer* 1433 at 1434. Indeed, this may be true of customary law, as well as hard laws. However, the meaning and relationship between these sources of international law is debatable, but it has been argued that these sources work symmetrically to create a coherent legal order. See generally, Allison Christians, “Hard Law, Soft Law, and International Taxation” (2007) 25:2 *Wisconsin Intl LJ* 355; Final Report of the Committee on the Statement of Principles Applicable to the Formation of General Customary International Law (200)

or the countries that are its signatories. Indeed, the provisions of a soft law instrument are open to all countries to adopt. One example here is the *Principles of International Commercial Contracts* (PICC).<sup>19</sup> The PICC is a set of black letter rules that deal with a “broad range” of issues related to international commercial contracts.<sup>20</sup> It is a product of the International Institute for the Unification of Private Law (UNIDROIT) – an independent intergovernmental organization.<sup>21</sup> This instrument, which is a private codification output, aims to promote principles to regulate international commercial contracts. In effect, it is a form of a restatement of “the commercial contract law of the world” which is not intended to be adopted as a treaty but as a model to countries.<sup>22</sup> Parties can expressly choose the PICC, either because there is a deadlock of choice of law, or because of its neutrality,<sup>23</sup> or if the contract stipulates that the contract is to be governed by “general principles of law.”<sup>24</sup> Also, the PICC could be used to interpret or supplement other international uniform law instruments or domestic laws.<sup>25</sup> It should be noted that “non-state law” as used in this thesis means “laws” similar to the PICC, that is, rules of international organization that suggests substantive commercial contract terms between private entities only. Therefore, “non-state law” in this thesis does not fit into the broader category of non-state laws.

Although there have been soft law instruments, like the PICC, that make provisions for the regulation of international commercial contracts, there had been no soft private international law on this subject until 19 March 2015 when the

---

International Law Association London Conference; Michael Byers, “Power, Obligation, and Customary International Law” (2001) 11:1 Duke J Comp L.

<sup>19</sup> The PICC’s 1<sup>st</sup> edition was in 2004, while the 2<sup>nd</sup> edition, which is its latest edition, was made in 2010. See the provisions of the 2<sup>nd</sup> edition with its new provisions, online: <[http://arbitrationplace.com/digitallibrary/Other/UNIDROIT%20Principles%20of%20International%20Contracts%20\(2010\).pdf](http://arbitrationplace.com/digitallibrary/Other/UNIDROIT%20Principles%20of%20International%20Contracts%20(2010).pdf)>.

<sup>20</sup> The PICC covers issues of validity of a contract and its application is not limited to a particular contract type like the CISG. See Perillo, *supra* note 17 at 282.

<sup>21</sup> Maud Piers & Johan Erauw, “Application of the Unidroit Principles of International Commercial Contracts in Arbitration” (2012) 8:3 J Priv Intl L 441 at 411.

<sup>22</sup> Perillo, *supra* note 17 at 283.

<sup>23</sup> See the Preamble to the PICC. It provides a model clause as follows: “This Contract shall be governed by the UNIDROIT Principles (2010) [except as to articles...].”

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

Hague Conference on Private International Law approved the *Principles on Choice of Law in International Commercial Contracts*.<sup>26</sup>

The next section examines the *Principles* in detail and in the light of reasons for the divergence of the scope of party autonomy between developed and developing countries, particularly, economic and colonial history. It also examines some provisions of the *Principles* and generally argues that the debate on developing a uniform scope for party autonomy is far from over.

### 5.2.1. Synoptic History, Scope, and Justification of the New Soft law (*Principles*)

Although regional hard laws on choice of law produced some convergence,<sup>27</sup> there has been no global convergence on the scope of party autonomy; hence the need for a “global instrument” that unifies the scope of this doctrine.<sup>28</sup> The Hague Conference took up the task to produce a global instrument through its Permanent Bureau. The Permanent Bureau reviewed various regional instruments on choice of law and noted particularly that there is a regional “proliferation of instruments” on party autonomy.<sup>29</sup> This is coupled with the fact that there are still varying limitations on the doctrine, especially in Latin America. After consultations with “interested parties in the field,” the Bureau concluded that promoting party autonomy at the international level meets “a real need for the actors in the field of

---

<sup>26</sup> *Principles*, *supra* note 1. Although there are different modes of enacting this soft law, which include model law, code of conduct, and good practice guides, the Hague Conference preferred the choice of Principles like the *PICC*.

<sup>27</sup> See generally, Giesela Rühl, “Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency” (2007) CLPE Research Paper 4/2007 1; Mathias Reimann, “Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century” (1998) 39:3 Va J Intl L 572; Friedrich K Juenger, “The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons” (1994) 42:2 Am J Comp L 381.

<sup>28</sup> For a historical development of the *Principles*, see Marta Pertegas & Brooke Adele Marshall, Pertegá, “Party Autonomy and Its Limits: Convergence Through the New Hague Principles on Choice of Law in International Commercial Contracts” (2014) 39:3 Brook J Intl L 975 at 980-981; Permanent Bureau of the Hague Conference on Private International Law, “Choice of Law in International Commercial Contracts: Hague Principles?” (2010) 15:3 & 4 Unif L Rev 883 at 883-889; see also Hague Conference, Council on General Affairs and Policy, Feasibility Study on the Choice of Law in International Contracts. Report on Work Carried Out and Preliminary Conclusions. Note Prepared by the Permanent Bureau, Prel Doc No 22A, March 2007 at 8, online: <<https://assets.hcch.net/docs/edd1c4ea-0dcb-42fc-8c17-561a9046a5f4.pdf>>.

<sup>29</sup> Hague Conference on Private International Law, Report on Work Carried Out and Perspectives for the Development of the Future Instrument, Preliminary Document No 7 of March 2009 for the attention of the Council of March/April 2009 on General Affairs and Policy of the Conference [Preliminary Draft of No 7 2009] at 5-6, online: <<https://assets.hcch.net/docs/64fe9fef-e0f1-4927-b8ca-924d6ee01e0c.pdf>>.

international commerce.”<sup>30</sup> The Bureau, therefore, constituted a Working Group made up of 29 scholars to draft the text of the instrument.<sup>31</sup> The Working Group, which first sat on 21 January 2010, completed the draft and the commentary on the Principles on 28 January 2014.<sup>32</sup> The final text, which consists of 12 articles with some “innovative” provisions in articles 3, 5, 6, and 8, was approved by the Hague Conference on 19 March 2015.<sup>33</sup>

Thus, the *Principles* is a supranational instrument that seeks to provide a uniform application of party autonomy and its scope, albeit in a global manner, just like the existing hard laws on choice of law.<sup>34</sup> Its scope is limited to express choice of law in international commercial contracts that are subject to arbitration and litigation proceedings.<sup>35</sup> It shares similar characteristics with the PICC because it serves as a model guide for private international hard law instruments, national legislation, and arbitrators.<sup>36</sup> It can also be used to interpret, supplement or develop private international law rules, just like the PICC.<sup>37</sup> In effect, the *Principles* shares a codification approach similar to the PICC – they are both sets of black letter laws supplemented by illustrations and comments to help users with interpretation.<sup>38</sup> Its envisaged users are lawmakers, courts and arbitrators, parties and their legal

---

<sup>30</sup> *Ibid* at 5. Interested parties include the UNIDROIT, UNCITRAL and international commerce practitioners.

<sup>31</sup> See the list of the members and observers, online: <<https://assets.hcch.net/docs/7d1e8619-6569-4b88-8033-77f41382aa99.pdf>>.

<sup>32</sup> Hague Conference on Private International Law, Report of the Fifth Meeting of the Working Group on Choice of Law in International Contracts, online: <<https://assets.hcch.net/docs/7cb9719d-7c7b-4653-bfaf-faac1a8c6f95.pdf>>.

<sup>33</sup> These provisions relate to the choice of non-state law, mode of choice of law, standard forms in contract, and application of *renvoi* in a choice of law. See the full text, and particularly paragraph 1.19 of the *Principles*, *supra* note 1.

<sup>34</sup> Symeon C Symeonides, “The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments” (2013) 61:4 Am J Comp L 873 at 876. See the *Principles*, *supra* note 1 at para 1 of the Preambles, para 1.13 (Introduction); see also Hague Conference on Private International Law, Report on Work Carried out and Perspectives for the Development of the Future Instrument, Preliminary Document No 6 of March 2010 for the attention of the Council of April 2010 on General Affairs and Policy of the Conference [Preliminary Draft of No 6 2010] at 6, online: <<https://assets.hcch.net/docs/068d96b3-5144-4e36-a420-58356acedbfa.pdf>>.

<sup>35</sup> See the *Principles*, *supra* note 1 at para 1.20 and 1.14 (Introduction). This is the first choice of law instrument that makes provision for both proceedings.

<sup>36</sup> *Ibid* at the Preamble.

<sup>37</sup> *Ibid*; Preliminary Draft of No 7 2009, *supra* note 29 at 7.

<sup>38</sup> See also *Intellectual Property, Principles Governing Jurisdiction, Choice of law, and Judgments in Transnational Disputes*, 2008 drafted by the American Law Institute, online <[www.wipo.int/wipolex/en/details.jsp?id=7687](http://www.wipo.int/wipolex/en/details.jsp?id=7687)>.



advisors.<sup>39</sup> Although the *Principles* do not have legal force to ensure compliance from its users because they are soft law, they persuade compliance through the intrinsic values that they possess.<sup>40</sup>

Notwithstanding arguments against the choice of soft law as a codification technique or approach,<sup>41</sup> the Hague Conference is justified in adopting this approach for the *Principles*.<sup>42</sup> First, the effectiveness of hard laws is hindered by challenges, one of which is ratification.<sup>43</sup> Apart from the fact that it is usually difficult for countries to reach an agreement,<sup>44</sup> there is no assurance that a hard law instrument will be adopted or ratified by states because, often times, ratification depends on political factors or policy concerns.<sup>45</sup> Even if a hard law instrument is ratified, states may implement it differently from one another.<sup>46</sup> The implementation of a hard law instrument also creates cost for states because

---

<sup>39</sup> *Principles*, *supra* note 1 at paragraph 1.20 (Introduction).

<sup>40</sup> See e.g. Symeonides, *supra* note 34 at 899.

<sup>41</sup> See generally Jan Klabbbers, “The Undesirability of Soft law” (1998) 67: 4 Nordic J Intl L 381 at 383 (He claims that a soft law is “a bad thing”); see also Jan Klabbbers, “The Redundancy of Soft law” (1996) 65:2 Nordic J Intl L 167 (He argues that soft law performs no identifiable purpose); Rebecca Byrnes & Peter Lawrence, “Can ‘Soft law’ Solve ‘Hard Problems’? Justice, Legal Form and the Durban-Mandated Climate Negotiations” (2015) 34:1 U Tasm L Rev 34 at 38 (They argue that “a hard law instrument best meets the requirements of international and intergenerational justice”).

<sup>42</sup> See the Hague Conference, Council on General Affairs and Policy, Feasibility Study on the Choice of Law in International Contracts. Report on Work Carried Out and Suggested Work Programme for the Development of a Future Investment. Note Prepared by the Permanent Bureau, Prel. Doc. No 7, March 2009 at 6-7, online: <<https://assets.hcch.net/docs/64fe9fefe0fl-4927-b8ca-924d6ee01e0c.pdf>>.

<sup>43</sup> This does not mean that hard laws do not possess utilitarian value. Hard laws allow states to commit themselves credibly to international instruments, they allow states to monitor their commitments, especially through international or regional courts, they are more credible because they can have direct legal effect on states, that is, they can be self-executing. See Kenneth Abbott & Duncan Snidal, “Hard law and Soft law in International Governance” (2000) 54:3 Intl Org 424 at 426 -33; Charles Lipson, “Why are some International Agreements Informal?” (1991) 45:4 Intl Org 495 at 508; Gregory Shaffer & Mark Pollack, “Hard vs. Soft law: Alternatives, Complements, and Antagonists in International Governance” (2010) 94:3 Minn L Rev 706 at 718; Tadeusz Gruchalla-Wesierski, “A Framework for Understanding ‘Soft law’” (1984) 30 McGill LJ 37 at 41.

<sup>44</sup> This problem is more pronounced when countries are from different legal backgrounds. See Alborno & Martin, *supra* note 3 at 457. This agreement is also needed in any amendment to the treaty. See Ian Brownlie, *Principles of Public International Law*, 7th ed (Oxford, UK: Oxford University Press, 2008) at 629.

<sup>45</sup> This is exemplified by the *Mexico Convention* that commands only two signatories – Venezuela and Mexico. See N Gonzalez-Martin, Private International Law in Latin America: From Hard law to Soft law” (2011) 11 Anuario Mexicano de Derecho Internacional, 393 at 401.

<sup>46</sup> Abbott & Snidal, *supra* note 43 at 434.

“formal commitments” to hard laws restrict states’ behavior in areas of national sensitivity.<sup>47</sup>

In effect, the choice of the soft law approach is beneficial for the potential influence/impact/effectiveness of the *Principles* because: (1) it is faster, easier and less costly to negotiate than a hard law instrument;<sup>48</sup> (2) it is flexible to adapt to different emerging trends in dealing with conflict of laws issues; (3) it allows experts who are familiar with the complexity of the realities in conflict of laws disputes to decide on the technical aspect of the law;<sup>49</sup> and (4) it serves as an interpretative guide for existing hard law instruments. Indeed, it is noted that the *Principles* aim to achieve three goals simultaneously – to serve as a source of inspiration to legislators, as a tool for interpretation by courts and arbitrators, and as a binding set of rules in contracts between public parties.<sup>50</sup>

Because of the codification technique of the *Principles* and its intended effect on regional private international law instruments and national statutes, it furthers the effort to unify the disparate scope of party autonomy as discussed in chapter 4. The ultimate aim is to unify both interpretations of existing regional instruments and national statutes on limitations of party autonomy. The *Principles* could also be applied in countries where there is no regional private international law instrument on choice of law. In effect, countries can adopt this instrument without any obligation to comply with it. By this, certainty in the application of the doctrine and its scope is “universally achieved” without compulsion. The next section examines how justifiable these claims are for developing countries.

### **5.3. The Hague Principles and the Developing Countries**

---

<sup>47</sup> Shaffer & Pollack, *supra* note 43 at 718.

<sup>48</sup> Albornoz and Martin, *supra* note 3 at 458.

<sup>49</sup> *Ibid*; the successes of the *PICC*, as well as difficulty in enacting a hard law persuaded the Hague Conference to adopt a soft law similar to the *PICC*. See Moreno Rodriguez, “Public Policy in the Hague Principles, Chile, Paraguay, MERCOSUR, Peru and Venezuela” (Legal Memorandum to the International Bar Association (IBA) Arbitration Committee & Recognition and Enforcement of Awards Subcommittee October 20 2014) [unpublished] at 3; see also Marta Pertegá & Brooke Adele Marshall, “Party Autonomy and its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts” (2014) 39:3 *Brook J Intl L* 975 at 983.

<sup>50</sup> Albornoz and Martin, *supra* note 3 at 460.

To achieve universalism or the acceptance of a common scope for party autonomy, provisions of the *Principles* must allay the fears or the skepticism of the countries that do not recognize any fundamental limits to the application of the doctrine.<sup>51</sup> The fears or skepticism peculiar to some developing countries in Latin America and Africa arise from the economic and political dominance exerted by some developed countries.<sup>52</sup> Unlike developed countries, developing countries generally experience stunted and uneven economic growth.<sup>53</sup> Therefore, the provisions of the *Principles* must be seen to facilitate compromise of national interests between parties from developed and developing countries.<sup>54</sup>

It must be pointed out that the *Principles*, as a composite instrument, has not facilitated a compromise. It only addresses the technical aspects of the doctrine; It does not speak to the competing national interests and concerns, especially in relation to unequal bargaining power between parties in developed and developing countries. The underlying competing national interests merit consideration because jurisdictional and legislative tasks reflect the status of sovereignty of each country. This thesis has pointed out that the arguments against party autonomy or its limitation in Latin America and Africa are based on the regions' economies that are weak and fragile, compared to the economies of the developed countries, and the colonial experience inflicted by the developed countries.<sup>55</sup> Indeed, parties or large

---

<sup>51</sup> This is the objective of the *Principles*. See *Principles*, *supra* note 1 at commentary P3 of the preamble. (“[t]he objective of the principles is to encourage the spread of party autonomy to states that have not yet adopted it, or have done so with significant restrictions, as well as the continued development and refinement of the concept where it is already accepted”).

<sup>52</sup> See generally Alice M Vickers, “The Choice of Law Clause in Contracts Between Parties of Developing and Developed Nations” (1981) 11:3 Ga J Intl & Comp 617.

<sup>53</sup> See the 2017 Fragile States Index Report published by the Fund for Peace, online: <<http://fsi.fundforpeace.org/>>. Most African and Latin American countries fall under the fragile states category. See also the 2016 Report, online: <<http://library.fundforpeace.org/library/fragilestatesindex-2016.pdf>>; see generally, Stephen Ekokobe Awong, *A Critical Analysis on the Reasons of Underdevelopment in Africa* (Munich: GRIN publishing, 2011). The term “developing countries” as used in this thesis is limited to countries in Africa and Latin America that exhibits structural features of developing countries which include: low per-capita income, high level of poverty and under-nutrition, undeveloped labour, financial and other markets, low level of industrialization, and dominance of informal sector. See Note, “Characteristics of Developing Countries,” online: <<http://web.uvic.ca/~kumara/econ420/characteristics-dev.pdf>>. It does not consider emerging economies which include south Asia, China, and India.

<sup>54</sup> Abbott & Snidal, *supra* note 43 at 447.

<sup>55</sup> Moreno Rodriguez, “Los contratos y La Haya: ancla al pasado o puente a] futuro? (2010) in: Basedow / Fernandez Arroyo / Moreno Rodrguez (coord.), *JComo se codifica hoy el derecho*

multinational companies from developed countries wield strong economic power in contracts involving parties from the developing states.<sup>56</sup>

It is a truism that party autonomy, if unrestricted, permits oppression of the weak by the strong.<sup>57</sup> Even advocates of party autonomy acknowledge that “in the event of unfair advantage arising from contractual disparities, State intervention is advisable.”<sup>58</sup> A situation of “unfair advantage” arises where parties from developed countries use standard forms containing a choice of law favourable to them to the detriment of parties from developing countries.<sup>59</sup> In effect, due to the “insufficient technological and managerial capacities of developing countries, and in part to the monopolization of world trade by industrialized countries,”<sup>60</sup> parties from the developing countries who are confronted with a take it or leave it situation may be in a disadvantageous position to bargain a favourable choice of law. This occasions abuse of party autonomy by contracting parties from developed countries, especially multinational corporations. For example, a multinational corporation that is aware of the advantage that a law confers on it, and to the detriment of the business of the party from a developing country, may insist on such choice of law. The latter reluctantly agrees because of the economic geographical sphere in which it operates.

In sum, “[b]argaining power disparities are a real phenomenon that affect the ability of the ‘weak’ party to obtain its preferred terms in a contractual

---

*comercialinternacional?*, Asunción, CEDEP / Thomson Reuters / La Ley Paraguaya 245 at 335; Friedrich K Juenger, “The Choice of Law in the Americas” (1997) 45:1 Am J Comp L 195 at 196.

<sup>56</sup> See Maria Mercedes Albornoz, “Choice of Law in International Contracts in Latin American Legal Systems” (2010) 6:1 J Priv Intl L 23 at 51 (“the fear exists that if choice of law were to be admitted, the foreign subject coming from a developed country would impose the designation of its own country's law to the defenceless Latin American part, especially in adhesion (small print) or ‘take it or leave it’ contracts, where the weak party has practically no bargaining power”).

<sup>57</sup> F Pocar, “La protection de la partie faible en droit international prive” (1984) 188 Rec des Cours 340 at 361. He refers to this risk as follows: “On a remarqued que c'est justement l'autonomie des parties qui permet en premier lieu une possibilite d'oppression du faible par le fort.” [It has been pointed out that it is precisely the autonomy of the parties which, in the first place, permits an oppression of the weak by the strong], [Translated by author].

<sup>58</sup> Rodriguez, *supra* note 55 at 307-308.

<sup>59</sup> Vickers, *supra* note 52 at 619. This is not the only means of limiting bargaining power. For other means, see generally, Micosha Palanee, *The Role of Unequal Bargaining Power in Challenging the Validity of a Contract in South African Contract Law* (LLM Thesis, University of KwaZulu-Natal, College of Law and Management Studies, School of Law, 2014) [Unpublished].

