COMPARATIVE STUDY OF BRAZIL AND SOUTH AFRICAN PRIVATE INTERNATIONAL LAW VIS-À-VIS PARTY AUTONOMY IN THE CHOICE OF LAW

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INTRODUCTION

The principle of party autonomy refers to the freedom of the parties to choose the 'governing law'[1] or the 'proper law'[2] of the contract. The principle has emerged as one of the cornerstone of the conflict of law rules and has been acknowledged as a universal principle by scholars and legislations.[3] The emergence of principle can be attributed to the proliferation of transboundary contracts, and consequently the number of dispute arising out of them[4]. The doctrine is significant because it not only respects free will and personal rights of the parties,[5] but also provides legal certainty and predictability to the parties; and is widely accepted as a means for efficiency.[6] Furthermore, the principle stands on firm economic grounds,[7] and has displaced the traditional connecting factors for contracts conflicts, viz, the place of the conclusion of a

[1] Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008) 37. Also see: PE, Nygh, *Autonomy on Jurisdiction and choice of Law* (Clarendon 1999). Symeon C Symeonides, 'Party Autonomy in International Contracts and the Multiple ways of Slicing the Apple' (2014) 39 Brooklyn Journal of International Law 1123.

[2] Lawrence Collins et al (eds.), *Dicey and Morris on the Conflict of laws,* vol 2 (11th edn, Steven & Sons 1985) 1161-96.

[3] Ole Lando, 'The EEC Convention on the Law Applicable to Contractual Obligations', (1987) 24 Common Market L. Rev. 159, 169

[4] Mathias Reiman,'Savigny's Triumph? Choice of Law in Contracts Cases at the close of the Twentieth Century', (1999), 39 Va. J. Int'l L. 571, 589

[5] Zhaohua Meng, 'Party Autonomy, Private Autonomy, and Freedom of Contract (2014), 215; see also Symeon Symeonides "Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple" (2014) Brooklyn Journal of International Law 1130.

[6] Dana Stringer, 'Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction and the Emerging Third Way, (2006), 44 Columbia Journal of Transnational Law 959, 960.

[7] Giesela Ruhl, 'Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency', (2007), CLPE Research Paper No. 4/2007.

contract (*lec loci contractus)* and the place of performance (*lex loci solutionis)* as the governing law.[8]

Although the principle has been long recognized as one of the most fundamental principles of private international law, the countries across the globe vary with respect to precise interpretation and parameters within which this freedom would operate. This is because, while some countries expressly recognize party's autonomy to choose any law, some restrict it[9] by putting several qualifications such as mandatory overriding norms or requirement of reasonable connection to the contractual obligations. Such subjective and objective interpretation of the principle[10] of party autonomy can be attributed to the early development and recognition of doctrine in certain countries such as Continental Europe and Anglo-America and late or persistent non-recognition of the doctrine in other parts of the world such as Latin America and Africa.[11]

Despite the growing prominence of the doctrine of party autonomy in the field of international commercial contracts, private international law of countries such as Brazil and South Africa are yet to make a definitive move to embrace the principle in their jurisdiction. This paper endeavors to provide a comparative analysis of party autonomy principle vis-à-vis choice of law in private international laws of South Africa and Brazil. It is structured as follows: Part II of the paper gives an overview of party autonomy principle in the choice of law in certain dominant jurisdictions across the globe. Part III and IV of the paper proceeds to analyze the private international laws of Brazil and South Africa and their position on party autonomy principle in the choice of law. Part V provides a comparative study on the current position of the principle of party autonomy in both the jurisdictions. Further, while recognizing the fact that principle of party autonomy in both the jurisdictions remains underdeveloped and is yet to be fully recognized part VI of the paper presents certain recommendations for the recognition and enactment of the principle in the private international laws of South Africa and Brazil. Part VII of the paper provides final remarks on the topic.

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[8] Saloni Khanderia, 'Indian Private international law vis-à-vis party autonomy in the choice of law', (2018), Oxford University Commonwealth Law Journal, 10.1080/14729342.2018.1436262,

[9] ibid.

[10] Collins (n 2) 1039-41. Further see: GC Cheshire, *Private International Law* (6th edn, Clarendon Press, 1961) 215: 'The word subjective and objective interpretation of party autonomy in the choice of law have been propounded by Dicey and Cheshire.' Also see: Khanderia (n 8), 2.

[11] Akinwumi Olawuyi Ogunranti, 'The scope of Party Autonomy in International Commercial Contracts: A New Dawn?' (2017).