<sup>60</sup> Vickers *supra* note 52 at 620 (“the superior commercial position enjoyed by parties from developed nations generally enables them to dictate whichever choice of law they favour”).

interaction with a ‘strong’ party” in developing countries.<sup>61</sup> Due to this imbalance arising from economic disparity between parties from developed and developing countries, there is a need for transnational justice or “state intervention.”<sup>62</sup> This is why some developing countries restrict the choice of an applicable law and forum to protect their domestic parties if there is a likelihood of an unfair outcome dictated by unequal bargaining power.<sup>63</sup> Factors that courts take into consideration to determine unequal bargaining power include the status of the contracting parties, the business sophistication of a party, illiteracy, poverty, economic background, gender, and monopolization of a particular market.<sup>64</sup>

Although the *Principles* recognised disparity or unequal bargaining power in employment and consumer contracts,<sup>65</sup> it generally assumes that parties are equal in other types of international contracts. This does not represent the current state of the context of international contracts.<sup>66</sup> This thesis argues that an abuse of party autonomy is not only inherent in employment or consumer contracts. Generally, it

---

<sup>61</sup> Daniel D Barnhizer, “Inequality of Bargaining Power” (2005) 76:1 U Colo L Rev 139 at 150.

<sup>62</sup> Olakunle Olatiwura agrees that “[i]n accepting modern international commercial law principles, clearly defined parameters of justice need to be introduced.” See Olakunle O Olatiwura, “The Context and Development of Transnational Law Practice and Policy in Nigeria” (2004) 9:3 Unif L Rev 511 at 533.

<sup>63</sup> Dana Stringer, “Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way” (2006) 44: Colum J Transnat’l L 959 at 981; see also Nadia de Araujo & Fabiola I Guedes de C Saldanha, “Recent Developments and Current Trends on Brazilian Private International Law Concerning International Contracts” (2103) 1:1 Panorama Brazilian Law 73.

<sup>64</sup> Barnhizer, *supra* note 61 at 214; see also Jalata Asafa, “The Triple Causes of African Underdevelopment: Colonial Capitalism, State Terrorism and Racism” (2015) 7:3 IJSA 75 at 75.

<sup>65</sup> Catherine Walsh, “The Uses and Abuses of Party Autonomy in International Contracts” (2010) 60:1 UNBLJ 12 at 17. The drafters of the *Principles*, and indeed majority of the countries of the world, acknowledge that these types of contracts, allow parties to “exploit a dominant position.” See Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford, UK: Oxford University Press, 2008) at 37; See also the *Principles*, *supra* note 1 at art 1; *Fry v Lane*, [1888] 40 Ch D 312 (English court recognized that it was inequitable for a party to consciously take advantage of the poverty and the ignorance of the other to strike an unfair bargain); see also *Cresswell v Potter*, [1978] 1 WLR 225 at 257; *Commercial Bank of Australia v Amadio*, [1983] 151 CLR 44.

<sup>66</sup> Ingeborg Schwenzer & Pascal Hachem, “The CISG – A Story of Worldwide Success” (Paper presented at the Staff Seminar University of Basel Switzerland, 5 February 2009) [unpublished] 119 at 126 (“[a]lthough it is now common ground in western, industrialised countries that the parties are free to choose the law applicable to their contract it is certainly not a standard that holds true in all parts of the world. The fear of giving western trade corporations too many advantages still leads developing and transition countries to deny validity to choice of law clauses”); the MERCOSUR Permanent Revision Tribunal stated that “there are situations where contracting is not a result of the free will but of other factors.” See Consultative Opinion (Opinión Consultiva) Number 1 of 2007, translated by Rodriguez *supra* note 55 at 14, n 21; see also Symeonides, *supra* note 34 at 882.

exists between parties in any international contract.<sup>67</sup> Regardless of the context, there is a general tension between the principle of party autonomy and the desire to protect the weaker party.<sup>68</sup>

To protect weaker parties, article 11 (1) & (2) of the *Principles* subjects parties' choice of law to the mandatory laws of the forum and third states.<sup>69</sup> However, this does not completely protect parties in developing countries. This is because, while article 11(1) directs the compulsory application of a forum law, article 11(2) leaves the application of a third state law to the discretion and interpretation of the forum court.<sup>70</sup> By this, the application of a mandatory law of a third state can be avoided by a choice of a forum court that is less likely to adopt the mandatory law of third states. In effect, a party can remove the legal efficacy of the third state law by manipulating the choice of a forum.<sup>71</sup> In any event, Article 11 does not enjoin the forum court to apply a local law. As explained in chapter 4, a local law is different from a mandatory law. While a local law does not possess a public interest element, a mandatory law possesses such an element.<sup>72</sup> A forum court may, therefore, ignore the application of the local law of a third state because it does not fall under the two categories contemplated by article 11 of the *Principles* – public policy and mandatory laws.

Also, article 2(4) of the *Principles* provides that “[n]o connection is required between the law chosen and the parties or their transaction.” This provision permits

---

<sup>67</sup> Catherine Walsh agrees that markets involving “sophisticated parties” require state control. She sees this as a source of divergence in the scope of party autonomy. See Walsh, *supra* note 65 at 23.

<sup>68</sup> Peter Nygh, *Autonomy in International Contracts* (Oxford: Clarendon Press, 1999) at 139 (“it is rare for parties in the market place to negotiate on the basis of complete equality... such equilibrium is rare indeed”).

<sup>69</sup> Article 11 (1) provides that “[the] Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties. Article 11(2) provides that “The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.”

<sup>70</sup> Walsh, *supra* note 65 at 16-17 (“the extent to which a state's overriding mandatory provisions limit party autonomy to choose the applicable law depends on whether the provisions form part of forum law or foreign law”).

<sup>71</sup> Symeonides calls this “a regrettable feature of the Principles.” See Symeonides, *supra* note 34 at 888. For a practical illustration of this point, see generally, Delphine Nougayrède, “TNK-BP, Party Autonomy, and Third Mandatory Rules” (2015) 35:2 Nw J Intl L & Bus 1 at 30 (“[t]he eviction from transnational commercial practice of national systems that are viewed as less developed must be viewed as a downside of the increasingly unconditional acceptance of party autonomy in private international law”).

<sup>72</sup> See also Laura Maria van Bochove, “Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law” (2014) 7:3 Erasmus L Rev 147 at 153.

parties to make an unrelated choice of law without any provision to check an abuse that may arise from it, especially in international contracts between developed and developing countries. This provision may not reflect developing countries' national interest. In fact, an African commentator noted that principles like *pacta sunt servanda* which is the foundation of article 2(4), "deny Third World States, whose only measure of sovereignty is the control of their natural resources, the right to make fair rules about the adjudication of disputes arising in connection with the exploitation of such resources."<sup>73</sup> This is not unconnected to the argument of Latin American commentators that it enables parties to choose the law of a foreign country whose economy is bigger than that of the domestic country.<sup>74</sup> It is, therefore, unsurprising that representatives from Brazil and Uruguay, in response to questions as to whether they will adopt this article, answered in the negative.

The argument that the choice of an unrelated law enables parties to choose a neutral law is hard to defend because a neutral law is never neutral. Such law is usually related more to one party than the other, hence the proposal for the choice of the neutral in the first place. The party in whose favour a neutral law is made may, therefore, find it more advantageous than the other party.<sup>75</sup> If the purpose of private international law rules is to do justice in different transnational relationships, it is impossible to argue that the *Principles* ensure justice for weaker parties in this circumstance. Without a proposal that balances the choice of an unrelated law and incidents of abuse, it is difficult to determine the response of these countries to the *Principles*. Although three African scholars were members of

---

<sup>73</sup> Andrew Okekeifere, "The Enforcement and Challenge of Foreign Arbitral Awards in Nigeria" (1997)14:3 J Intl Arb 223 at 237.

<sup>74</sup> Even in Canada, Catherine Walsh stated that "the unrelenting progression of the principle of party autonomy in private international law may well be the cusp of a correction". See Walsh, *supra* note 65 at 31. It should be noted that Free Trade Agreements in Latin American states may insulate companies from these regions from the classification of foreign companies.

<sup>75</sup> Christian von Bar & Ole Lando, "Communication on European Contract law: Joint response of the Commission on European Contract Law and the Study Group on a European Civil Code" (2002) Eur R Pri L 183 at 217; see also Christiana Fountoulakis, "The Parties' Choice of 'Neutral Law' in International Sales" (2005) 7:3 Eur JL Reform 303 at 313 ("[o]ne should not forget that even when choosing a third law allegedly equally unfamiliar to both parties, that law might have a closer connection to the law of one of the parties than to the law of the other party. This could have the consequence that, yet again, one party will take advantage of being more akin to the applicable law than the other").

the working group, it is difficult to argue that these persons represent the interest of African society.<sup>76</sup>

It may be argued that if a party is strong enough to enter into an international contract, it does not need much state protection. However, this argument is less persuasive because the strength of a party may be a relative reality. A party that is generally strong may be considered weak when dealing with another party that possesses stronger economic power in the context of negotiating an international contract. It is commonplace that “African countries rightfully feel threatened by the overwhelming power of certain multinational corporations whose financial resources far surpass their own and whose tentacles extend into many different countries.”<sup>77</sup> It is, therefore, not an overstatement that parties do not possess equal bargaining power in the making of international contracts.

In view of the foregoing, it is noteworthy that though Paraguay adopted article 2(4) of the *Principles* in its private international law legislation, it excluded franchising, agency, representation and distributorship contracts from it.<sup>78</sup> Except the franchising agreement, these issues are governed by Paraguay’s Law 194/1993.<sup>79</sup> This law protects local investors from foreign manufacturers or foreign firms by dictating the terms of their contract, just like the Egyptian Competition Law<sup>80</sup> and the Nigerian Technology Regulation discussed in chapter 4.<sup>81</sup> It also

---

<sup>76</sup> The total number of member was 19. The Africans are Richard Oppong, Jan Neels, and Ahmed Sadek El Koshery. The composition of the Working Group is as follows: 7 from Europe, 5 from the Americas (3 of whom are from developed countries: United States and Canada), 3 from Africa, 2 from Asia, and 2 from Asia Pacific. It is arguable that this composition may not reflect the interests of the developing countries because the developed countries only considered the *Principles* as an opportunity to harmonize their existing regional instruments and only wished that developing countries will, in the future, adopt the *Principles*. Even if developing countries in Africa finally adopts the it, the provisions of the *Principles* protects the interest of parties from developed countries. In short, parties from developed countries stand to gain more from the *Principles* than parties in developing countries.

<sup>77</sup> Sempesa Samson L, “Obstacles to International Commercial Arbitration in African Countries” (1992) 41:2 ICLQ 387 at 393 (“[w]hether such fears are well grounded or not, they obviously still produce feelings of insecurity and dependence and a deep suspicion of a hidden agenda essentially for the benefit of big business”).

<sup>78</sup> *A Paraguayan Law 5393 “on the law applicable to international contracts”* 2015, art 1.

<sup>79</sup> Ley 194/93-Que Aprueba Con Modificaciones El Decreto-Ley N° 7 Del 27 De Marzo De 1991, Por El Que Se Establece El Régimen Legal De Las Relaciones Contractuales Entre Fabricantes Y Firmas Del Exterior Y Personas Físicas O Jurídicas Domiciliadas En El Paraguay.

<sup>80</sup> *Law No. 56 of 2014 Amending Law No. 198 of 2008 on the Protection of Competition and the Prohibition of Monopolistic Practices.*



subjects any dispute arising from these contracts to the jurisdiction of Paraguay.<sup>82</sup> International contracts that fall under this law are interpreted strictly against the foreign manufacturer because the contract is interpreted from a “domestic perspective.”<sup>83</sup> A commentator sees the law as discriminatory, because “it restricts freedom of contract, [whose] single purpose is to punish foreigners.”<sup>84</sup> The 2014 proposed amended draft of the Law 194/1993 still shares similar characteristics with the old law. In fact, it has been noted that “the draft legislation aims to provide more elements of protection for Paraguayan representatives, agents or distributors.”<sup>85</sup>

Assuming that every country adopts the *Principles* but also excludes some local or private contracts from their domestic application, the logical enquiry must be what then is the achievement of the *Principles*. Specifically, the issues to resolve are whether it has achieved uniformity or certainty in transnational commerce and choice of law; and whether as soft law, it is not redundant, as Klabbers claimed.<sup>86</sup> If the *Principles* recognize the reality of unequal bargaining power between contracting parties, perhaps its provisions would have, apart from the mandatory clause, included a clause that makes a uniform provision for weaker parties. Today, the economy-protecting localised statutes in Latin America and Africa not only threaten uncertainty in the scope of the doctrine. They also show that states that

---

<sup>81</sup> See Samir Hamza & Howard Stovall, “Proposed Law to Regulate Technology Transfers in Egypt” (1987) 2 Arab LQ 3 at 10; Mohamed S Abdel Wahab, “The Law Applicable to Technology Transfer Contracts and Egyptian Conflict of Laws: A Triumph of Nationalism over Internationalism?” In eds Andrea Bonomi & Gian Paolo Romano, *Yearbook of Private International Law* vol 12 (Munich: Sellier European Law Publishers, 2010) at 464; Olakunle Olatawura, *supra* note 62 at 533; George Nnona, “The Choice of Law in International Contracts for the Transfer of Technology: A Critique of the Nigerian Approach” (2000) 44:1 J Afr L 78.

<sup>82</sup> *Ibid*, art 10. The Paraguay Supreme Court in Acuerdo y Sentencia Number 827 of 2001 gave reasons for restricting party autonomy to choose a foreign forum as follows: “[article 10] constitutes a guarantee for the parties so that the matter at stake can be discussed in the place of performance of the contract. Nothing more logical or fair... the State, through this law, intervenes in the relationship by establishing clear rules to which the parties shall adhere.” See also Acuerdo y Sentencia 285 of 2006 in the case: “Acción de Inconstitucionalidad en el juicio: Gunder ICSA c/KIA Motors Corporation s/ indemnización de daños y perjuicios.”

<sup>83</sup> Rodriguez, *supra* note 49 at 12. It is presumed that the distributor does not exercise free will due to his particular disadvantaged bargaining position.

<sup>84</sup> Maciel et al, “Legal Memoranda” (1997) 29:1 U Miami Inter-American L Rev 373 at 409.

<sup>85</sup> Maria Gloria Triguís, “Paraguay’s Legal Regime Between Manufacturers and Foreign Firms to be Amended: Law 194 – Distribution and Agency Law” (January 2014), Lexology (blog) at 4, online: <[www.lexology.com/library/detail.aspx?g=4997fbbd-afc1-4151-afd1-8a4e340ace8a](http://www.lexology.com/library/detail.aspx?g=4997fbbd-afc1-4151-afd1-8a4e340ace8a)>. The commentator concluded that Paraguay still restricts free trade.

<sup>86</sup> See generally, Klabbers, *supra* note 41.

recognize party autonomy are still conscious of the economic threat that an abuse of party autonomy poses.

In sum, the *Principles* may remain less persuasive because of some of its negative economic consequences for developing countries. It is difficult to argue that, in relation to unequal bargaining power, the *Principles* put due weight on the underlying economic concerns of developing states and the general effect that this has on the economic bargaining power of parties, as well as the impact of the abuse of party autonomy on the economy of developing countries that this induces. Indeed, a Latin American commentator noted that “party autonomy cannot be judged purely from a technical standpoint because it puts values at stake. That is why we cannot give a blank cheque to party autonomy.”<sup>87</sup> Some other commentators see a law of this nature as “hardly anything short of an ego trip by a few writers of the developed world eager to impose, for the advantage of their countries and regions, rules that they are conversant with on the poor less heard nations without caring about the sensibilities of the latter’s local setting and peculiar dynamics.”<sup>88</sup>

It is plausible to argue that the Working Group drafted the Principles without caring about the sensibilities of the developing countries’ local systems and peculiar dynamics, most likely because the developing countries, especially those from Africa, did not participate in the Hague Conference’s survey that sampled the application and scope of party autonomy in various countries.<sup>89</sup> Majority of the 33 members states that responded to the questionnaires are European countries.<sup>90</sup> A reason for this omission may be that the Hague Conference does not consider the

---

<sup>87</sup> Cecilia Fresnedo de Aguirre, ‘Party Autonomy - A Blank Cheque?’ (2012) 17:4 Unif L Rev 655 at 657. (She believes that “the extent to which party autonomy is accepted stands in direct relation to the clash between strong, and opposing, commercial and economic interests”).

<sup>88</sup> Okekeifere, *supra* note 73 at 237; see also Heather Mbaye, “Why National States Comply with Supranational Law” (2001) 2:3 European Union Politics 259 at 262.

<sup>89</sup> See the Hague Conference, Council on General Affairs and Policy, Feasibility Study on the Choice of Law In International Contracts Report on Work Carried Out And Conclusions (Follow-Up Note), prepared by the Permanent Bureau, Prel. Doc. No 5, February 2008 at 4, online: <<https://assets.hcch.net/docs/cb1ca59e-5e69-4a86-b9f1-e929075fdef2.pdf>>. The Countries that participated in the survey are Albania, Australia, Austria, Belgium, Bulgaria, Chile, China (including Hong Kong and Macao SAR), Croatia, Czech Republic, Denmark, Estonia, European Community, France, Germany, Greece, Hungary, Iceland, Italy, Japan, Malaysia, Mexico, Monaco, New Zealand, Norway, Poland, Serbia, Slovakia, Slovenia, Spain, Switzerland, Turkey, United Kingdom and the United States of America.

<sup>90</sup> Only Mexico, Chile and the United States were from the Americas.

agreement of countries as a condition for the acceptance of the *Principles*; it only hopes that the *Principles* “constitutes a preliminary stage which, in a more distant future, might facilitate the adoption of a veritable international convention on this topic within the Hague Conference.”<sup>91</sup> But agreement on the *Principles* is not the same as consultation before the enactment of the *Principles*. It is difficult to imagine how developing countries who were not consulted or whose interests were not taken into account at the “preliminary stage,” would become signatories to the future Convention in its final form.

### **5.3.1. Possible Effect and Acceptance of Article 3 in Developing Countries**

Article 3 of the *Principles* provides that “the law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.” It also allows parties to choose a hard law, regardless that they are not contracting states.<sup>92</sup> Thus, in an indirect way, article 3 of the *Principles* turns a hard law into soft law for contracting parties in regions without Conventions that regulate choice of law issues. For example, it was pointed out in chapter 2 that there is no regional instrument that regulates choice of law in Africa. If the provisions of the *Principles*, especially article 3, are adopted in national private international rules in African countries, it enables parties in African states to choose international instruments from other regions as the governing law in their contracts.<sup>93</sup> This fosters transnational trade because private international law instruments can be applied beyond their initial geographical area. Continents like Africa, with few experts on conflict of laws, can also benefit from the industry and resources channelled into these Conventions. Also, parties in Latin America that are not signatories to the *Mexico Convention* can indirectly benefit from the *Principles*’ provisions through the adoption of article 3.<sup>94</sup>

---

<sup>91</sup> See the Preliminary Draft of No 7 2009, *supra* note 29 at 7.

<sup>92</sup> See the *Principles*, *supra* note 1 at comment 3.5.

<sup>93</sup> Through article 3 of the *Principles*, these instruments are chosen as soft laws instead of hard laws.

<sup>94</sup> However, article 3 of the *Principles* may, sometimes, produce unforeseen negative consequences for parties in developing countries. This is because the private international hard laws – *Rome I Regulation* and

However, it is unclear how developing countries, especially in Africa, would accept the choice of a non-state law in their domestic courts even if no treaty prohibits it.<sup>95</sup> Some developing countries mistrust and are unconvinced by non-state law because they seem like “classical principles of international law.”<sup>96</sup> Indeed, it has been noted that “lex mercatoria [non-state law] is a creation of a coterie of western scholars...who [load them] with norms entirely favourable to international business.”<sup>97</sup> As well, non-state laws were made at a time when developing countries were not members of international organizations.<sup>98</sup> As a result, most developing countries do not consider that such laws represent their interest.<sup>99</sup> It is even believed that the interests expressed in the non-state laws are “inimical” to the interests of developing countries.<sup>100</sup>

The *Principles* is a non-state law that proposes another non-state law. In this sense, it is doubly unappealing to African states for adoption. This is notwithstanding that three African scholars were members of the working group that drafted the *Principles*. In sum, the *Principles*’ provisions can hardly be said to cater to the preferences of most African states. This overall distrust on the part of developing countries against non-state laws means that the *Principles*’ elevation of party autonomy to the level of non-state law may be seen as designed to entrench

---

*Mexico Convention*, arise from negotiations that only focus on the peculiar circumstances of the contracting states.

<sup>95</sup> Rodriguez claims that it is gaining considerable acceptance in Latin America but he did not give an example of a case where a domestic solely applied a non-state law to the parties’ contract. Indeed, he conceded at page 888 that “in practice, not too many cases in the region apply non-state law, either directly or for the purpose of interpreting national law provisions.” See generally, José Antonio Moreno Rodríguez, “Contracts and Non-State Law in Latin America” (2011) 16:4 Unif L Rev 877; The scepticism in this thesis is shared by Richard Oppong, *Private International Law in Commonwealth Africa* (Cambridge: Cambridge University Press, 2013) at 137. He believes that the “challenges” in the application of a non-state law pose a threat to its application in Africa.

<sup>96</sup> Pedro Roffe, “Reflections on Current Attempts to Revise International Legal Structures: The North-South Dialogue-Clash of Values and Concepts, Contradictions and Compromises” (1979) 9:3 Ga J Intl & Comp L 559 at 567.

<sup>97</sup> Muthucumaraswamy Sornarajah, “The UNCITRAL Model Law: A Third World View Point” (1989) 6:4 J Intl Arb 7 at 17.

<sup>98</sup> Clive M Schmitthoff, “Progressive Development of the Law of International Trade” in Report of the Secretary General (UN Doc.A/6396, para 210), reprinted in (1968-70) I (1) UNCITRAL Yearbook II (“[t]he developing [African] countries of recent independence have had the opportunity to participate only to a small degree in the activities carried out up to now in the field of harmonization, unification and modernization of the law of international trade. Yet those are the countries that especially need adequate and modern laws which are indispensable to gaining equality in their international trade”).

<sup>99</sup> Schwenzer & Hachem, *supra* note 66 at 137.

<sup>100</sup> Sornarajah, *supra* note 97 at 18.

the existing imbalance of bargaining power between developed and developing countries.

It is not uncommon that a stronger party, with the unsuspecting approval of the weaker party, may exclude his liability under some non-state laws through contract clauses.<sup>101</sup> For example, article 6 of the *CISG* enables parties to derogate from provisions of the Convention,<sup>102</sup> including those meant to protect weak contracting parties.<sup>103</sup> This may not be problematic if the *CISG* is interpreted together with the private international rules of a contracting state, as localized laws of these states protect the parties. But where the choice is made through the *Principles*, localized laws cease to apply because they are not covered by Article 11 of the *Principles*.<sup>104</sup> Since the *CISG* is the chosen law, stronger parties can evade localized laws to their benefit. This situation may be prevented if parties are subject to local laws that contain non-derogable fair contract terms.

However, in defence of a non-state law, it has been argued that even if a non-state law creates disadvantages for parties in developing countries, only parties are affected, not the larger society.<sup>105</sup> This larger society is not identified, nor who its members may be. However, this argument creates a distinction between members of a society or a state. The function of a country is to protect every member of its constituent communities, large or small. Even if discrimination is permitted as between these communities and their members, it is not true, as otherwise argued, that the choice of a non-state law does not affect developing countries. As stated above, the law chosen creates either an adverse or a positive network effect on the economy of a developing country. For example, if a party, through a superior bargaining power, chooses a non-state law that adversely affects

---

<sup>101</sup> See the *CISG*, art 6.

<sup>102</sup> It should be noted that the *Principles* treats *CISG* as a non-state law for countries that are not signatory to the Convention. See Peter Mankowski, “Article 3 of the Hague Principles: The Final Breakthrough for the Choice of Non-State Law?” (2017) 22:2 *Unif L Rev* 369 at 370.

<sup>103</sup> For example, see chapters of the *CISG* defining the obligations of sellers and buyers (chapter 2 & 3 respectively).

<sup>104</sup> Brooke Adele Marshall, “The Hague Choice of Law Principles, *CISG* and *PICC*: A Hard Look at a Choice of Soft Law” Max Planck Private Law Research Paper no 16/27 (2018) *Am J Comp L* 1 at 18(forthcoming).

<sup>105</sup> Andreas Schwartz, “New Trends in Parties' Options to Select the Applicable Law? The Hague Principles on Choice of Law in International Contracts in a Comparative Perspective” (2015) 12:1 *U St Thomas LJ* 87 at 96.

the business of a party in a developing country such that the latter becomes insolvent. This necessarily reduces the per capita income of the developing country.

Furthermore, article 3 may be less persuasive because of the *Principles'* conditions for its application.<sup>106</sup> As earlier quoted, article 3 states that “[t]he law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.” In effect, even if a forum court permits the application of a non-state law, parties can only choose it if it possesses some characteristics.<sup>107</sup> These include that the non-state law must be a generally accepted neutral and balanced set of rules. The questions that arise from these conditions include: who determines if the rule is neutral or balanced? Is it the parties or the court? If it is the parties, it creates an unnecessary burden on them because they could also choose a state law. In effect, if parties have to justify their choice of non-state law, they may not likely choose a non-state law.

Article 3 explains the term “neutral”, but it remains vague and controversial, especially when the “neutral law” is made by an agency or organization of which the forum state is not a member. By whose standard is the acceptance to be measured – the parties or national courts? How do we quantify the level of acceptance or who determines when the rule is balanced enough? To subject a non-state law to these tests is a heavy burden that even states find difficult to bear.<sup>108</sup> The issue is more problematic because some countries classify some non-state laws as “seller friendly” or “buyer friendly.”<sup>109</sup> For example, while some delegates at the Vienna Conference on the CISG classify it as “seller friendly,” other countries classify it as “balanced.”<sup>110</sup> Thus, if a forum country accepts a non-state law as neutral, it may not be accepted as such by the enforcing country, that is, where the

---

<sup>106</sup> For criticism of the conditions, see generally, Ralf Michaels, “Non-State Law in the Hague Principles on Choice of Law in International Contracts” in K Purnhagen, Kai, Rott, Peter eds, *Varieties of European Law and Regulation: Liber Amicorum for Hans Micklitz* (Gewerbestrasse, Switzerland: Springer International Publishing, 2014) at 46.

<sup>107</sup> *Ibid* at 55 (“the qualifiers seem to act more as substantive restrictions than clarifiers”).

<sup>108</sup> See Douglas Laycock, “Religious Freedom and International Human Rights in The United States Today” (1998) 12:2 *Emory Intl L Rev* 951 at 967.

<sup>109</sup> See Schwenger & Hachem, *supra* note 66 at 137. Countries that see the Convention as not neutral include Kenya, Nigeria, Pakistan and China.

<sup>110</sup> *Ibid*.

judgment creditor seeks to enforce his judgment. The judgment may be set aside for being contrary to the enforcing country's public policy.

Can developing countries, especially in Africa, be swayed or persuaded by the *Principles* and its adoption by other countries, even if there is no treaty obligation that is against it? It is difficult to answer this question in the positive. This is because of the challenges engaged by the application or interpretation of non-state laws. These exercises are difficult or challenging because: (1) the law's content cannot be established with sufficient certainty, and (2) there is no authoritative source for interpreting it.<sup>111</sup> This may lead to differences in interpretation – a situation that ultimately breeds uncertainty in the decisions of national courts.

To overcome interpretational challenges, a commentator suggested national courts should invite scholars to proffer interpretations on “internationally accepted” non-state laws.<sup>112</sup> But this may not also produce certainty because, apart from the debate on the sufficiency of such opinion, opinions of scholars on private international law issues are divergent.<sup>113</sup> Also, the argument that non-state laws should be applied like foreign law is fraught with some challenges because, while a foreign law is an external law that belongs to another sovereign state, a non-state law does not belong to any sovereign state.<sup>114</sup> Non-state laws can, therefore, not be treated as “external law” because, if the former is recognised by national private international law, it becomes part of the domestic law that is applied in such a state without need for “proof” like foreign law. Even if a non-state law is treated like a foreign law, it will lead to uncertainties because some states use different principles to determine the content and interpretation of a foreign law.<sup>115</sup>

---

<sup>111</sup> For example, it has been noted that judicial interpretation of the *New York Convention* (1958) in African Countries and to African peculiar situation is terse and difficult. See Amazu A Asouzu, “African States and the Enforcement of Arbitral Awards: Some Key Issues” (1999) 15:1 *Arb Intl L* at 6. See also Michaels, *supra* note 106 at 5; Genevieve Saumier, “The Hague Principles and the Choice of Non-State ‘Rules of Law’ to Govern an International Commercial Contract” (2014) 40:1 *Brook J Intl L* at 26.

<sup>112</sup> Saumier, *ibid* at 26.

<sup>113</sup> This is demonstrated in Chapter 2 and 3 of this thesis.

<sup>114</sup> See generally, Clive M Schmitthoff, “The Law of International Trade-Growth, Formulation and Operation” in C Schmitthoff ed, *The Sources of the Law of International Trade*, (London, UK: Stevens & Sons, 1964) at 3-4.

<sup>115</sup> Synthesis Report with Recommendations, “The Application of Foreign Law in Civil Matters In The Eu Member States And Its Perspectives For The Future” (2011) *Swiss Institute of Comparative Law* 3 at 9,

Even if arguments on the application of non-state laws are persuasive, the problematic interpretations of the application, such as the “general acceptability” and “neutrality” concepts of the *Principles* may produce arbitrary results in developing countries.<sup>116</sup> More so for their lack of the calibre of seasoned judiciary that can bring judicial expertise to handle this sort of situation.<sup>117</sup> Thus, to avoid decision-making uncertainties, some developing countries may not adopt article 3 altogether.<sup>118</sup> Consequently, courts may favour the application of the forum law whose complex interpretations of non-state law may lead to arbitrary application of the same.<sup>119</sup>

Overall, the conditions attached to article 3 breed another set of disputes over the suitability of non-state law. The choice of non-state law may be challenged on the basis that it does not meet the criteria set out by the *Principles*.<sup>120</sup> This is because parties, and even courts, may interpret the *Principles*’ criteria differently. In countries with slow judicial processes, resort to non-state law may be a way to delay trial in cases where there is no defence to the plaintiff’s claim. As an analyst concluded, the conditions in Article 3 of the *Principles* are “riddled with uncertainty, obfuscation and self-serving terminology.”<sup>121</sup>

---

online: <[http://ec.europa.eu/justice/civil/files/foreign\\_law\\_iii\\_en.pdf](http://ec.europa.eu/justice/civil/files/foreign_law_iii_en.pdf)>. (“[t]he application of foreign law depends on a variety of factors...(1). Once the need to apply foreign law has been established, legal systems contain different principles as to the manner of determining the content of foreign law (2). In case it is not possible to establish the content of the applicable foreign law, legal systems might provide for varying consequences (3). The control of the application of foreign law by superior courts also has an impact on the status of foreign law (4). Lastly, some special considerations might apply when it comes to application of foreign law by non-judicial authorities).

<sup>116</sup> This issue has already been considered in this chapter.

<sup>117</sup> Maria Albonoz agrees that “Although an international treaty should be afforded the same interpretation in all the jurisdictions of the contracting states,” the danger posed by divergent national interpretations in the application of its provisions is always latent.” See Albonoz, *supra* note 56 at 34.

<sup>118</sup> See generally, Jay Loschky, “Less Than Half Percent in Africa Confident in Their Judicial Systems” (6 August 2014), GALLUP (blog), online: <[www.gallup.com/poll/174509/less-half-africa-confident-judicial-systems.aspx](http://www.gallup.com/poll/174509/less-half-africa-confident-judicial-systems.aspx)> (only 44% had confidence in the Nigeria. Others are Congo: 22%, Chad: 23%, Liberia: 31%, Uganda: 39%). E.g. a tacit choice is not allowed in Chinese private international law because of Chinese judicial development. See Zhengxin Huo, “Highlights of China’s New Private International Law Act: From the Perspective of Comparative Law” (2011) 45:3 RJT 637 at 651.

<sup>119</sup> Indeed, this is one of the reasons why Latin American countries that reject party autonomy prefer the application of the *lex fori* to multi-state contracts. See Albonoz, *supra* note 56 at 50.

<sup>120</sup> See Carol M Kaplan, “The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith” (2000) 75:4 NYUL Rev 1045 at 1061-1062.

<sup>121</sup> Andrew Dickinson, “A principled approach to choice of law in contract?” (2013) 18 Butterworths J Intl Ban & Fin L 151 at 152.



## 5.4. The Hague Principles and Hard laws

Apart from the effects of the *Principles* on weak parties and its application in developing countries, they may also be faced with legal normative challenges from hard laws on choice of law issues. This section argues that treaty compliance may also influence some countries' decision to ignore some provisions of the *Principles*. Although its Working Group sought to avoid any immediate risk of conflict of standards with other hard law instruments,<sup>122</sup> there is still a divergence between the provision of some hard laws and the *Principles*. This discussion focuses on the *Principles* and two private international law documents – the *Mexico Convention* and the *Rome I Regulation*. It discusses two provisions under these instruments – mandatory law and non-state law.

### 5.4.1. Mandatory Laws

The scope of the application of mandatory laws under the *Rome I Regulation*, *Mexico Convention* and the *Principles* appears divergent. The *Principles* permits a wider application of mandatory laws than the *Rome I Regulation* and *Mexico Convention*. Article 11(2) of the *Principles* permits the forum court to determine when mandatory provisions of third states override the parties' choice of law. Also, it does not require proximity of third states' mandatory law with the contract. However, article 11(2) of the *Mexico Convention*, although worded differently, requires that the mandatory law of a third state must bear "close ties" to the contract. Article 9(3) of the *Rome I Regulation* specifically refers to the mandatory law of the place of performance.<sup>123</sup>

Although there are differences between the provisions of these international instruments,<sup>124</sup> some of these could be harmonized by resort to the purpose of the *Principles* to achieve collaborative interpretation with other instruments. For example, the *Principles* may be regarded as a general statute that suggests a wide

---

<sup>122</sup> Preliminary Draft of No 7 2009 *supra* note 29 at 7; see also Pertegas & Marshall, *supra* note 28 at 983.

<sup>123</sup> Nearly 20 national private international law codifications contain the proximity limitation. See Symeon C Symeonides, *Codifying Choice of Law Around the World* (Oxford: Oxford University Press, 2014) at 184. The countries include Argentina, Netherlands, Poland, Serbia, Turkey, Switzerland, and Ukraine.

<sup>124</sup> Jonathan Levin, "The Hague Principles on Choice of Law in International Commercial Contracts: Enhancing Party Autonomy in A Globalized Market" (2016) 13:1 NYUJ L & Bus 272 at 284 – 85.

discretion to apply mandatory laws of third states while the *Mexico Convention* and the *Rome I Regulation* may be regarded as specific statutes that curtail the discretion of the judge. This interpretation could mean putting a soft law and hard laws on the same legal or normative order. However, this may not necessarily be so if the soft law (*Principles*) is seen in the light of the older treatise on the subject (*Mexico Convention* and the *Rome I Regulation*).<sup>125</sup> If seen in this light, it can be argued that the three instruments permit the discretion of the forum court to apply the law of a third state.

#### 5.4.2. Non-state law

The *Principles* proposes the possibility of choice of a non-state law – an issue that has been the subject of academic comments and criticisms.<sup>126</sup> As earlier quoted, article 3 provides that “[t]he law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.” Notwithstanding criticism, Paraguay’s national private international law legislation have incorporated this provision.<sup>127</sup> However, none of the countries in Europe have adopted it. This may not be unconnected to the fact that *Rome I Regulation* does not allow a choice of non-state law; it only allows it if parties incorporate it in their contracts.<sup>128</sup> This thesis answers the question whether countries signatory to the

---

<sup>125</sup> Commenting on avoidance of “collision” of Hard law and soft law, Jan Klabbers, stated that “[t]he most popular and obvious strategy, then, is to simply deny the existence of any conflict, and interpret the older treaty in the light of the newer soft law instrument. Indeed, this has probably become the most often invoked explanation concerning the legal effects of soft law instruments: they may serve as interpretative guides.” See Klabbers, *supra* note 41 at 177.

<sup>126</sup> For example, some commentators argue that non-state laws are not legitimized by a democratic legislative process. See Schwartze, *supra* note 105 at 95. On other comments, see generally, Markus Petsche, “The Application of Transnational Law (Lex Mercatoria) by Domestic Courts” (2014)10:3 J Priv Intl L 489; Michael Joachim Bonell, “Soft law and Party Autonomy: The Case of the UNIDROIT Principles” (2005) 51:2 Loy L Rev 229.

<sup>127</sup> Paraguay. *A Paraguayan Law 5393 “on the law applicable to international contracts”* (2015), art 5. Indeed, it has been noted that the legislation, regarding choice of law, basically reproduces the *Principles* with minor modifications. See José Antonio Moreno Rodríguez, “The new Paraguayan Law on international contracts: back to the past?” (2016) vol 2 *Eppur Si Muove: The age of Uniform Law-Essays in Honour of Michael Joachim Bonell to Celebrate his 70<sup>th</sup> Birthday* 1 at 8, online: <[www.mondaq.com/pdf/clients/519934.pdf](http://www.mondaq.com/pdf/clients/519934.pdf)>.

<sup>128</sup> See Recital 13 of the *Rome I Regulation*’s Preamble, parties can only make a to a non-state law “by reference into the[ir] contract a non-State body of law or an international convention.”

*Rome I Regulation* can adopt the Principles or use it as a guide for the interpretation of a choice of a non-state law, as contemplated by the preamble of the *Principles*. Put more generally, can signatories to a Convention that does not allow the choice of a non-state law adopt the *Principles*' non-state law provision, even if persuaded by the provision in the *Principles*? The answer is in the negative because the *Principles* is a soft law that has no normative legal force to ensure compliance like the *Rome I Regulation*.<sup>129</sup> The *Principles* can only serve as a supplement when there is no conflict between it and the *Regulation*.<sup>130</sup> Indeed, in 2008, the European Commission proposed non-state law provisions to the European Council and parliament for inclusion in the *Rome I Regulation* but it was rejected in the final draft.<sup>131</sup> It is unsurprising that representatives from the European Union opposed the choice of non-state law in the *Principles* “with vehemence.”<sup>132</sup>

### **5.5. The Scope of Article 3 of the *Principles* and its Relationship with other Soft laws or Non-State Law – The PICC and the CISG**

Assuming that countries under a treaty obligation are persuaded to adopt article 3 of the *Principles*, the application of the *Principles* still raises some interpretational issues that arise from its relationship with some soft laws and non-state laws – PICC and CISG. This discussion argues that article 3, which makes provision for non-state laws, sometimes poses a challenge to systematic application and interpretation of the *Principles* with other soft laws and non-state laws—PICC and CISG. Also, the *Principles*, when interpreted in the light of its article 3, poses difficulty for determining the nature and scope of its provisions. This thesis

---

<sup>129</sup> In fact, the *Rome I Regulation* need not to be adopted by member states, it applies automatically. See Alférez, *supra* note 10 at 62.

<sup>130</sup> Consolidated Version of Preparatory Work Leading to the Draft Hague Principles on the Choice of Law in International Contracts Preliminary Document No 1 of October 2012 for the attention of the Special Commission of November 2012 on Choice of Law in International Contracts at 7, online: <<https://assets.hcch.net/docs/9436c200-bc46-40b7-817e-ae8f9232d306.pdf>>.

<sup>131</sup> Article 3(2) of the Commission's Proposal for Regulation of the European Parliament and the Council on the law applicable to Contractual Obligations states that “the parties may also choose as the applicable law the principles and rules of the substantive law of contract recognized internationally or in the community.” See COM (2005) 650 final of 15 December 2005, online: <[www.europarl.europa.eu/meetdocs/2004\\_2009/documents/com/com\\_com\(2005\)0650\\_/com\\_com\(2005\)0650\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2005)0650_/com_com(2005)0650_en.pdf)>.

<sup>132</sup> Michaels, *supra* note 106 at 11.

proposes interpretations that avoid some of the difficulties that arise from the *Principles*' application.

### 5.5.1. The Problematic nature and Scope of the *Principles*

The introduction to the *Principles* states that parties and their legal advisors are part of the envisaged users of the *Principles*.<sup>133</sup> Does this mean that parties can choose the *Principles* as a soft law? If article 3 permits the choice of a soft law, is this provision not self-selecting of the *Principles*, which itself is soft law? A commentator thinks that parties can opt into the *Principles*, like the CISG or PICC, because the *Principles* is also soft law or non-state law.<sup>134</sup> His reason is that the *Principles* did not expressly foreclose parties from opting into it.<sup>135</sup> This interpretation arises from a principle that everything that is not forbidden is permitted.<sup>136</sup> But this may not necessarily be so because the *Principles* could be interpreted by another statutory interpretation to the effect that the express mention of a thing in a statute excludes the other (*expressio unius est exclusio alterius*). Since the *Principles* did not expressly allow parties to opt into it, parties should be excluded from adopting it. Although the introduction to the *Principles* states that legal advisers and parties are its envisaged users, the preamble, which sets out the *Principles*' application, did not extend its application or scope to adoption by parties. Thus, the aim of the *Principles* is, through legal advice, to “guide” parties in their contracts clauses (incorporation); it does not aim to be a party-selecting governing law.

It may be argued that article 3 of the *Principles* contemplates that the *Principles* should be a self-selecting rule for parties. Comment 3.10 of the *Principles* requires that for a law to qualify as a non-state, such law must be used to

---

<sup>133</sup> See the *Principles*, *supra* note 1 at Para 1.20. The *Principles* is meant “for parties and their legal advisors, the Principles provide guidance as to the law or “rules of law” that the parties may legitimately be able to choose, and the relevant parameters and considerations when making a choice of law, including important issues as to the validity and effects of their choice, and the drafting of an enforceable choice of law agreement.”

<sup>134</sup> Marshal, *supra* note 104 at 13.

<sup>135</sup> *Ibid.*

<sup>136</sup> This principle is recognized in *Constitution of the Argentine Nation* (1995), § 19 (“[n]o inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit.”), online: <[www.biblioteca.jus.gov.ar/argentina-constitution.pdf](http://www.biblioteca.jus.gov.ar/argentina-constitution.pdf)>.

solve “common contract problems in the international context.” It can, therefore, be argued that since the *Principles* intends to solve common choice of law problems that arise from international contracts, it qualifies as a non-state law that parties may choose. This argument may not go too far because, generally, soft laws can be classified into two— procedural and substantive transnational law.<sup>137</sup> A procedural soft law aims to process the differences between the national laws – rules of private international law. It is a sort of transnational conflict of laws system, but a substantive soft law seeks to harmonize the targeted body or area of law – rules of law.<sup>138</sup> Therefore, a soft law can be classified as “rules of law” or “rules of private international law.” The PICC and the CISG are examples of rules of law, while the *Principles* is an example of a rule of private international rule. In effect, since article 3 only mentions “rules of law,” it impliedly excludes rules of private international law – thereby preventing the *Principles* from self-selecting itself. In fact, an earlier version of article 3 of the *Principles* explicitly stated that “parties may also designate non-state private international law rules.”<sup>139</sup> Since this provision was removed in the final draft of the *Principles*, it forecloses the *Principles* from becoming self-selecting.<sup>140</sup>

### **5.5.2. Does Article 6 (1) (a) of the *Principles* Contemplate that the Choice of a Non-state law be applied to Putative Issues?**

Article 6 (1) (a) of the *Principles* provides that “whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to.”<sup>141</sup> This provision subjects the agreement on choice of law to the putative proper law. This means that where one party challenges the existence of a choice of law agreement, either through duress, misrepresentation or any other vitiating contract element, reference must be made to the law to which the parties purportedly agreed.<sup>142</sup> It

---

<sup>137</sup> Larry Di Matteo, “Soft law and the Principle of Fair and Equitable Decision Making in International Contract Arbitration” (2013) Chinese J Comp L 1 at 13; see generally Graf-Peter Calliess, “The Making of Transnational Contract Law” (2007) 14:2 Ind J Global Leg Stud 469.

<sup>138</sup> Matteo, *ibid.*

<sup>139</sup> Draft Commentary on the Draft Hague Principles on the Choice of Law in International Contracts, November 2013, para. 8.13, online: <[https://assets.hcch.net/upload/wop/princ\\_com.pdf](https://assets.hcch.net/upload/wop/princ_com.pdf)>.

<sup>140</sup> Marshall, *supra* note 104 at 14.

<sup>141</sup> *Principles*, *supra* note 1.

<sup>142</sup> Commentary to the *Principles*, *supra* note 1 at 6.7.

answers the “bootstrap” arguments discussed in chapter 2 on whether the validity of a choice of law should be legally determined independently of parties’ choice.

The pertinent issue is whether reference to “law” in article 6 means reference to a state law or a non-state law. This issue is important because parties, through article 3, can solely choose a non-state law as the governing law of their contract. In this instance, it may be argued that the non-state law is the putative law of the contract. This argument may arise because the *Principles* does not clarify when it refers to state laws as opposed to non-state laws. However, this thesis argues that reference to a putative law in article 6 means a state law because the commentary to article 6 did not refer to a non-state law.<sup>143</sup> Even when the *Principles* referred to the CISG, it treated it as a state law, and not as a soft law instrument to be applied outside its intended geographical scope.<sup>144</sup>

This foregoing position is a plausible interpretation of article 6 (1) (a) of the *Principles* because the determination of a putative law through a choice of non-state law produces some problematic results.<sup>145</sup> The application of non-state laws to putative issues means that they will be applied outside their intended scope.<sup>146</sup> The PICC and CISG intend to answer substantive contract law questions; they do not intend to primarily cover private international law issues.<sup>147</sup> Although the PICC makes provisions for validity and formation of an agreement, these provisions can be excluded by parties.<sup>148</sup> Thus, parties can exclude provisions of the PICC relating to mistakes, impossibility of initial performance, and misrepresentation.<sup>149</sup> If parties exclude these provisions, the PICC cannot accept a reference on putative issues from the *Principles*.

The same scenario applies where the CISG is the chosen putative law. The CISG expressly limits its application to matters relating to the “formation of the

---

<sup>143</sup> See the *Principles*, *supra* note 1 at art 6, scenario 1 & 2.

<sup>144</sup> *Ibid*, see Comments 6.23 and 6.24.

<sup>145</sup> This thesis argues that, except the *Principles* is adopted by a state law, the parties’ choice of the *Principles* cannot mandate the choice of non-state law.

<sup>146</sup> Indeed, issues of validity or formation of contract are first subjected to the “domestically mandatory rules” before decisions on whether they comply with the UNIDROIT Principles. See the UNIDROIT Principles *supra* note 19 at art 1.4.

<sup>147</sup> Di Matteo, *supra* note 137 at 13.

<sup>148</sup> See chapter 2 and 3 of the UNIDROT Principles on formation and validity of a contract respectively.

<sup>149</sup> See article 3.1.3, 3.2.1 and 3.2.2 of the UNIDROIT Principles.

contract of sale and the rights and obligations of the seller and the buyer arising from such a contract.”<sup>150</sup> It excludes questions relating to the validity of a contract.<sup>151</sup> The CISG, therefore, does not contemplate the resolution of conflict of law issues especially on the choice of law.<sup>152</sup> It has been noted that “any issue of validity [of contract] ... falls outside the scope of the Convention and is governed by the rules of the domestic jurisdiction whose law is otherwise applicable.”<sup>153</sup> The rationale is that validity issues usually reflect public policy issues that are peculiar to each domestic legal system.<sup>154</sup> Indeed, the CISG cannot accept the *Principles*’ reference to independently determine the validity of a choice of law because the former is usually applied as part of the conflict of law rules of each forum state.<sup>155</sup>

The application of the CISG and PICC in putative decisions, therefore, creates a sort of “*renvoi*” between the *Principles* and the non-state laws. For example, while the *Principles* refer questions of validity of choice of law to the CISG, the latter refers it back to the *Principles* as a private international law rule because the CISG does not contain provisions that cater for this situation. This reference may go on indefinitely if the two non-state laws are not “creatively” interpreted.<sup>156</sup>

---

<sup>150</sup> The *CISG*; art 4; see also articles 14 and 19 on the formation of a sale of goods contract. By article 7 of the *Principles*, agreements on choice of law are separable contracts from the main contract. This makes the CISG inapplicable to choice of law agreements; the *CISG* only applies to contract of sale agreements.

<sup>151</sup> The *CISG*, art 4(a).

<sup>152</sup> This analysis is not restricted to choice of law agreements alone; it also applies to article 9(e) of the *Principles* which relates to validity of the main contract.

<sup>153</sup> Helen E Hartnell, “Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods” (1993) 18:1 Yale J Intl L 1 at 4; but see Amy Kastely, “Uniform and Community: A Rhetorical Analysis of the United Sales Convention (1988) 8 Nw J Intl L & Bus 575 at 621. (the commentator argues that the language of the Convention will lose its integrity if courts and arbiters interpret it according to their own domestic law).

<sup>154</sup> Hartnell, *ibid* at 49. (“[t]he purpose of article 4(a) is precisely to admit of national divergences regarding sensitive issues.”) He described this exclusion as a “political compromise.”

<sup>155</sup> Indeed Article 4(2) of the *CISG* directs the application of the private international rules in cases that are not “expressly settled” in the Convention. See Thomas Kadner Graziano, “Solving the Riddle of Conflicting Choice of Law Clause in Battle of Forms Situations: The Hague Solution” (2013) 14 YB Priv Intl L 71 at 96; See also Susie A Malloy, “The Inter-American Convention on the Law Applicable to International Contracts: Another Piece of the Puzzle of the Law Applicable to International Contracts” (1995) 19:2 Fordham Intl LJ 662 at 681 (“[t]he C.I.S.G. is not and does not purport to be a complete and exclusive set of international rules distinct from the many bodies of domestic law, which tend to be interpreted against a background of institutions and rules well known to each forum court”).

<sup>156</sup> For example, article 7(3) of the *CISG* provides that “[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by the rules of private international law.

The application of article 6(2) of the *Principles* may be a solution to these “renvoi” cases.<sup>157</sup> It provides that “the law of the State in which a party has its establishment determines whether that party has consented to the choice of law *if, under the circumstances, it would not be reasonable to make that determination under the law specified in paragraph 1.*”<sup>158</sup> This means that if it will be “unreasonable” to determine the choice of law under the law referred to, the court can resort to the law of the place of establishment of the party who seeks to impugn consent. This article enjoins users of the *Principles* to consider both the circumstance of the case, and the reasonableness of the law. There are two ways to interpret this provision to solve “renvoi” cases.

First, it could be argued that Article 6(2) is inapplicable to situations where the chosen non-state law does not contemplate its application in the first instance. For Article 6(2) to apply, the non-state law must contain provisions that are unreasonable or will lead to an absurd result.<sup>159</sup> Since choice of law rules governing choice of law agreements are absent or may be excluded in these non-state laws – PICC and CISG – there is nothing that produces an unreasonable result. The second interpretation takes into consideration both the circumstance of the reference and the effect of the application of a non-state law. The *Principles*’ reference to non-state law, which leads to a *renvoi* situation is, in itself, an unreasonable result that needs gap-filling by state laws.<sup>160</sup> This is because “reasonability” is a subjective term that arises from different scenarios. This thesis prefers the latter argument because it furthers the purpose of the *Principles* – to serve as a supplement for national statutes and international instruments.

---

<sup>157</sup> Marshall, *supra* note 104 at 30.

<sup>158</sup> Italics mine.

<sup>159</sup> An example is the case of *Milliken v Pratt*, [1878] 125 Mass Jud Sup Ct 374 discussed in chapter 3 above where the defendant’s law relieved her from paying a debt that she guaranteed, a contract that would have been valid at the place of the defendant’s establishment. Assuming the law of the defendant’s domicile was chosen in this instance, it would have produced an absurd result. Thus, the law of the place of establishment of the defendant was applied to avoid this absurdity.

<sup>160</sup> Therefore, article 3.15 of the *Principles* provides for a gap filling situation. The *Principles*’ Draft Report alluded to this interpretation when it stated that “[t]he Working Group also agreed to continue the analysis and discussions on the identification of the law applicable *where the chosen rules do not provide a solution* (gap-filling) [Italics for emphasis]. See the Report of the Second Meeting of the Working Group on Choice of Law in International Contracts (15-17 November 2010), online: <<https://assets.hcch.net/docs/6580f1b8-86d2-4c74-bc79-b933ea0376cf.pdf>>.



However, to avoid difficulty in the interpretation and application of article 6 (1) (a) of the *Principles*, the Hague Conference should clearly define “law” in subsequent amendments/reviews of the *Principles*. If the Hague Conference wishes that non-state law should be applied to putative circumstances, this should be explicitly stated.<sup>161</sup> Also, article 6(2) could be amended to include situations where it is impossible to determine the issues on validity of choice of law through a choice of a non-state law. By this amendment, the *renvoi* situation is avoided because the applicable law, in cases where non-state law is not applicable, will be the law of the place of establishment of the party that seeks to challenge the choice of a law.

### **5.5.3. The Normative Relationship of the Principles with other Non-State Laws**

The application of article 3 of the *Principles* raises normative issues with other soft laws.<sup>162</sup> The pertinent issue in this regard is whether the *Principles*, being soft law, can empower the choice of another soft law.<sup>163</sup> For example, the PICC contemplates that parties might empower its application if they choose a forum’s private international law rule. However, parties cannot choose through the *Principles* because the *Principles* does not have any legal force like national private international rules. Since the *Principles* and the PICC are both soft laws, the former cannot empower, direct, or control the application of the latter. In effect, the *Principles* and the PICC are in the same legal normative hierarchy. The *Principles* can only empower the PICC if the states adopt the former. It is the national private international rule that empowers the *Principles* to adopt another soft law.

The relationship between the *Principles* and the CISG is different from the PICC because the CISG is a binding convention in contracting states.<sup>164</sup> The CISG is applicable when the rules of private international law lead to the application of

---

<sup>161</sup> It should be noted that this will generate another level of argument on “private legislation” as stated by Henry Beale. See generally, Joseph Henry Beale, “What Law Governs the Validity of Contract I” (1909) 23:1 Harv L Rev 1.

<sup>162</sup> See generally, Marshall, *supra* note 104.

<sup>163</sup> This argument assumes that parties can adopt the *Principles*.

<sup>164</sup> The CISG is currently in force in 84 countries, including the United States, Canada, Russia, China, Japan, most American states (except Brazil and Bolivia), Australia, Singapore, European Union Member States (except The United Kingdom, Ireland, Portugal and Malta), and Switzerland. See Graziano, *supra* note 152 at 94 –5.

the law of a contracting state.<sup>165</sup> Clearly, this criterion does not contemplate soft private international rules like the *Principles*; it only contemplates private international law rules of countries.<sup>166</sup> It is, therefore, impossible for the *Principles* to control, empower, or direct the application of the CISG without the force of a national private international law rule. Thus, the *Principles* must first be adopted by countries, whether they are member states of the Hague Conference or not, before it could control the application of the CISG. This is because the *Principles* – a soft law – is lower in the legal normative hierarchy than the CISG – a hard law. Even if the CISG is chosen as a soft law in non-contracting states – where it becomes soft law – the *Principles* is still in the same legal normative hierarchy with CISG. Therefore, it cannot control the application of the CISG.

In sum, it is difficult to argue that some envisaged users of the *Principles* – parties and their legal advisers – can directly choose the *Principles* to control other soft laws, either because they are in the same legal normative hierarchy or because they outrank the *Principles*.

## 5.6. Conclusion

This discussion answers the question posed in this chapter in the negative, namely that the *Principles* cannot effect uniformity in the scope of party autonomy. Although scholars have expressed optimism for global acceptance of the *Principles*,<sup>167</sup> and, thus, a uniform scope of party autonomy, application of the *Principles* raises a new set of problems or challenges which range from acceptability to interpretational. This thesis showed the possible reluctance of both the developed and developing countries to accept or adopt some provisions of the *Principles*. The developing countries consider some of its provisions as lacking in sensitivity to their fragile economies and colonial history. The developed countries consider some of the *Principles*' provisions (for example, article 3) as an invitation to flout a treaty obligation. The *Principles* also face interpretational challenges.

---

<sup>165</sup> This is not the only condition for its application. See the *CISG*, art 1.

<sup>166</sup> Franco Ferrari, "PIL and CISG: Friends or Foes?" (2013) 31 *JL & Com* 43 at 58-59.

<sup>167</sup> Symeonides *supra* note 34 at 899; Pertegás & Marshal *supra* note 28 at 1002. The United Nations Commission on International Trade Law (UNCITRAL) endorsed the *Principles* in its Forty-Eight Session at Vienna on 29 June – 16 July 2015.

Though its provisions are explained through commentaries, it still encounters interpretational challenges that face most soft laws. These challenges arise from the ambiguity surrounding its scope as soft law, and its relationship with other soft and non-state laws. These issues, if not addressed, may make the *Principles* redundant as Klabbers has claimed.

The next chapter assesses the development of party autonomy so far, and recommends possible solutions to the new challenges that arise from the introduction of the *Principles*. The aim is to propose a better way to unify the scope or limitation of party autonomy in most jurisdictions and to solve some of the interpretational challenges identified in the discussion in this chapter.

## CHAPTER 6: CONCLUSION

### 6.1. Uniform Scope for Achieving Party Autonomy: Assessment

The universal recognition and development of party autonomy has been arduous and long, but the determination of its scope has been more arduous. The scope of party autonomy, as discussed in this thesis, still presents a global challenge for regional legislative bodies, international organizations and actors, and private international law scholars. As this thesis shows, various regional instruments have championed the cause to unify the scope with little success. However, there appears to be a new dawn with the Hague Conference's approval of the global soft model law – *Principles on Choice of Law in International Commerce* – that serves as a code of best practices on party autonomy and its scope in international commercial contracts. But, as this thesis shows, this instrument is not without its challenges, especially because it is the first of its kind in international choice of law instruments.

This thesis presented examples of sovereignty and interpretational challenges to the application of the *Principles*. These challenges, which arise from the divergent historical and economic backgrounds of countries, and the nature and scope of the *Principles* itself, militate against the uniformity and certainty goals of party autonomy in transnational trade or commerce. For instance, although Paraguay has adopted the provisions of the *Principles*, this lone “success” must not detract attention from the challenges that the *Principles* face. The question to be answered is how the Hague Conference can solve or, at least, minimize the challenges so as to achieve the *Principles*' objective – global acceptance and application of party autonomy and its scope.

The sovereignty of states is one of the reasons why the scope of party autonomy still lacks global uniformity. As this thesis shows, states limit party autonomy for various reasons. One reason, common to developing countries – Latin America and Africa – is the protection of national economies/interests from foreign exploitation. Countries in Latin America and Africa believe that allowing contracting parties to choose the governing law, in some instances, gives foreign

parties an opportunity to choose laws inimical to the interest of their economies. As a result, these countries show little interest in international instruments that permit wide application of party autonomy such as the *Principles*.<sup>1</sup> Consequently, these developing countries are barely conversant with the content and application of instruments like the *Principles*.<sup>2</sup> To remedy this situation, especially as it relates to the *Principles*, the Hague Conference must create avenues to address this apathy toward the *Principles* and to fill the information gap in order to interest developing countries in its potential benefits.

The Hague Conference can create awareness for the *Principles* by literally taking the *Principles* to the “doorsteps” of developing countries, especially countries where party autonomy is not accepted or where it is fundamentally restricted. This can be done by explaining the application of the *Principles* through workshops and seminars that highlight the benefits of adopting it, and to allay the fears associated with some of *Principles*’ provisions, and to suggest ways to better apply its provisions. Already, the *Principles* have generated discussion from the academy, but further discussion, especially from developing country scholars,, may generate knowledge and improve awareness of the Principles.<sup>3</sup> This may improve

---

<sup>1</sup> Argentina is an example. See Department of International Law, Secretariat for Legal Affairs Organization of American States, “The Inter-American Convention on the Law Applicable to International Contracts and the Furtherance of its Principles in the Americas” (Paper prepared by the Department of International Law, Secretariat for Legal Affairs Organization of American States, 15 March 2016) OEA/SG/DDI/doc. 3/16 [unpublished] at 21.

<sup>2</sup> See José Antonio Moreno Rodríguez & María Mercedes Albornoz, “Reflections on the Mexico Convention in the Context of the Preparation of the Future Hague Instrument on International Contracts” (2011) 7:3 J Priv Intl L 491 at 493. E Hernández-Bretón is convinced that this is the case. See E Hernández-Bretón, “La Convención de México (CIDIP V, 1994) como modelo para la actualización de los sistemas nacionales de contratación internacional en América Latina” (2008) 9 DeCITA, derecho del comercio internacional, temas y actualidades 170.

<sup>3</sup> See e.g. Symeon C Symeonides, “The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments” (2013) 61:3 Am J Comp L 29 (he hopes for positive outcomes); see also Andrew Dickinson, “A Principled Approach to Choice of Law in Contracts” (2013) Butterworths J Intl Ban & Fin L 159; Thomas Kadner Graziano, “Solving the Riddle of Conflicting Choice of Law Clause in Battle of Forms Situations: The Hague Solution” (2013) 14 YB Priv Intl L 71; Brooke Adele Marshall, “Reconsidering the Proper Law of the Contract” (2012) 13:1 Melb J Intl L 1; Moreno Rodríguez & M Albornoz, “Reflections on the Mexico Convention in the Context of the Preparation of the Future Hague Instrument on International Contract” (2011) 7:3 J Priv Intl L 491; Brooke Adele Marshall, “The Hague Choice of Law Principles, CISG and PICC: A Hard Look at a Choice of Soft Law” Max Planck Private Law Research Paper no 16/27 (2018) Am J Comp L 1(forthcoming); Jürgen Basedow, “The Hague Principles on Choice of Law: Their Addressees and Impact” (2017) 22:2 Unif L Rev 304; Peter

information for, among others, the *Principles* more generally, notwithstanding its wide-ranging party autonomy provisions. Of course, as the experience with the *Mexico Convention* shows,<sup>4</sup> knowledge of the application of the *Principles* would not necessarily translate into its global acceptance.

To make the *Principles* a universal, acceptable code of best practices on the doctrine of party autonomy and its scope, the Hague Conference must, when reviewing the *Principles*, consider some underlying factors of concern to the developing countries. As discussed, the *Principles* did not, generally, take into consideration the reality of unequal bargaining power in international contracts, especially as it affects developing countries. Provisions in the *Principles*, especially article 11 which subjects every choice of law agreement to public policy and the operation of the mandatory laws of the forum and third states, are limited in their application and, as a result, “they do not necessarily coincide with the need to protect the weaker party.”<sup>5</sup> If the *Principles*’ provisions are not reviewed to generally protect against the adverse impacts of unequal bargaining power in international contracts, it may be of no interest in developing countries that are eager to protect their economies. Left in its current form, the *Principles*’ provisions, especially in relation to unrestricted party autonomy, may expose developing countries’ economies to threats from developed state parties or large multinational corporations from developed countries.

The Hague Conference should take a cue from two regional instruments in the inter-American sphere that make provisions for weak parties. If it does, it may help developing countries to cease thinking of the *Principles*’ provisions as a “disguised attempt to consecrate policies amenable to Western interests as rules of universal validity.”<sup>6</sup> Article 4 of the *Buenos Aires Protocol on International Jurisdiction in Contractual Matters* provides that parties may choose a jurisdiction

---

Mankowski, “Article 3 of the Hague Principles: The Final Breakthrough for the Choice of Non-State Law?” (2017) *Unif L Rev* 369.

<sup>4</sup> Despite academic discussions on the scope and benefits of the *Mexico Convention*, only two countries are signatories to it—Mexico and Venezuela.

<sup>5</sup> See Peter Nygh, *Autonomy in International Contracts* (Oxford: Clarendon Press, 1999) at 141.

<sup>6</sup> Hyder Razvi, “Mandatory Rules of Law in International Business Arbitration” (1998) 3:2 *Lahore Journal of Economics* 35 at 58.

“provided that [the] agreement has not been obtained *abusively*.”<sup>7</sup> Also, article 1(d) of the *Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments* provides that the forum choice is valid “provided that such jurisdiction was not established in an abusive manner and had a reasonable connection with the subject matter of the action.”<sup>8</sup> These clauses take into consideration the actual negotiating capacity of parties and the possible abuse that arises from unrestricted party autonomy.<sup>9</sup> These provisions are recommended to the Hague Conference.

Article 11 of the *Principles* could also be amended by including a provision that generally protects a weaker party as follows:

Notwithstanding the mandatory laws and public policy of the forum state and a third state, the forum court shall apply the law of the habitual residence of the weaker party or parties with less bargaining power in cases where parties have not really agreed on the choice of law or there is a likelihood of abuse due to unequal bargaining power. Such application may be raised by the weaker party or by the court *suo motu*.

Apart from the issue on unequal bargaining power, the *Principles*' proposal for applying non-state laws (article 3) in international litigation proceedings merits a review. This provision should be removed from the *Principles* because it does not have any effect on the goals that the *Principles* seek to achieve as to the scope of party autonomy – certainty, predictability and uniformity. It is difficult to imagine how the proposal or the introduction of non-state laws in international commercial litigation proceedings will ensure certainty or uniformity of party autonomy, as most countries, except Paraguay and Venezuela, do not allow the choice of non-state law. It is doubtful that article 3 of the *Principles* will be accepted in the

---

<sup>7</sup> *Buenos Aires Protocol on International Jurisdiction in Contractual Matters*: MERCOSUR/CMC/DEC. N° 01/94. See also Cecilia Fresnedo de-Aguirre, “Party Autonomy- A Blank Cheque?” (2012) 17:4 *Unif L Rev* 665 at 663 [Emphasis mine].

<sup>8</sup> CIDIP-III, La Paz, 1984; see also Solari Barrandeguy, *Pactos Procesales de La Paz*, (1986) Montevideo, Fundación de Cultura Universitaria 50 quoted in de-Aguirre, *supra* note 7 at 663 [Emphasis mine].

<sup>9</sup> Solari Barrandeguy, *Pactos Procesales de La Paz*, (1986) Montevideo, Fundación de Cultura Universitaria 50, quoted in de-Aguirre, *ibid*.

European community, especially because a regional treaty – *Rome I Regulation* – prohibits parties to choose a non-state law. It also presents a big step for developing countries that had, hitherto, not recognized party autonomy. Now, they will not only recognize party autonomy but also recognize a non-state law. Of course, the *Principles*, may be used by for interpretation of national statutes, but is this the best that the *Principles* can achieve?

So, how can the introduction of non-state law represent “international best practice” in international commercial contracts as claimed by the *Principles*? It is not clear to whom the introduction of non-state law represents best practices: countries, or the Hague Conference’s Working Group. It is not the countries because, since the *Principles* is a soft law, they did not negotiate on this provision. The conditions of neutrality, general acceptance and the balanced nature of a non-state law create another set of disputes on its own because these words are ambiguous, resulting in uncertainty of decisions. Such a situation had hitherto been absent from the application of non-state law, albeit, in arbitral proceedings. In effect, instead of the *Principles* finding solutions to the existing divergence on the scope of party autonomy, the application of non-state law creates a new set of problems. Indeed, the introduction of this provision creates an unnecessary distraction from other issues of party autonomy which require uniform application in most jurisdictions.<sup>10</sup> The Hague Conference may wish to draft a comprehensive hard law instrument that will give states the opportunity to negotiate a non-state law proposal, instead of experts’ proposal in a soft law.

The Hague Conference should also review interpretational challenges which arise from the nature of the *Principles* and its relationship with other soft and non-state law. For example, the Conference should negatively answer the question of whether the *Principles* is a self-selecting rule for parties. Also, the relationship of the *Principles* with other soft laws merits further review, especially where it is impossible to solve conflict of law issues through reference to a putative soft law

---

<sup>10</sup> Ralf Michaels agrees with this opinion. See Ralf Michaels, “Non-State Law in the Hague Principles on Choice of Law in International Contracts” in K Purnhagen, Kai, Rott, Peter eds, *Varieties of European Law and Regulation: Liber Amicorum for Hans Micklitz* (Gewerbestrasse, Switzerland: Springer International Publishing, 2014) at 23 (“article 3 responds to a need that is not really there”).



(article 6(1) (a)). In this case, article 6(2) could be amended to include situations where it is impossible to determine the issues on validity of choice of law through a choice of a non-state law. By this amendment, the *renvoi* situation is avoided because the applicable law, in cases where non-state law is not applicable, will be the law of the place of establishment of the party that seeks to challenge the choice of a law.

In sum, the *Principles* could mean the beginning of a new dawn if the Hague Conference on private international law accommodates some of the issues of concern in the developing countries and also further expatiates on some of the *Principles*' provisions. However, this is not to boldly claim that total uniformity is achievable once these issues are resolved. This is because of the peculiar sovereignty challenges that constantly arises in private international law. As stated in chapter 1, the role of scholars concerned with private international law is to constantly seek common criteria through which cases that has foreign elements are decided. Even if total uniformity may be unrealistic in private international law, we must "substantially" seek uniform rules that do justice between private individuals in transnational contract. For example, although the disparity of bargaining power is a reality among states, the Hague Conference can make rules that minimize the effect of such disparity, even if it may not be able to totally bridge it. The Hague Conference may have acknowledged this in its provisions on mandatory rules and public policy. However, these provisions are not enough to bridge such disparity gap in unequal bargaining power of parties across jurisdictions. A general clause as suggested in this subsection would mean that the effect of the disparity is realistically considered.

## **6.2. General Conclusion**

Transnational trade is a natural phenomenon in the world, just like sleeping, eating, laughing, and crying are natural to human life.<sup>11</sup> Party autonomy, which is a function

---

<sup>11</sup> See Joseph M Perillo, "Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review" (1994) 63:2 Fordham L Rev 281 at 281.

of every legal system, is the freedom of contracting parties to choose a governing law for their transnational trade contracts. Therefore, as a choice of law rule, party autonomy would encourage transnational trade or commerce in the 21<sup>st</sup> century, because if parties can choose the governing law of their contracts, business persons who engage in trans-border trade are certain of their contractual choices and would be encouraged to carry on business. Thus, it is, of interest for transnational trade that there should be a global application and scope of party autonomy. In effect, if parties in international contracts know when they are permitted to choose a governing law, and to what extent such a choice is permissible, they will be eager to do business with each other.

This thesis examined the history of party autonomy in four different regions: Continental Europe, Anglo-America, Latin America, and Africa. The histories and developments in party autonomy in these regions are uneven, influenced by varying factors – scholarship in continental Europe; case law in Anglo-American society; colonialism in Latin America and Africa with their resultant fragile economies. The development of party autonomy in these regions was also characterized by arguments for and against the doctrine. Some scholars argued that party autonomy is the enthronement of the parties’ will within the ambit of the law, but other scholars regard the doctrine as a license for contracting parties to perform a “legislative act.”<sup>12</sup> The latter, therefore, argue that party autonomy must be subject to the sovereign power of a state through its legislation.

Notwithstanding the arguments against the doctrine, the rise of international trade in the 20<sup>th</sup> century required most countries to recognize party autonomy. Notwithstanding the recognition, some Latin American and African countries have still not recognized party autonomy or fundamentally its scope, partly for reasons of the late development of the doctrine in the regions, but mainly for the adverse economic effects of their colonial experiences.

It is the case that the history of party autonomy cannot be isolated from other choice of law rules. Consequently, arguments against party autonomy necessarily

---

<sup>12</sup> Beale championed this cause. See generally Joseph Henry Beale, “What Law Governs the Validity of Contract I” (1909) 23:1 Harv L Rev 1.

feature arguments in favour of other choice of law rules. This thesis examined other such rules, including the law of the place of contracting (*lex loci contractus*), law of the place of performance (*lex loci solutionis*), law of the place that validates the contract (*lex validitatis*), and the law of the place of domicile (*lex domicilii*). As noted, these are all characterized by uncertainty and absurdity in their application.<sup>13</sup> However, the application of the party autonomy rule (express intention) ensures certainty and uniformity in choice of law decisions. The thesis argued that party autonomy, because of its certainty and uniformity function in international commerce, is the “least problematic” choice of law rule. Although courts still apply other choice of law rules, they only resort to them in cases where parties have not made an express choice of law.

However, as advantageous as the doctrine of party autonomy is to international trade, to leave it unrestricted is to open it to abuse by parties with superior bargaining power over those with less bargaining power. National laws, therefore, restrict the scope of the doctrine to prevent or minimize this potential. In other words, the sovereignty of states permits them to control the scope of party autonomy for different reasons ranging from the economic to the political.

The comparative analysis of countries’ varying applications of the limitation of party autonomy showed that the importance of party autonomy, certainty and uniformity may be under threat because (1) party autonomy is essentially a manifestation of national intent, rather than a matter of supranational recognition; (2) absolute or unlimited party autonomy is almost impossible in any legal system; (3) there are varying degrees or scope of party autonomy in different countries, depending on which factors held sway, from the economic, through history, to the religious; (4) the relative exceptions and expansion of the doctrine and constraints in most jurisdictions challenge the realization of the uniform scope of party autonomy.

For the foregoing reasons, regional instruments, including the *Rome I Regulation*, the *Mexico Convention*, and the *Montevideo Convention*, have sought to

---

<sup>13</sup> It should be noted that some scholars see these choice of law rules as express intentions of the parties because the connecting factors for determining the rules are based on the actions or intentions of the parties. For example, it is the parties’ action to execute a contract in a place that activates the *lex loci contractus* rule.

unify the scope of party autonomy. Notwithstanding that these conventions are hard laws, the scope of party autonomy remains divergent around the world. One of the reasons may be that these instruments, being regional instruments, concentrate on the regional peculiarities of each enacting body. They have also been criticized as lacking to cater for all conflict of laws situations and are sometimes, insensible to the peculiar needs of countries. This accounts for low ratifications of some of the instruments.<sup>14</sup>

To push uniformity forward, notwithstanding, the Hague Conference on private international law developed an instrument that possesses characteristics different from the existing regional hard law instruments on the subject, *Principles on Choice of Law in International Commercial Contracts*. This soft law instrument commands no obligation from states; it only serves as a model law for states to adopt. It aims to solve the existing global challenge on party autonomy and its scope that this thesis examined in chapter 4. For the first time in the history of a choice of law instrument, this soft law seeks to make uniform provisions on the scope of party autonomy, not just for courts but for arbitral proceedings. Some commentators have expressed hope that if its provisions are globally adopted, it will eradicate or, at least, reduce the challenges as to uniform scope of party autonomy.

But this thesis highlighted some challenges that may still confront the *Principles*. These challenges arise from the uneven development of party autonomy in the four regions examined in this thesis. The Hague Conference did not consider, or neglected the interests of developing states in some of the provisions of the *Principles*, especially articles 3 and 2(4) of which relate to the introduction of non-state laws, and an unrestricted party autonomy, respectively. Although the *Principles* exclude consumer and employment contracts from its scope, developing countries may still feel threatened by provisions that give wide latitude to parties to choose any governing law in their international contracts, simply for reason of economic power disparities that favour the developed countries, and/or their multinational companies.

---

<sup>14</sup> As noted in Footnote 4.

Article 11 of the *Principles* which provides that parties shall not derogate from the application of mandatory statutes or the public policy of the forum or third state, is not enough to prevent the abuse of party autonomy. This is because it makes the mandatory law of a third state discretionary and a matter of interpretation for the forum court. Moreover, article 11 does not cover the provisions of localised laws that most developing countries enact to protect their residents and national economies. A forum court can, therefore, refuse the application of a third state's mandatory law, either because it does not consider it to be mandatory, or because it does not recognize its localized law. To this extent, the *Principles* may not command global adoption, especially in some developing countries.

The *Principles'* proposal of non-state law in its article 3 in national courts may also be a step too far in a soft law. Although Paraguay has recognized the application of non-state laws in its national courts, non-state laws have been rejected by most jurisdictions. One reason for its rejection, especially in Africa, is that most African countries were not part of organizations that drafted some soft laws, and so, their interests were not represented in them. A likely reason for its rejection in continental Europe is that a hard law – the *Rome I Regulation* prohibits the application of soft laws in national courts to resolve in disputes arising from international contracts. The best possible way to introduce a non-state law in international commercial litigation is through a hard law, where states have the opportunity to negotiate the application and scope of such a law.

The *Principles'* conditions for the application of a non-state law, which relate to acceptance and the neutral and balanced nature of the non-state law, also create difficult interpretational hurdles for parties and national courts to cross for reasons of their ambiguity, creating another set of interpretational disputes. Parties and national courts may interpret the conditions differently, such that certainty and uniformity in the application of non-state laws are lost both in international commercial litigation and arbitration proceedings. This, in turn, creates uncertainty in the enforcement of judgments decided on a non-state law because the application of a non-state law may be against the enforcing country's public policy.

Apart from the neglect of national values in some developing countries and the controversial introduction of non-state laws in international commercial litigation proceedings, the nature of the *Principles* and its application, just like other soft laws, creates further interpretational issues. The *Principles* shares a similar legislative approach with other soft laws, especially UNCITRAL's *Principles of International Commercial Contracts*. However, its application is different from them. Other soft laws regulate the substantive contract terms in specific contract situations – rules of law. In contrast, the *Principles* regulates only the choice of law as it relates to party autonomy – rules of private international law. Therefore, since party autonomy is a function of national private international rules, parties cannot adopt or choose the *Principles* as the governing law in their contracts, like other soft laws. They can, however, incorporate its provisions into their contracts. In effect, although the *Principles* shares the characteristics of other soft laws, it is different in application.

Finally, on the international legislative hierarchy, the *Principles* possess no legal normative force, just like other soft laws. Thus, it cannot empower the choice of another soft or hard law because it does not possess the legal normative power to do so. Its provisions must, therefore, remain persuasive to its envisaged users. Consequently, reference to other soft or hard laws in the *Principles* is subject to national private international law rules. This is more so because reference to other soft laws, sometimes, produces unintended results because the latter does not contemplate such reference or even refers the issues back to private international law rules.

In sum, the Hague Conference's introduction of the *Principles* as a soft choice of law instrument constitutes a step in the right direction to unify the scope of party autonomy. However, the *Principles* face acceptance and interpretational challenges in its application to international commercial contracts. It is, therefore, too early to think that a new dawn on the uniform scope of party autonomy has arrived.

## BIBLIOGRAPHY

### International Materials

#### *Treaties*

*EC, Regulation (EC) No 593/2008 of the European Parliament and of the Council on 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I).*

*Convention on the Law Applicable to Contractual Obligations, with Protocol, and Joint Declaration – Rome Convention, 19 June 1980, 19 ILM 14.*

*United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988).*

*Hague Convention on the Law Applicable to Matrimonial Property Regimes, 14 March 1978, 16 ILM 14 (entered into force 1 September 1992).*

*EC, Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, [2007] OJ L199/40 (Rome II).*

*Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, 23 November 2007 (entered into force 1 August 2013).*

*Convention on the Law Applicable to Contractual Obligation, with Protocol, and Joint Declarations, 19 June 1980; BTS 2 (1992) (entered into force on 1 April 1991).*

*Inter-American Convention on the Law Applicable to International Contracts, 17 March 1994, 33 ILM 732, 733.*

*Hague Convention on the Law Applicable to Agency, 14 March 1978, 16 ILM 775 (entered into force 1 May 1992).*

*International Convention for the Unification of Certain Rules Relating to Bills of Lading, with Protocol of Signature, and Process-Verbal of Deposit of Ratifications, 25 August 1924, 120 LNTS 155 (entered into force 2 June 1931).*

*Statute of the Hague Conference on Private International Law, 31 October 1951, 220 UNTS 121 (entered into force 15 July 1955).*

*Treaty on International Civil Law, 12 February 1889, 18 Martens (2d) 443 (Sp) (entered into force 3 September 1889).*

*Convention on the Rights and Duties of States, 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934).*

### ***Other International Materials***

*Universal Declaration of Human Rights*, GA Res 217 (III), U.N. GAOR, 3d Sess., Supp. No 13, U.N. Doc A/810 (1948).

*Principles of International Commercial Contracts*, 2010.

*Principles on Choice of Law in International Commercial Contracts*, 2015, online:<[www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf](http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf)>.

### **National Legislation**

*Admiralty Jurisdiction Act* Cap A5 Laws of the Federation Nigeria, 2004.

*Algerian Civil Code*, 2007.

*Angola Civil Code*, Law Decree 496 of 25 November 1977.

*Armenian Civil Code*, 1998.

*Austrian Federal Statute on Private International Law*, 1978.

*Bulgarian Private International Law Code* Law No 42 of 2005 as amended by Law No 59 of 2007.

*Cape Verde Civil Code*, 1997.

*Chinese Private International Law Act*, 2010.

*Civil and Commercial Code of the Argentine Republic*, 2015.

*Civil Code of Guinea-Bissau*, re-enacted by *Guinea-Bissau Law* No 1/73 of 27 September 1973.

*Civil Code of Qatar* as amended by Law 22/2004 of 8 August 2004.

*Civil Code of the Russian Federation, Part III*, enacted by *Federal Law* No 146 of 26 November 2001.

*Civil Code of the Social Republic of Vietnam*, 1995.

*Civil Peruvian Code*, 1936.

*Civil Procedure Code, Federal Law* no 11 of 1992 (UAE).



*Constitution of the Argentine Nation*,1995.

*Cuba Civil Code (Law No 59)*, 1998.

*Czechoslovakian Act No 97*, 1963.

*Electronic Communications and Transactions Act*, No 21, 2009 (Zambia).

*Estonian Private International Law Act*, 2002.

*Federal Law of No (5) of 1985 On the Civil Transactions Law of the United Arab Emirates*, Amended by *Federal Law No (1) of 1987 (UAE)*.

*Code of Civil Procedure*, 1981 (France).

*German Introductory Law to the Civil Code (EGBGB)*, 1986.

*Japanese Act on the General Rules of Application of Laws*, Law No 10 of 1898, amended in 2006.

*Law No 10428 on Private International Law*,2011. (Albania)

*Law No. 3 of 2005 on the Protection of Competition and Prohibition of Monopolistic Practices*, 2005.

*Liechtenstein Private International Law Act*,1996.

*Lithuanian Civil Code*, 2000.

*Moldova Civil Code Law 1107*, 2002.

*Mozambique Civil Code*, enacted by *Portuguese Ordinance No 22,869* of September 1967.

*National Office for Technology Acquisition and Promotion Act Cap 62* Laws of the Federation Nigeria, 2004.

*Panamanian Private International Law Code Law No. 7*, 2014.

*Paraguayan law “Regarding The Applicable Law to International Contracts”* no 5393, 2015.

*Peruvian Civil Code*, 1985.

*Private International Law Act*, 2002. (Russia)

*Quebec Civil code SQ 1991*, c 61.

*Serbian Ministry of Justice Draft Code on Private International Law*, 2012.

*Spanish Civil Code*, 1974.

*Statutes of Newfoundland, 1932, C 18.*

*Switzerland Federal Act on Private International law* 1989, amended on 1<sup>st</sup> July 2014.

*Turkish Code of Private International Law and International Civil Procedure*, 2007.

*Turkish Code of Private International Law and International Civil Procedure*, Law No. 5718, 2007.

*Ukrainian Private International Law No 2709 –IV* as amended, 2005.

*Uniform Commercial Code*, 2008. (United States)

*Uruguay Draft General Law of Private International Law*, 2009.

*Venezuela Act of 6 August 1998 on Private International Law*, 1998.

## **Jurisprudence**

### **Australia**

*Commercial Bank of Australia v Amadio*, (1983) 151 CLR 44.

*Freehold Land Investment Ltd v Queensland Estate Ltd*, (1970) 123 CLR 48.

*Golden Acres Ltd v Queensland Estates*, [1969] St R Qd 378.

*Queensland Estate v Collas*, [1971] St R Qd 75.

*Oceanic Sun Line Special Shipping Co Inc v Fay*, (1988), 62 ALJR 389, 165 CLR 197 (AUST)

### **Canada**

*Dickson in R v Wetmore*, [1983] 2 SCR 284.

*Cloyes v Chapman* (1876), 27 UCCP 2.

*Etlar v Kertesz* ([1961], 26 DLR (2d) 209 (Ont CA).

*Imperial Life Assurance Co. of Canada v Colmenares*, [1967] SCR 443.

*United Nations v Atlantic Seaways Corporation*, [1979] 2 FC 541.

*Hunter Engineering Co v Syncrude Canada Ltd*, [1989] 1 SCR 426.

*Bank of Montreal v Snoxell* (1982), 143 DLR (3d) 349.

*Nike Infomatic Systems Ltd v Avac Systems Ltd* (1979), 105 DLR (3d) 455 (BCSC).  
*GNLV Corp v Wan*, [1991] 30 ACWS (3d) 1132 (BCSC).

### **Kenya**

*Friendship Container Manufacturers Ltd v Mitchell Cotts, (K) Ltd*, [2001] 2 EA 338 (Kenya)  
*Fonville v Kelly III*, [2002] 1 EA 70 (Kenya).  
*Karachi Gas Co Ltd v Issaq*, [2002] 1EA 71 (Kenya).  
*Raytheon Aircraft Credit Incorporation v Air-Faraj Limited*, [2005] 2 KLR 47 (Kenya).  
*Universal Pharmacy (k) Limited v Pacific International Lines (PTE) Ltd & Kenya Railways Corporation*, [2015] eKLR 1(Kenya).

### **Nigeria**

*JFS Investment Ltd v Brawal Line Ltd & Ors*, [2010] 18 NWLR (Pt 1225) 495.  
*Fuduk Engineering Ltd v McArthur*, [1995] All NLR 157.  
*Sonnar (Nigeria) Ltd. v Partenreedri M S Nordwind*, [1987] NWLR (Pt 66).  
*Commet Shipping Agencies (Nigeria) Ltd. v Panalpina World Transport (Nigeria) Ltd*, [1990] LRC (Comm) 206 (Nigeria).

### **United Kingdom**

*Robinson v Bland* [1760] 2 Burr 1077.  
*Re Missouri S S Co* (1889), 42 Ch Div 321 at 340-341.  
*Foubert v Turst*, [1703]1Eng Rep 464.  
*Quarrier v Colston*, [1842] 1 Phillips 147,41 Eng. Rep. 587 (Ch.)  
*In Re Missouri 2* (1889), 42 Ch Div 321 at 340-341. §  
*P & O Stearn Navigation Co. v Shand*, [1865] 3 Moo PCC NS 272.  
*Jacobs v Crédit Lyonnais*, [1865] LR QB115.  
*Jacobs v Crédit Lyonnais*, [1884] 12 QBD 589.  
*Stapleton v Conway*, 3 Atk R 727.

*Vita Food Products v Unus Shipping Co*, [1939] AC 277.  
*Mount Albert Borough Council v Australian Temperance and General Mutual Society*, [1938] AC 224.  
*R v International Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] LJKB 236.  
*Re Helbert Wagg & Co Ltd*, [1956] Ch 323.  
*Kleinwort Sons & Co v Ungarische Baumwolle Industrie AG*, [1939] 2 KB 678.  
*Ralli Bros v Compania Naviera Sota Y Aznar*, [1921] 2 KB 287.  
*Richardson v Mellison* (1824), 130 Eng. Rep. 294.  
*Fry v Lane*, (1888), 40 Ch D 312.  
*Cresswell v Potter*, [1978] 1 WLR 225 at 257.

### **United States**

*Pritchard v Norton*, 106 US 124 (1882).  
*Wayman v Southand*, 23 US 148 (1825).  
*London Assurance v Companhia de Moagens do Barreior*, 167 US 149 (1890).  
*Mutual Life Insurance Company of New York v Tine Cohen*, 179 US 262 (1900).  
*Pinney v Nelson*, 183 US 144, 22 S Ct 52 (1901).  
*Mutual Life Insurance Company of New York v Hill*, 193 US 551 (1904).  
*E Gerli and Company v Cunard S S Co*, 48 F 2d 115 (2d Cir 1931).  
*Slater v Mexican Nat'l Railroad Co*, 194 US 120 (1904).  
*Dreyfus v Paterson Steamships Ltd*, 43 F 2D 824 at 827 (2D Cir 1930).  
*Seeman v Philadelphia Warehouse Co*, 274 US 403 (1927).  
*The Bremen v Zapata Off-Shore Co*, 407 US 1 (1972).  
*Milliken v Pratt*, [1878] 125 Mass Jud Sup Ct 374.  
*Auten v Auten*, 308 NY 155 (1954).  
*Haag v Barnes*, 9 N Y 2d 554 (1961).  
*Dym v Gordon*, 16 NY 2d 120 (1965).  
*Kossick v United Fruit Co*, 365 US 731 (1961).  
*Arnold v Potter*, 22 Iowa 194 (1867).

*Lilienthal v Kaufman*, 239 OR Sup Ct 1 395 P 2d 543 (1964).  
*Siegelman v Cunard White Star Limited*, 221 F 2d 189 (2d Cir 1995).  
*Southern Int'l Sales Co v Potter & Brumfield*, 410 F Supp 1339 (SDNY 1976).  
*Wright v Martek Power Inc*, 314 F Supp 2d 1065 (D Colo 2004).  
*Sentinel Indus Contracting Corp v Kimmins Indus Service Corp*, 743 So 2d 954 (Miss 1999).  
*Robinson v Robinson*, 778 So 2d 1105 (SC La 2001).  
*Curtis 1000 Inc v Suess*, 24F 3d 941 (7<sup>th</sup> Cir 1994).  
*Fuller Company v Compagnie De Bauxites De Guinee*, 421 F Supp 938 (WD Pa 1976)  
*Radioactive, JV v Manson*, 153 F Supp 2d 462 (SDNY 2001).

### **South Africa**

*Guggenheim v Rosenbaun*, [1961] 4 SA 21 (South Africa).  
See *Creutzburg v Commercial Bank of Namibia*, [2006] 4 All SA 327 (South Africa).  
*Tesoriero v Bhyjo Investments Share Block (Pty) Ltd*, [2000] (1) SA 162 (South Africa).  
*Cooper v Bros & Co v HWJ Bottriel & Co Ltd*, [1971] (1) SA 22 (South Africa).

### **Other Countries**

*CILEV v Chiavelli*, [1967] GLR 651 (Ghana).  
*Fan Milk Ltd v State Shipping Corporation*, [1971] 1 GLR 238 (Ghana).  
*Van Nievelt, Goudriaan and Co's Stoomvaartmij NV v Hollandsche Assurantie Societeit and Others* [ALNATI case] HR 13 May 1966.  
*CEP v Sensor Nederland* Rh Den Haag, 17 September 1982, (1983) 23 International Legal Matters 66.  
*Embotelladora Caracas CA et al v Pepsi Cola Panamericana SA*, [1997] SPA Tribunal Supremo de Justicia, (Sala Politico administrative) 1421.  
*Star City Pty Ltd v Tan Hong Woon*, [2002] 2 SLR 22 (CA) (Singapore).

### **Secondary Material: Monographs**

- Alhmad Shaiba Aoudallah (تنزاع القوانين واحكام التنزاع القضائي في القانون المراتي) *Conflict of Laws and the Conflict of Internal Jurisdiction in the Emirati Law* (Dubai, United Arab Emirate: Dubai Police Academy, 2001).
- Arroyo P Fernandez, Diego. *La codificación del derecho internacional privado en América Latina: ámbitos de producción jurídica y orientaciones metodológicas*, vol 6 (Madrid: Beramer, 1994).
- Awong, Ekokobe Stephen. *A Critical Analysis on the Reasons of Underdevelopment in Africa* (Munich: GRIN publishing, 2011).
- Batiffol, Henri. *Form and Capacity in International Contracts Lectures on Conflict of Laws and International Contracts* delivered at the Summer Institute on International and Comparative Law University of Michigan Law School 5 August 1949 (Buffalo, New York: Hein & Co, 1982).
- Battifol, Henri & Paul Largade. *Droit International Privé*, 7th ed (Paris: La Librairie Juridique de reference en Ligne, 1981).
- Beale, Henry Joseph. *A Treatise on the Conflict of Laws* vol 2 (New York: Baker, Voorhis & Co, 1935).
- Briggs, Adrian. *Agreements on Jurisdiction and Choice of Law* (Oxford, UK: Oxford University Press, 2008).
- Brownlie, Ian. *Principles of Public International Law*, 7th ed (Oxford, UK: Oxford University Press, 2008).
- Castel, Jean-Gabriel. *Canadian Conflict of Laws*, 3rd ed (Toronto, Canada: Butterworths, 1993).
- Castel, Jean-Gabriel. *Canadian Conflicts of Laws*, 4th ed (Toronto, Canada: Butterworth publishers, 1997).
- Cavers, F David. *Choice of Law Process* (Michigan: University of Michigan Press, 1965).
- Cheshire, GC. *International Contracts* (the fifteenth Lecture on the David Murray Foundation in the University of Glasgow, delivered on March 4, 1948) (Glasgow, UK: Jackson, Son & Company. 1948).
- JJ Fawcett & JM Carruthers. eds, *Cheshire, North & Fawcett: Private International Law*, 14th ed (Oxford: Oxford University Press, 2008)

- Collins, Lawrence et al. eds, *Dicey & Morris on The Conflict of Laws*, 13th ed (London, UK: Stevens & Sons, 2000).
- Cook, Wheeler Walker. *The Logical and Legal Basis of Conflict of Laws* (Massachusetts: Harvard University Press, 1949).
- Currie, Brainerd. *Selected Essays on the Conflict of Laws* (Durham, UK: Duke University Press, 1963).
- De Saxoferatto, Bartolus. *Conflict of Laws* (Beale's translation) (Cambridge, UK: Harvard University Press, 1914).
- Di Matteo, A Larry. *Law of International Contracting*, 2nd ed (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2009).
- Dicey AV & JHC Morris. eds, *Dicey and Morris on The Conflict of Laws*, 8th ed (London, UK: Stevens & Sons, 1967).
- Dicey AV & JHC Morris. *Dicey and Morris on The Conflict of Laws*, 9th ed (London, UK: Stevens & Sons, 1973).
- Dicey Venn Albert. *A Digest of the Law of England with Reference to the Conflict of Laws* (London, UK: Stevens and Sons, 1896).
- Dicey, Venn Albert. *Conflict of Laws*, 7th ed (London, UK: Sweet & Maxwell, 1958).
- Eagleton, Terry & Michael Payne. *The Significance of Theory* (Hoboken, New Jersey: Wiley Blackwell, 1992).
- Ehrenzweig, Albert. *Conflicts in a Nutshell*, 2nd ed (Boston: St Paul, 1970).
- Ehrenzweig, Albert & Erik Jayme. *Private International Law, A Comparative Treatise on American International Conflicts Law, Including the Law of Admiralty*, vol 3 (Leyden: AW Sijthoff, 1977).
- François, Laurent. *Le droit civil international* (Bruxelles: Bruylant-Christophe, 1880).
- Goodrich, F Herbert. *Conflict of Laws*, 3rd ed (Minnesota: West Publishing Co, 1949).
- Graveson, Harry Ronald. *The Conflict of Laws*, 5th ed (London, UK: Sweet & Maxwell 1965).
- Harrison, Frederic. *On Jurisprudence and the Conflicts of Laws* (Oxford, UK: Clarendon Press, 1919).

- Hartley, C Trevor. *International Commercial Litigation* (Cambridge: Cambridge University Press, 2009).
- Hay Peter, Patrick J Borchers & Symeon C Symeonides. *Conflict of Laws*, 5th ed (West Publishing Co, 2010).
- Holmes, Wendell Oliver. *The Common Law* ed by Mark Dewolfe Howe (Boston: Little Brown, 1963).
- Hook, Maria. *The Choice of Law Contract* (Oxford, UK: Hart Publishing Co, 2016).
- Huber, Ulrich. *De Conflictu Legum*, translated by EG Lorenzen (New Haven: Yale University Press, 1947).
- Jitta, D Josephus. *La Substance Des Obligations Dan Le Droit International Privé*, vol 2 (The Hague: Hague Librairie Belinfante Frères, 1907).
- Juenger, K Friedrich. *Choice of Law and Multistate Justice* (Leiden: Martinus Nijhoff Publishers, 1993).
- Kahn-Freund, Otto. *The Growth of Internationalism in English Private International Law Jerusalem* (Jerusalem: Magnes Press, 1960).
- Kegel, Gerhard & Klaus Schurig. *Internationales Privatrecht*, 9th ed (Munich: Beck'sche CH Verlagsbuchhandlung Oscar Beck, 2004).
- Kelsen, Hans. *Pure Theory of Law* (Berkeley: University of California Press, 1967).
- Lainé, Armand. *Introduction au droit international privé: contenant une étude historique et critique de la théorie des statuts et des rapports de cette théorie avec le Code civil*, vol 2 (Librairie Cotillon, F Pinchon, successeur, 1892).
- Lew, Julian. *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Oceana Transnational Services) (Dobbs Ferry, New York: Oceana Publications, 1978).
- Minor, C Raleigh. *Conflict of Law; or Private International Law* (Boston: Little, Brown & Co, 1901).
- Nishitani, Y. *Mancini und die parteiautonomie im Internationalen Privatrecht* (Heidelberg: Winter, 2000).
- North PM & JJ Fawcett. eds, Cheshire & North: *Private International Law*, 11th ed (London, UK: Butterworths, 1987).



- Nygh, Peter. *Autonomy in International Contracts* (Oxford, UK: Clarendon Press 1999).
- Oppong, Richard. *Private International Law in Commonwealth Africa* (Cambridge: Cambridge University Press, 2013).
- Pillet, Antoine. *Principes de Droit International Privé* (Paris: Pedone Grenoble, Allier Frères, 1903).
- Pillet, Antoine. *Traite Pratique de Droit International Privé*, vol 2 (Paris: Imprimerie J Allier, 1924).
- Rabel, Ernst. *Recht Das Warenkaufs*, vol 2 (Berlin: Walter De Gruyter & Co, 1958).
- Rabel, Ernst. *The Conflict of Laws, A Comparative Study*, vol 2 (Chicago: Callaghan & Co, 1947).
- Redfern, Allan & Martin Hunter. *Law and Practice of International Commercial Arbitration*, 3rd ed (London, UK: Sweet & Maxwell, 2003).
- Samtleben, Jurgen. *Internationales Privatrecht in Lateinamerika: Allgemeiner Teil* (Tubingen: Mohr Siebeck, 1979).
- Savigny, Carl von Friedrich. *A Treatise on the Conflict of Laws*, (Guthrie translation), 2nd ed (London, UK: Stevens & Sons, 1869).
- Savigny, Carl von Friedrich. *Private International Law, and the Retrospective Operation of Statute: A Treatise on the Conflict of Laws, and the Limits of Their Operations in Respect of Place and Time*, 2nd ed (Guthrie's Translation) (Edinburgh: T & T Clark, 1880).
- Scoles, F Eugene et al. *Conflict of Laws*, 4th ed (Minnesota: West Group Publishers, 2004).
- Shapiro, Martin. *Courts: A Comparative and Political Analysis* (Chicago, Illinois: University of Chicago Press, 1981).
- Spiro, Erwin. *Conflict of Laws* (South Africa: Juta & Co, 1973).
- Story, Joseph. *Commentaries on the Conflict of Laws*, 1st ed (reprint) (New Jersey: Lawbook Exchange, 2010).
- Story, Joseph. *Commentary on the Conflicts of Laws, Foreign and Domestic: In Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Succession, and Judgment* (Boston: Hilliard Gray, 1834).

- Stumberg, Wilfred George. *Principles of Conflict of Laws*, 3rd ed (Brooklyn: The Foundation Press, 1963).
- Symeonides, C Symeon, Wendy Perdue & Arthur Taylor Von Mehren. *Conflict of Laws: American, Comparative, International: Cases and Materials*, 3rd ed (West Publishing Co, 2012).
- Symeonides, C Symeon. *American Private International Law* (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2008).
- Symeonides, C Symeon. *Codifying Choice of Law Around the World* (Oxford, UK: Oxford University Press, 2014).
- Vischer, Frank. *General Course on Private International Law* (Leiden: Martinus Nijhoff Publishers, 1993).
- Walker, Janet. *Canadian Conflict of Laws*, 6th ed (Toronto: LexisNexis 2005).
- Weintraub, J Russel. *Commentary on the Conflict of Laws* (Mineola, New York: Foundation Press, 1971).
- Weintraub, J Russell. *Commentary on the Conflict of Laws*, 2nd ed (Mineola, New York: The Foundation Press, 1980).
- Westlake, John. *Private International Law*, 7th ed (London, UK: Sweet & Maxwell Ltd, 1925).
- Wharton, Francis & George H Parmele. *A Treatise on the Conflict of Laws; or, Private International Law*, 3rd ed (Rochester, New York: The Lawyers' Co-operative Publishing Co, 1905).
- Wolff, Han Julius. *Das Problem Der Konkurrenz Von Rechtsordnungen In Der Antike* (Heidelberg: Winter Publishing Co, 1979).
- Wolff, Martin. *Private International Law*, 2nd ed (Oxford, UK: The Clarendon Press, 1945).
- Zweigert, Konrad and Hein Kötz. *An Introduction to Comparative Law*, 3rd ed, translated by Tony Weir (Oxford, UK: Oxford University Press, 1998).

### **Theses**

- Carlquist, Helen. *Party autonomy and the Choice of Substantive Law in International Commercial Arbitration* (LLM Thesis, School of Business, Economics and Law Göteborg University, 2006) [unpublished].

Hamad, Ibrahim Ahmed Ali Alustath. *Choice of Law in Respect of contracts in the United Arab Emirates and the European Union; and Related Aspects of Private International Law in Relation to the Dubai International Financial Centre* (DCL Thesis, University of Essex School of Law, 2015) [unpublished].

Richardson, SM. *International Contracts and The Choice of Law* (DCL Thesis, University of Canterbury, 2005) [unpublished].

Schoeman, Elsabe. *Domicile and Jurisdiction as Criteria in External Conflict of Laws with Particular Reference to Aspects of the South African Law of Persons* (DCL Thesis, University of South Africa, 1997) [unpublished].

Palanee, Micosha. *The Role of Unequal Bargaining Power in Challenging the Validity of a Contract in South African Contract Law* (LLM Thesis, University of KwaZulu-Natal, College of Law and Management Studies, School of Law, 2014) [Unpublished].

#### **Secondary Material: Articles**

Abbott, Kenneth & Duncan Snidal. "Hard Law and Soft Law in International Governance" (2000) 54 *International Organization* 424.

Abdel, Wahab S Mohamed. "The Law Applicable to Technology Transfer Contracts and Egyptian Conflict of Laws: A Triumph of Nationalism over Internationalism?" In eds Andrea Bonomi & Gian Paolo Romano, *Yearbook of Private International Law*, vol 12 (Munich: Sellier European Law Publishers, 2010).

Albornoz, Maria Mercedes & Nuria Gonzalez-Martin. "Towards the Uniform Application of Party Autonomy for Choice of Law in International Commercial Contracts" (2016) 12:3 *J Priv Intl L* 437.

Albornoz, Mercedes María. "Choice of Law in International Contracts in Latin American Legal Systems" (2010) 6:1 *J Priv Intl L* 23.

Alfárez, Garcimartín & J Francisco. "The Rome I Regulation: Much Ado About Nothing?" (2008) 2 *Eur Leg F* 61.

Anton, AE. "The Introduction into English Practice of Continental Theories on the Conflict of Laws" (1956) 5:4 *ICLQ* 534.

Asafa, Jatala. "The Triple Causes of African Underdevelopment: Colonial Capitalism, State Terrorism and Racism" (2015) 7:3 *IJSA* 75.

- Asouzu, A Amazu. "African States and the Enforcement of Arbitral Awards: Some Key Issues" (1999) 15:1 Arb Intl 1.
- Atiyah, S Patrick. "The Classical Law of Contract 'in an Introduction to the Law of Contract'" in Richard Devlin ed, *Contracts, Supplement II Contract Law in Politico-Philosophical Perspective* (Dalhousie University, 1988) 28.
- Babic, Davor. "Rome 1 Regulation: Binding Authority for Arbitral Tribunals in the European Union?" (2017) 13:1 J Priv Intl L 71.
- Badawi, Adam. "Harm, Ambiguity, and the Regulation of Illegal Contracts" (2010) 17:2 Geo Mason L Rev 483.
- Baker, N Steven. "Foreign Law Between Domestic Commercial Parties: A Party Autonomy Approach with Particular Emphasis on North Carolina Law" (2008) 30:3 Campbell L Rev 437.
- Baniassadi, Reza Mohammad. "Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?" (1992) 10:2 Intl Tax & Bus Lawyer 60.
- Bar, Von Christian & Ole Lando. "Communication on European Contract law: Joint response of the Commission on European Contract Law and the Study Group on a European Civil Code" (2002) Eur R Priv L 183.
- Barnhizer, D Daniel. "Inequality of Bargaining Power" (2005) 76:1 U Colo L Rev 139.
- Basedow, Jürgen. "The Hague Principles on Choice of Law: Their Addressees and Impact" (2017) 22:2 Unif L Rev 304.
- Batiffol, Henri. Subjectivisme et Objectivisme dans le Droit International privé des Contrats [Subjectivism and Objectivism in the Private International Law of Contracts], in ed, Faculte droit et des Sciences economiques Toulouse, *Mélanges Offerts À Jacques Maury: T. 1-2* (Paris: Paris Press, 1960) 53 [translated by author].
- Bauerfeld, Richard. "Effectiveness of Choice-of-Law Clause in Contract Conflicts of Law: Party Autonomy or Objective Determination?" (1982) 82:8 Colum L Rev 1659.
- Behr, Volker. "Rome I Regulation A—Mostly—Unified Private International Law of Contractual Relationships Within—Most—of The European Union" (2011) 29 JL & Com 233.

- Bell, John. "Legal Research and Distinctiveness of Comparative Law" in eds, Marke Van Hoecke & Francois Ost, *European Academy of Legal Theory Monograph Series* (Oxford: Hart Publishing Ltd, 2011) 157.
- Blom, Joost. "Choice of Law Methods in the Private International Law of Contract" (Part 2) (1979) 17 *Can YB Intl L* 206.
- Boer, M De Thomas. "Party Autonomy and Its Limitations in the Rome II Regulation" (2008) 9 *Year Book Private International Law* 19.
- Bonell, Joachim Michael. "Soft law and Party Autonomy: The Case of the UNIDROIT Principles" (2005) 51:2 *Loy L Rev* 229.
- Borchers, Patrick. "The Internationalization of Contractual Conflicts Law" (1995) 28 *Vand J Transnat'l L* 421.
- Brainerd, Currie. "Survival of Actions: Adjudication in the Conflict of Laws" (1958) 10 *Stan L Rev* 205.
- Brilmayer, Lea. "Government Interest Analysis: A House Without Foundations" (1985) 46:3 *Ohio St LJ* 459.
- Brown, R Blake. "A taxonomy of Methodological Approaches in Recent Canadian Legal History" (2004) 34:1 *Acadiensis: Journal of the History of the Atlantic Region* 146.
- Bunn, Charles. "Freedom of Contract under the Uniform Commercial Code" (1960) 2:1 *Boston College L Rev* 59.
- Byrnes, Rebecca & Peter Lawrence. "Can 'Soft law' Solve 'Hard Problems?'" *Justice, Legal Form and the Durban-Mandated Climate Negotiations* (2015) 34:1 *U Tasm L Rev* 34.
- Calliess, Galf- Peter. "The Making of Transnational Contract Law" (2007) 14:2 *Ind J of Global Leg Stud* 469.
- Carpinello, George. "Testing Limits of Choice of Law Clause: Franchise Contracts as a Case Study" (1990) 74:3 *Marq L Rev* 57.
- Carter, PB. "The Role of Public Policy in English Private International Law" (1993) 42:1 *ICLQ* 1.
- Cavers, F David. "A Critique of the Choice-of-Law Problem" (1933) 47:2 *Harv L Rev* 173.

- Cavers, F David. "Re-Restating The Conflict of Laws: The Chapter on Contracts" in Kurt Hans Nadelmann, Arthur Taylor Von Mehren & John Newbold Hazard, eds, *Xxth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E Yntema* (Leyden: A W Sythoff 1961) 349.
- Chang, Sherman. "The Validity of Contract in the Conflict of Laws" (1934) 7:1 China L Rev 33.
- Cheatham, E. "Sources of Rules for Conflict of Laws" (1941) 89:4 U Pa L Rev 430.
- Chong, Adeline. "The Public Policy and Mandatory Rules of Third Countries in International Contracts" (2006) 2:1 J Priv Intl L 27.
- Caldwell Jack, Jordan Robert & Pugh George, "Choice of Law under the Uniform Commercial Code" (1950) 10:3 La L Rev 278.
- Collins, Lawrence. "Contractual Obligations – The EEC Preliminary Draft Convention on Private International Law" in *Essays in International Litigation and the Conflict of Laws* (Oxford: Clarendon Press, 1994).
- Columbia Law Review, "Party Autonomy Limited by Strong Policy of State of Dominant Interest" (1958) 58:2 Colum L Rev 274.
- "Commercial Security and Uniformity Through Express Stipulations in Contracts as to Governing Law", Note (1949) 62:4 Harv L Rev 647.
- "Conflict of Laws, 'Party Autonomy' in Contracts", Note, (1957) 57:4 Colum L Rev 553.
- Cook, Wheeler Walter. "Jurisdiction of Sovereign States and the Conflicts of Laws" (1931) 31:3 Colum L Rev 368.
- Cook, Wheeler Walter. "The Logical and Legal Bases of the Conflict of Laws" (1924) 33:5 Yale LJ 457.
- Cooke, Harold Gutteridge. "Case Comment on Vita Food" (1939) 55 Law Q Rev 323.
- Coyle, F John. "The Canons of Construction for Choice-of-Law Clauses" (2017) 92:2 Wash L Rev 631.
- Cuniberti, Gilles. "The International Market for Contracts: The Most Attractive Contract Laws" (2014) 34:3 Nw J Intl L & Bus 455.
- Danzig, R. "Hadley v. Baxendale: A Study in the Industrialisation of the Law" (1975) 4:2 J Leg Stud 249.

- De Aguirre, Fresnedo Cecilia. “La autonomía de la voluntad en la contratación internacional” (1991) Basado en mi tesis publicada con este mismo título en Montevideo, FCU, y en la 2ª edición (actualizada), que se encuentra en preparación 323.
- De Araujo, Nadia & Fabiola I Guedes de C Saldanha. “Recent Developments and Current Trends on Brazilian Private International Law Concerning International Contracts” (2013) 1:1 Panorama of Brazilian Law 73.
- Delaume, Rene Georges. “What is an International Contract? An American and a Gallic Dilemma” (1979) 28:2 ICLQ 258.
- Devlin, Richard. “The Charter and Anglophone Legal Theory” (1998) 4:1 Rev Const Stud 19.
- Di Matteo, A Larry. “Soft law and the Principle of Fair and Equitable Decision Making in International Contract Arbitration” (2013) Chinese J Comp L 1.
- Dickinson, Andrew. “A Principled Approach to Choice of Law in Contracts” (2013) Butterworths Journal of International Banking and Financial Law 159.
- Hartnell, E Helen. “Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods” (1993) 18:1 Yale J Intl L 1.
- Edwards, Pamela. “Into the Abyss: How Party Autonomy Supports Overreaching Through the Exercise of Unequal Bargaining Power” (2003) 36:2 John Marshall La Rev 421.
- Edwards T Harry. “The Growing Disjunction between Legal Education and the Legal Profession” (1993) 91:8 Mich L Rev 2191.
- Ehrenzweig, Albert. “Adhesion Contracts in the Conflict of Laws” (1953) 53:8 Colum L Rev 1072.
- Ehrenzweig, Albert. “The Lex Fori – Basic Rule in the Conflicts of Laws” (1960) 58 Mich L Rev 637.
- Fauvarque-Cosson, B. “Comparative Law and Conflict of Laws: Allies or Enemies? New Perspectives on an Old Couple” (2001) 49:3 Am J Comp L 407.
- Ferrari, Franco. “PIL and CISG: Friends or Foes?” (2013) 31 JL & Com 45.

- Fisher, Robin. "Judging History: Reflections on the Reasons for Judgment in *Delgamuukw v BC*" (1992) 95 BC Stud 43.
- Fisher, W William III. "Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History" (1997) 49:5 Stan L Rev 1065.
- Fisk, L Catherine & Robert W Gordon. "Law as...': Theory and Method in Legal History" (2011) 1:3 UC Irvine L Rev 519.
- Fletcher, P Justin. "An Argument for Ratification: Some Basic Principles on the 1994 Inter-American Convention on the Law Applicable to International Contracts" (1999) 27:3 Ga J Intl & Comp L 479.
- Fountoulakis, Christiana. "The Parties' Choice of 'Neutral Law' in International Sales" (2005) 7:3 Eur JL Reform 303.
- Fresnedo, de Aguirre Cecilia. "Party Autonomy - A Blank Cheque?" (2012) 17:4 Unif L Rev 655.
- Friedman, David. "Bringing Order to Contracts against Public Policy" (2012) 39 Fla St UL Rev 564.
- Gabor, A Francis. "Emerging Unification of Conflict of Law Rules applicable to the International Sales of Goods: UNCITRAL and the New Hague Conference on Private International Law" (1986) 7:4 Nw J Intl L & Bus 697.
- Garcimartín Alférez, J Francisco. "The Rome I Regulation: Much Ado About Nothing?" (2008) 2 Eur Leg F 61.
- Gertz, M Craig. "The Selection of Choice of Law Provisions in International Commercial Arbitration: A case for Contractual Depeçage" (1991) 12:1 Nw J Intl L & Bus 163.
- Gordon, W Robert. "Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography" (1975) 10:1 Law & Soc'y Rev 9.
- Graves, M Jack. "Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C S 1-301 and a Proposal for Broader Reform" (2005) Seton Hall L Rev 59.
- Graveson, Harry Ronald. "The Proper Law of Commercial Contracts as Developed in the English Legal System" (Lectures on Conflict of Laws and International Contracts delivered at the Summer Institute on International and Comparative Law University of Michigan Law School 5 August 1949) (Buffalo, New York: Hein & Co, 1982).



- Graziano, Kadner Thomas. "Solving the Riddle of Conflicting Choice of Law Clause in Battle of Forms Situations: The Hague Solution" (2013) 14 YB Priv Intl L 71.
- Gruchalla-Wesierski, Tadeusz. "A Framework for Understanding 'Soft law'" (1984) 30 McGill LJ 37.
- Grundmann, Stefan. "Information, Party Autonomy and Economic Agents in European Contract Law" (2002) 39 CML Rev 269.
- Gutmann, Thomas. "Theories of Contract and the Concept of Autonomy" (Paper delivered at the Shibolet Private Law Theory Workshop at Tel-Aviv University Faculty of Law / The Zvi Meitar Center for Advanced Legal Studies, March 6, 2013) [unpublished].
- Guzman, T Andrew & Timothy L Meyer. "International Soft law" (2010) 2:1 J Leg Analysis 171.
- Hamza, Samir & Howard Stovall. "Proposed Law to Regulate Technology Transfers in Egypt" (1987) 2 Arab LQ 3.
- Harburger, "Rapport a L'Inst. de dr Int sur les Conflits de Lois en Matiare d'obligations, Annuaire" (1902) Ann inst dr int 148.
- Harper, V Fowler. "Policy Bases of the Conflict of Laws: Reflections on Reading Professor Lorenzen's Essays" (1947) 56 Yale LJ 1155.
- Heiss, Helmut. "Insurance Contracts in Rome 1: Another Recent Failure of the European Legislator" (2008) 10 YB Priv Intl L 261.
- Hernández-Bretón, E. "La Convención de México (CIDIP V, 1994) como modelo para la actualización de los sistemas nacionales de contratación internacional en América Latina" (2008) 9 DeCITA, derecho del comercio internacional, temas y actualidades 170.
- Hill, Jonathan. "Review: Comparative Law, Law Reform and Legal Theory: An Introduction to Comparative Law by Konrad Zweigert and Hein Kötz" (1989) 9:1 Oxford J Leg Stud 101.
- Hoecke, Van Mark. "Legal Doctrine: What Method (s): For what kind of Discipline?" in eds Mark Van Hoecke & Francois Ost, *European Academy of Legal Theory Monograph Series* (Oxford: Hart Publishing Ltd, 2011).
- Holmes, Wendel Oliver. "The Path of the Law" (1987) 110:5 Harv L Rev 457.

- Huo, Zhengxin. “Highlights of China’s New Private International Law Act: From the Perspective of Comparative Law” (2011) 45:3 RJT 637.
- Hutchinson, Terry & Nigel Duncan. “Defining and Describing what we Do: Doctrinal Legal Research” (2012) 17:1 Deakin L Rev 83.
- Institute of International Law, “Resolution on the Autonomy of the Parties in International Contracts Between Private Persons or Entities” (1992) 64 II YB 383.
- Jaffey, AJE. “Essential Validity of Contracts in the English Conflict of Laws” (1974) 23:1 ICQL 1.
- James, C Louis. “Effects of the Autonomy of the Parties on Conflict of Laws Contracts” (1959) 36:1 Chicago-Kent L Rev 34.
- Javitch, M Victor. “Conflict of Laws – Tests Determining What Law Governs a Contract” (1961) 12:4 Case W Res L Rev 801.
- Jayme, Erik. “Identité culturelle et intégration: Le droit international privé postmoderne” (1995) 251 Rec des Cours 147.
- Johns, Fluer. “Performing Party Autonomy” (2008) 71:3 Law & Contemp Probs 243.
- Jonathan, Levin. “The Hague Principles on Choice of Law in International Commercial Contracts: Enhancing Party Autonomy in A Globalized Market” (2016) 13:1 NYUJ L & Bus 272.
- Juenger, K Friedrich. “A Page of History” (1984) 35:2 Mercer L Rev 419.
- Juenger, K Friedrich. “The Choice of Law in the Americas” (1997) 45:1 Am J Comp L 195.
- Juenger, K Friedrich. “The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons” (1994) 42:2 Am J Comp L 381.
- Junming, Luo. “Choice of Law for Contracts in China: A Proposal for the Objectivatization of Standards and their Use in Conflict of Law” (1996) 6:2 Ind Intl & Comp L Rev 439.
- Kahn- Freund, Otto. “Case Comment on Vita Food” (1939) Mod L Rev 61.
- Kain, Brandon & Douglas T Yoshida. “The Doctrine of Public Policy in Canadian Contract Law” In Hon Todd L. Archibald & Hon. Randall Scott Echlin, eds, *Annual Review of Civil Litigation* (Toronto: Thomson Carswell, 2007) 1.

- Kamba, J Walter. "Comparative Law: A Theoretical Framework" (1974) 23:3 ICLQ 485.
- Kaplan, M Carol. "The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith" (2000) 75:4 NYUL Rev 1045.
- Karayanidi, Milana. "Party Autonomy to Choose a Forum: Philosophical and Historical Justification" (5 May 2016) (New Private Law blog), online: <<https://blogs.harvard.edu/nplblog/2016/05/05/party-autonomy-to-choose-a-forum-philosophical-and-historical-justification-milana-karayanidi/>>.
- Kastely, Amy. "Uniform and Community: A Rhetorical Analysis of the United Sales Convention (1988) 8 Nw J Intl L & Bus 575.
- Kelly, David St L. "Reference, Choice, Restriction and Prohibition" (1977) 26:4 ICLQ 857.
- Kessler F, G Gilmore & A Kronman. "Contract as a Principle of Order" in Richard Devlin ed, *Contracts, Supplement II Contract Law in Politico-Philosophical Perspective* (Dalhousie University, 1988).
- Kincaid, Peter. "Rationalising Contract Choice of Law Rules" (1993) 8:1 Otago L Rev 93.
- Kirchner, Christian. "Justifying Limits to Party Autonomy in the Internal Market – Mainly Consumer Protection" in eds, Stefan Grundmann, Wolfgang Kerber & Stephen Weatherill, *Party Autonomy and the Role of Information in the Internal Market* (Berlin: Walter de Gruyter, 2000).
- Klabbers, Jan. "The Redundancy of Soft law" (1996) 65:2 Nordic Journal of International Law 167.
- Klabbers, Jan. "The Undesirability of Soft law" (1998) 67: 4 Nordic Journal of International Law 381.
- Kostritsky, P Juliet. "Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory" (1988) 74 Iowa Law Review 115.
- Kramer, Larry. "More Notes on Methods and Objectives in the Conflict of Laws" (1991) 24:2 Cornell Intl LJ 245.
- Kramer, Robert. "Some Observations on Law and Interdisciplinary Research" (1959) 8:4 Duke LJ 563.

- Kronman, T Anthony. "Contract Law and Distributive Justice" (1980) 89:3 Yale LJ 472.
- Lando, Ole. "The Proper Law of a Contract" (1964) 8 Scand Stud L 107.
- Lando, Ole. "The EEC Convention on the Law Applicable to Contractual Obligations" (1987) 24:2 CML Rev 159.
- Laycock, Douglas. "Religious Freedom and International Human Rights in The United States Today" (1998) 12:2 Emory Intl L Rev 951.
- Leflar, A Robert. "Conflict of Laws: More on Choice-Influencing Considerations" (1966) 54:4 Cal L Rev 1584.
- Lehmann, Mathias. "Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws" (2008) 41:2 Vand J Transnat'l L 381.
- Lin, Yock Tan. "Good Faith Choice of Law to Govern a Contract" (2014) Sing JLS 307.
- Lipson, Charles. "Why are some International Agreements Informal?" (1991) 45:4 International Organization 495.
- Lichtenstein, Crawford Cynthia. "Hard law v. Soft law: Unnecessary Dichotomy?" (2001) 35:4 Intl Law 1433.
- Lorenzen, Ernst & Raymond J Heilman. "The Restatement of the Conflict of Laws" (1935) 83:5 U Pa L Rev 555.
- Lorenzen, G Ernst. "Huber's De Conflictu Legum" (1919) 13 Ill L Rev 375.
- Lorenzen, G Ernst. "Story's Commentaries on the Conflict of Laws – One Hundred Years After" (1934) 48:1 Harv L Rev 15.
- Lorenzen, G Ernst. "Territoriality, public policy, and the Conflict of Laws" (1924) 33:7 Yale LJ 736.
- Lorenzen, G Ernst. "Validity and Effect of Contracts in the Conflict of Laws" (1921) 30:6 Yale LJ 565.
- Maciel et al. "Legal Memoranda" (1997) 29:1 University of Miami Inter-American Law Review 373.
- Malloy, A Susie. "The Inter-American Convention on the Law Applicable to International Contracts: Another Piece of the Puzzle of the Law Applicable to International Contracts" (1995) 19:2 Fordham Intl LJ 662.

- Mancini, Pasquale Stanislao. “De l’utilité de rendre obligatoires pour tous les Etats, sous la forme d’un ou de plusieurs traits internationaux, un certain nombre de règles générales du droit international privé pour assurer la décision uniforme des conflits entre les différentes législations civiles et criminelles” (1874) *Journal de droit international* 221.
- Mankowski, Peter. “Article 3 of the Hague Principles: The Final Breakthrough for the Choice of Non-State Law?” (2017) *Unif L Rev* 369.
- Mann, Alexander Frederick. “The Proper Law in the Conflict of Laws” (1987) 36:3 *ICLQ* 437.
- Mann, Alexander Frederick. “The Proper Law of the Contract” (1950) 3:1 *ILQ* 60.
- Marshall, Adele Brooke. “Reconsidering the Proper Law of the Contract” (2012) 13:1 *Melb J Intl L* 1.
- Marshall, Adele Brooke. “The Hague Choice of Law Principles, CISG and PICC: A Hard Look at a Choice of Soft Law” *Max Planck Private Law Research Paper* no 16/27 (2018) *Am J Comp L* 1(forthcoming).
- Maultzsch, Felix. “Party Autonomy in European Private International Law: Uniform Principle or Context-dependent Instrument?” (2016) 12:3 *J Priv Intl L* 467.
- Mayer, Pierre. “Mandatory Rules of Law in International Arbitration” (1986) 2:4 *Arb Intl* 274.
- Mbaye, Heather. “Why National States Comply with *Supranational* Law” (2001) 2:3 *European Union Politics* 259.
- Michaels, Ralf. “Non-State Law in the Hague Principles on Choice of Law in International Commercial Contracts” in Kai Purnhagen & Peter Rott eds, *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Gewerbstrasse, Switzerland: Springer International Publishing, 2014).
- Min, Tiong Yeo. “The Effective Reach of Choice of Law Agreements” (2008) 20:3 *Sing Ac LJ* 723.
- Morris, JHC & GC Cheshire. “The Proper Law of a Contract in the Conflict of Laws” (1940) 56:3 *Law Q Rev* 320.
- Morris, JHC. “The Proper Law of a Contract: A Reply” (1950) 3:2 *Intl LQ* 197.
- Moss, Cordero Giuditta. “International Arbitration and the Quest for the Applicable Law” (2008) 8:3 *Global Jurist (Advances)* Art 2, 1.

- Mupangavanhu, Yeukai. "Fairness a Slippery Concept: The Common Law of Contract and the Consumer Protection Act 68 of 2008" (2015) 48:1 De Jure LJ 116.
- Nadelmann, H Kurt. "Introduction to Yntema, The Comity Doctrine" (1966) 65:1 Mich L Rev 1.
- Neels, L Jan & Easa A Fredericks. "Tacit Choice of Law in The Hague Principles on Choice of Law in International Contracts" (2011) 44:1 De Jure LJ 101.
- Newton, E Brent. "Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy" (2010) 62:1 SCL Rev 105.
- Niboyet, JP. "La théorie de l'autonomie de la volonté" (1927) 16 Rec des Cours 1.
- Nissani, Moti. "Ten Cheers for interdisciplinarity: The Case for Interdisciplinary Knowledge and Research" (1997) 34:2 Social Science Journal 201.
- Nnona, George. "The Choice of Law in International Contracts for the Transfer of Technology: A Critique of the Nigerian Approach" (2000) 44:1 J Afr L 78.
- Nordstrom, J Robert & Dale B Ramerman. "The Uniform Commercial Code and the Choice of Law" (1969) 18:4 Duke LJ 623.
- North, PM. "Choice in Choice of Law" (1992) 3 KCLJ 29.
- Nougayréde, Delphine. "TNK-BP, Party Autonomy, and Third Mandatory Rules" (2015) 35:2 Nw J Intl L & Bus 1.
- Nussbaum, Arthur. "Conflicting Theories of Contracts: Cases versus Restatement" (1942) 51:6 Yale LJ 893.
- Nygh, Peter. "The Reasonable Expectations of the Parties as a Guide to Choice of Law in Contract and in Tort" (1995) Rec des Cours 251.
- O'Hara, Anna Erin & Larry E Ribstein. "Conflict of Laws and Choice of Law" in *Encyclopaedia of Law and Economics* vol 5, by Bouckaert, Bouldewijn & De Geest, Gerrit (Cheltenham: Edward Elgar, 2000).
- Okekeifere, Andrew. "The Enforcement and Challenge of Foreign Arbitral Awards in Nigeria" (1997) 14:3 J Intl Arb 223.

- Olaniyan, Hakeem. "A Review of Judicial and Legislative Approach of Nigeria to Discretionary Jurisdiction over Foreign Cases" (2012) 13:12 Intl J Bus & Soc Sci 204.
- Olaniyan, Hakeem. "Conflict of Laws and an Enlightened Self Interest Critique of Section 20 of the Admiralty Jurisdiction Act of Nigeria" (2012) 1:1 Nigerian Institute of Advanced Legal Studies International Journal of Legislative Drafting 22.
- Olatawura, O Olakunle. "The Context and Development of Transnational Law Practice and Policy in Nigeria" (2004) 9:3 Unif L Rev 511.
- Olawoyin, Adedamola Adewale. "Forum Selection Disputes Under Bills of Lading in Nigeria: A Historical and Comparative Perspective" (2005) 29:2 Tul Mar LJ 255.
- Oprea, Alina. "Observations on the Principle of Autonomy of the Will in the Private International Law of Contracts" (2015) 1:5 Rom Rev Priv L 90.
- Oppong, Richard. "Choice of Law and Forum Agreements Survives a Constitutional Challenge in the Kenya Court of Appeal" (2007) 33:1 Commonwealth L Bull 158.
- Oppong, Richard. "Private International Law in Africa (1884-2009)- A Selected Bibliography" (2010) 58:2 Am J Comp L 319.
- Oppong, Richard. "Private International Law in Africa: The Past, Present, and The Future" (2007) 55:4 Am J Comp L 677.
- Oppong, Richard. "Recognition and Enforcement of Foreign Judgments in Ghana: A Second Look at Colonial Inheritance" (2005) 31:4 Commonwealth L Bull 19.
- Oppong, Richard. "The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation" in Petar Sarcevic, Paul Volken & Andrea Bonomi eds, *Yearbook of Private International Law* (GMBH, München: Sellier European Law Publishers, 2006) 189.
- Owen, Dave & Caroline Noblet. "Interdisciplinary Research and Environmental Law" (2015) 41:4 Ecology LQ 887.
- Penn, A Graham & Thomas W Cashel. "Choice of Law clauses under English and New York law" (1986) I & II J Bus L 333.
- Perillo, M Joseph. "Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review" (1994) 63:2 Fordham L Rev 281.

- Perloff, Saul. "The Ties that Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration" (1992) 13:2 U Pa J Bus L 323.
- Permanent Bureau of the Hague Conference on Private International Law, "Choice of Law in International Commercial Contracts: Hague Principles?" (2010) 15:3 & 4 Unif L Rev 883.
- Pertegá, Marta & Brooke Adele Marshall. "Party Autonomy and its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts" (2014) 39:3 Brook J Intl L 975.
- Petsche, Markus. The Application of Transnational Law (Lex Mercatoria) by Domestic Courts (2014) 10:3 J Priv Intl L 489.
- Pfeiffer, Magdalena. "Legal Certainty and Predictability in International Succession Law" (2016) 12:3 J Priv Intl L 566.
- Phillips, Jim. "Why Legal History Matters" (2010) 41:3 VUWLR 293.
- Pierce, G David. "Post-Formation Choice of Law in Contracts" (1987) 50:2 Mod L Rev 176.
- Piers, Maud & Erauw, Johan. "Application of the Unidroit Principles of International Commercial Contracts in Arbitration" (2012) 8:3 J Priv Intl L 441.
- Pocar, F. "La protection de la partie faible en droit international prive" (1984) 188 Rec des Cours 340.
- Pounds, W Thomas. "Party Autonomy – Past and Present" (1970) 12:2 S Tex LJ 214.
- Prebble, John. "Choice of Law to Determine the Validity and Effect of Contracts a Comparison of English and American Approaches to the Conflict of Laws" (1973) 58:4 Cornell L Rev 635.
- Ralf, Michaels. "The Functional Method of Comparative Law" (2005) Duke Law School Faculty Scholarship Series, Paper 26.
- Razvi, Hyder. "Mandatory Rules of Law in International Business Arbitration" (1998) 3:2 Lahore Journal of Economics 35.
- Reese, Willis. "Contracts and the Restatement of Conflict of Laws, Second" (1960) 9:4 ICLQ 531.
- Reimann, Matthias. "Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century" (1998) 39:3 Va J Intl L 572.



- Revoredo, De Bakey Delia. "The Law Applicable to International Contracts in the Peruvian Civil Code" (1977) 397 Peruvian Case L 349.
- Rheinstein, Max. "Review of Essays on the Conflict of Laws by John D Falconbridge, Essays on the Conflict of Laws" (1947) 15 U Chicago L Rev 478.
- Rodriguez, Antonio Moreno José & Maria Mercedes Albornoz. "Reflections on the Mexico Convention in the Context of the Preparation of the Future Hague Instrument on International Contracts" (2011) 7:3 J Priv Intl L 491.
- Rodríguez, José Antonio Moreno. "Contracts and Non-State Law in Latin America" (2011) 16:4 Unif L Rev 877.
- Rodríguez Jose Antonio Moreno, "Beyond the Mexico Convention and the Hague Principles: What's Next for the Americas?" (2017) 22:2 Unif L Rev 435.
- Rodríguez, José Antonio Moreno. "The new Paraguayan Law on international contracts: back to the past?" (2016) vol 2 Eppur Si Muove: The age of Uniform Law-Essays in Honour of Michael Joachim Bonell to Celebrate his 70<sup>th</sup> Birthday.
- Rodriguez, José Antonio Moreno. "Los contratos y La Haya: ancla al pasado o puente a] futuro? (2010) in: Basedow / Fernandez Arroyo / Moreno Rodrfiguez (coord.), *JComo se codifica hoy el derecho comercialinternacional?*, Asunción, CEDEP / Thomson Reuters / La Ley Paraguaya 245.
- Rodriguez, José Antonio Moreno. "Public Policy in the Hague Principles, Chile, Paraguay, MERCOSUR, Peru and Venezuela" (Legal Memorandum to the International Bar Association (IBA) Arbitration Committee & Recognition and Enforcement of Awards Subcommittee October 20 2014) [unpublished].
- Roffe, Pedro. "Reflections on Current Attempts to Revise International Legal Structures: The North-South Dialogue-Clash of Values and Concepts, Contradictions and Compromises" (1979) 9:3 Ga J Intl & Comp L 559.
- Roosevelt, Kermit III. "The Myth of Choice of Law: Rethinking Conflicts" (1999) 97:8 Mich L Rev 2449.
- Rühl, Giesela. "Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency" (2007) 3:1 CLPE Research Paper 4/20071.
- Rumble, E Wilfred. "Legal Positivism of John Austin and the Realist Movement in American Jurisprudence" (1981) 66:5 Cornell L Rev 986.

- Ryan, Thomas. "Reasonable Relation and Party Autonomy under the Uniform Commercial Code" (1980) 63:2 Marq L Rev 219.
- Saumier, Genevieve. "The Hague Principles and the Choice of Non-State 'Rules of Law' to Govern an International Commercial Contract" (2014) 40:1 Brook J Intl L 1.
- Scheuer, M Luke. "Are 'Legal' Marijuana Contracts 'illegal'?" (2015) 16:1 UC Davis Bus LJ 1.
- Schmitthoff, M Clive. "The Law of International Trade-Growth, Formulation and Operation" in C Schmitthoff ed, *The Sources of the Law of International Trade*, (London, UK: Stevens & Sons, 1964).
- Schulze, Christian. "Legal Aspects of Offshore Transactions" (1994) 27:1 Comp & Intl LJS Afri 27.
- Schwartz, Andreas. "New Trends in Parties' Options to Select the Applicable Law? The Hague *Principles* on Choice of Law in International Contracts in a Comparative Perspective" (2015) 12:1 U St Thomas LJ 87.
- Sedler, Robert. "The Contracts Provision of the Restatement (Second): An Analysis and a Critique" (1972) 72:2 Colum L Rev 279.
- Sempesa, Samson L. "Obstacles to International Commercial Arbitration in African Countries" (1992) 41:2 ICLQ 387.
- Shaffer, Gregory & Mark Pollack. "Hard vs. Soft law: Alternatives, Complements, and Antagonists in International Governance" (2010) 94:3 Minn L Rev 706.
- Sloan, Karen. "Empiricism Divides the Academy" (2011) Nat'l LJ 1.
- Song, Lu. "Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (full-text)" (2013) 1:1 Chinese J Comp L 185.
- Sornarajah, Muthucumaraswamy. "The UNCITRAL Model Law: A Third World View Point" (1989) 6:4 J Intl Arb 7.
- Stringer, Dana. "Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way" (2006) 44:3 Colum J Transnat'l L 959.
- Swan, John. "Choice of Law in Contracts" (1991) 19 Can Bus LJ 213.

- Symeonides, C Symeon. "Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple" (2014) 39:3 Brook J Intl L 1123.
- Symeonides, C Symeon. "The First Conflicts Restatement Through the Eyes of Old: As Bad as its Reputation" (2007) 32:1 S Ill ULJ 39.
- Symeonides, C Symeons. "The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments" (2013) 61:3 Am J Comp L 29.
- Tatiana, B De Maekelt. "General Rules of Private International Law in the Americas: New Approach" (1982) 177 Rec des Cours 193.
- Tetley, William. "*Vita Food Products* Revisited (Which Parts of the Decision are Good Law Today?)" (1992) 37 McGill LJ 292.
- Teubner, Gunther. "Breaking Frames: The Global Interplay of Legal and Social Systems" (Review) (1997) 45:1 Am J Comp L 149.
- Thompson, A. "A Different Approach to Choice of Law in Contract" (1980) 43:6 Mod L Rev 650.
- Tiong, Min Tiong Yeo. "Statute and Public Policy in Private International Law: Gambling Contract and Foreign Judgments" (2005) 9 SYBIL 133.
- Twerski, Aaron. "Choice of Law in Contracts: Some Thoughts on the Weintraub Approach" (1972) 57:5 Iowa L Rev 1239.
- Undurraga, Vial. "La autonomía de la voluntad en la legislación chilena de derecho internacional privado" (2013) 40:3 Revista Chilena de Derecho 891.
- Van, Bochove Maria Laura. "Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law" (2014) 7:3 Erasmus L Rev 147.
- Vickers, M Alice. "The Choice of Law Clause in Contracts Between Parties of Developing and Developed Nations" (1981) 11:3 Ga J Intl & Comp L 617.
- Von, Mehren AT. "The Contribution of Comparative Law to the Theory and Practice of Private International Law" (1978) 26 Am J Comp L (Supplement) 31.
- Walsh, Catherine. "The Uses and Abuses of Party Autonomy in International Contracts" (2010) 60:1 UNBLJ 12.
- Watson, Alan. "Legal Change: Sources of Law and Legal Culture" (1983) 131:5 U Pa L Rev 1121.

- Weinberg, Louise. "Theory Wars in the Conflict of Laws" (2005) 103:6 Mich L Rev 1631.
- Weinberger, Alan. "Party Autonomy and Choice-of-Law: The Restatement (Second), Interest Analysis, and the Search for a Methodological Synthesis" (1976) 4:3 Hofstra L Rev 605.
- Weintraub, J Russell. "Functional Developments in Choice of Law for Contracts" (1984) 187 Rec des Cours 239.
- Weintraub, J Russel. "Choice of Law in Contract" (1968) 54:3 Iowa L Rev 399.
- West, Robin. "Law, Rights, and other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law" (1986) 134:4 U Pa L Rev 817.
- Wheeler, Cook Walter. "Contracts' and the Conflict of Laws: 'Intention' of the Parties" (1937) 32:8 Ill L Rev 143.
- Whincop, Michael & Mary Keyes. "Towards an Economic Theory of Private International Law" (2000) 25:1 Austl J Leg Phil 1.
- Wilderspin, Michael. "The Rome 1 Regulation: Communitarisation and Modernisation of the Rome Convention" (2008) 9:2 J Academy of European Law (ERA Forum) 259.
- Wolff, M. "Some Observations on the Autonomy of Contracting Parties in the Conflict of Laws" (1950) 35 Trans Grot Soc 143.
- Wolff, M. "The Choice of Law by the Parties in International Contracts" (1937) 49:2 Jurid Rev 110.
- Woodward, J William Jr. "Contractual Choice of Law: Legislative Choice in an Era of Party autonomy" (2001) 54:2 SMULR 697.
- Xiao, Yongping & Weidi Long. "Contractual Party Autonomy in Chinese Private International Law" (2009) 11 YB Priv Intl L 193.
- Yeo, T M. "Loans for Extraterritorial Gambling and the Proper Law" (1998) 2 Sing JLS 421.
- Yntema, E Hessel. "Autonomy' in Choice of Law" (1952) 1:4 Am J Comp L 341.
- Yntema, E Hessel. "The Hornbook Method and the Conflict of Laws" (1928) 37:4 Yale LJ 468.

Yntema, E Hessel. "The Objectives of Private International Law" (1957) 35 Can Bar Rev 721.

Zeller, B. "Uniformity of Laws: A Reality or just a Myth" (2008) 1:3 Intl J Priv L 231.

Meng, Zhaouhua. "Party Autonomy, Private Autonomy, and Freedom of Contract" (2014) 10:6 Can Soc Sci 212.

### **Reports and Papers**

*Argentino de Derecho Internacional Segundo Congreso Sudamericano de Derecho Internacional Privado de Montevideo 1939-1940* (Imprenta de la Universidad).

Awamleh, Al. "Abu Dhabi Court: Choice of Law May not be a Choice" (6 March 2011) AL Tamimi & Co (blog), online: <[www.tamimi.com/en/magazine/law-update/section-7/march-6/abu-dhabi-court-choice-of-law-may-not-be-a-choice.html](http://www.tamimi.com/en/magazine/law-update/section-7/march-6/abu-dhabi-court-choice-of-law-may-not-be-a-choice.html)>.

Barreda, Fernandini Ricardo. "National Report Peru" (2003), online: <[http://212.63.69.85/Database/2003/notarius\\_2003\\_01\\_014\\_en.pdf](http://212.63.69.85/Database/2003/notarius_2003_01_014_en.pdf)>.

Bouwers, Garth. "Tacit Choice of Law in International Commercial Contracts – A Turkish Study" (paper delivered at the scientific cooperations 2<sup>nd</sup> International Conference on Social Sciences, Instabul, Turkey, 2-3 April 2016) [unpublished] at 172.

Department of International Law, Secretariat for Legal Affairs Organization of American States, "The Inter-American Convention on the Law Applicable to International Contracts and the Furtherance of its Principles in the Americas" (Paper prepared by the Department of International Law, Secretariat for Legal Affairs Organization of American States, 15 March 2016) OEA/SG/DDI/doc. 3/16 [unpublished].

Flechtner Harry, "Introductory Note: United Nations Convention on Contracts for the International Sales of Goods, Vienna, 11 April 1980" (2009) The Audiovisual Library of International Law1, online: <<http://legal.un.org/avl/ha/ccisg/ccisg.html>>.

Garro, M Alejandro & Alberto L Zuppi. "The New Civil And Commercial Code of Argentina (2015) and the Vienna Convention on Contracts for the Sale Of Goods" (2015) at 8, online: <[www.sbm.com.ar/assets/pdf/prensa/nuevo\\_codigo/final\\_the\\_new\\_CCiv\\_com\\_Arentina\\_and\\_the\\_cisg4.pdf](http://www.sbm.com.ar/assets/pdf/prensa/nuevo_codigo/final_the_new_CCiv_com_Arentina_and_the_cisg4.pdf)>.

- Giuliano, Mario and Lagarde, Paul. *Report on the Convention on the Law Applicable to Contractual Obligations* [1980] OJ C 282/1 at 17 [Giuliano-Lagarde Report].
- Kruger, Thalia. “Feasibility Study on the Choice of Law in International Contracts – Overview and Analysis of Existing Documents- “(Preliminary document No 22, The Hague Permanent Bureau Netherlands 2008) at 14, online: <<https://assets.hcch.net/docs/e7a5badc-b56e-4f94-a859-a07ee858dd71.pdf>>.
- Leon, Barry & Graham Reynolds. “Canada: A Canadian Perspective: Choice of Law and Choice of Forum.” Online: <[www.mondaq.com/canada/x/39956/Contract+Law/A+Canadian+Perspective+Choice+of+Law+and+Choice+of+Forum](http://www.mondaq.com/canada/x/39956/Contract+Law/A+Canadian+Perspective+Choice+of+Law+and+Choice+of+Forum)>.
- Loschky, Jay. “Less Than Half Percent in Africa Confident in Their Judicial Systems” (6 August 2014), GALLUP (blog), online: <[www.gallup.com/poll/174509/less-half-africa-confident-judicial-systems.aspx](http://www.gallup.com/poll/174509/less-half-africa-confident-judicial-systems.aspx)>.
- Lucena, Claudia et al. “Construction 2016: Peru” (3<sup>rd</sup> March 2017), Claudia Lucena (blog) online: <<http://latinlawyer.com/jurisdiction/1003056/peru>>.
- Mills, Christopher & Susie Abdel-Nabi. UAE: Choice of Governing Law and Jurisdiction” (6 March 2014) Clyde & Co (blog), online: <[www.clydeco.com/insight/article/uae-choice-of-governing-law-and-jurisdiction](http://www.clydeco.com/insight/article/uae-choice-of-governing-law-and-jurisdiction)>.
- Rolin, Henri. (1925) 32 *Annuaire* 96.
- Schmitthoff, M Clive. “Progressive Development of the Law of International Trade” in Report of the Secretary General (UN Doc.A/6396, para 210), reprinted in (1968-70) I (1) UNCITRAL YB II.
- Schwenzer, Ingeborg & Pascal Hachem. “The CISG – A Story of Worldwide Success” (Paper presented at the Staff Seminar University of Basel Switzerland, 5 February 2009) [unpublished].
- Trigúis, Gloria Maria. “Paraguay’s Legal Regime Between Manufacturers and Foreign Firms to be Amended: Law 194 – Distribution and Agency Law” (January 2014), Lexology (blog), online: <[www.lexology.com/library/detail.aspx?g=4997fbbd-afc1-4151-afd1-8a4e340ace8a](http://www.lexology.com/library/detail.aspx?g=4997fbbd-afc1-4151-afd1-8a4e340ace8a)>.