PARTY AUTONOMY IN CHOICE OF LAW OF SOME JURISDICTIONS: AN OVERVIEW

Over the course of the twentieth century, as international trade has increased with the rise of globalization, the principle of party autonomy in conflict of laws has garnered greater support. It has been considered as one of the most practicable solution for conflict of laws in international contracts and reigns subject to clearly defined limits. Several jurisdictions across the world have embedded the doctrine of party autonomy in their legal systems through ratification to several international conventions thereby espousing for party autonomy in the choice of law. For example – most of the civil law countries have accepted the doctrine through ratification to The United Nations Convention on Contract for the International Sale of Goods (CISG).[12] Similarly, European states (except Norway, Denmark, Iceland and Switzerland) and United Kingdom by ratifying to Rome I Regulation, have embraced subjective interpretation of party autonomy in the choice of law.[13] The regulation however, do place certain restriction on the parties' right to choose the law, viz, that it does not derogate from the mandatory provisions of the *lex fori.*[14] United States of America too, has embraced the doctrine by way of a local statute and subjects it to certain qualifications[15]

In a similar manner, several other jurisdictions, which have dispensed with the need for any nexus between the chosen law and the contractual obligations, include China,[16] Hong Kong,[17] Japan,[18] Mexico,[19] South Korea,[20] Russia,[21] Switzerland,[22] Turkey[23] and Venezuela.[24]

The Hague Conference on Private International Law's recent principle on Choice of Law in International Commercial Contracts (the Hague Principles) is also one of the significant Conventions on the principle of Party Autonomy, which allows the parties to choose any law

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[12] *Ibid*.
[13] Recital (11) Rome 1; See also: 3(1) Rome I, which espouses the parties freedom of choice of law.
[14] Ibid art. 3(3) read with art 9(2) and 21.
[15] Restatement (Second) of the Conflict of Laws, 1998.
[16] Art 3 of the law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations 2010.
[17] Graeme Johnston, *The Conflict of Laws in Hong Long* (2nd edn, Sweet and Maxwell 2012) 189.
[18] art 7 of the Japanese Act on the General Rules on the Application of Laws, Act No 78 of 2006.
[19] art 7 of the Inter-American Convention of the Law Applicable to International Contracts, (1994) 33 ILM 732.
[20] art 25 of the Conflict of Laws Act of the Republic of Korea 2001.
[21] art 1210 of the Civil Code of the Russian Federation 2006.
[22] art 15 of Switzerland's Federal Code of Private International Law 1987.
[23] art 24 of the Turkish Code on Private International Law and International Civil Procedure 2007 (Act No 5718)
[24] art 7 (n 19).

to govern their contract without requiring any connection with the transaction in question[25]. It however, curtails the freedom of parties to choose any law to the extent it derogates form 'overriding mandatory provisions of the law of the forum or when it is against the fundamental notion of public policy.[26] The Hague Principles even though serve as 'soft law' could become particularly relevant to interpret, supplement and develop the rules of private international law on party autonomy in the choice of law[27] of several jurisdictions such as South Africa, Brazil, Uruguay, Chile, and Argentina where the doctrine of party autonomy in choice of law remains unrecognized or has not been fully developed.

BRAZIL PRIVATE INTERNATIONAL LAW: PARTY AUTONOMY IN THE CHOICE OF LAW

The rules of Brazil Private International Law are incorporated in the Law of Introduction to the Brazilian Civil Code, Decree No. 4.657 of 1942, under Articles 7 to 17. Brazil follows the traditional system of conflict of law comprising of indirect rules of a bilateral nature.[28]

It is pertinent to note that currently there is no regulation in the Brazil's private international law, which authorizes party autonomy in the choice of law. Article 13 of the earlier Code i.e. 1916 Civil Code's Introductory Law expressly authorized for choice of law. It provided that the law of the place where the contract was perfected was applicable, unless otherwise stipulated. However, Garland[29] argues that despite such provision the inclination to apply Brazilian law in courts (before 1942) prevailed over party choice of law. From, 1942 onwards, Article 9 of the Introductory Law[30] determines the law applicable to contractual obligations. The provision makes it explicit that rule applicable to international agreements will be primarily 'the law of the state in which they are constituted'. However, if the agreement is entered by correspondence, the law of the proponent will be applicable.[31] Further, if the

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[25] art 2(4) of the Hague Principles. See also: The Hague Conference on Private International Law, 'Commentary on the Hague Principles' <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135> accessed 22nd April, 2018. (Commentary)
[26] ibid. See: art 11((1), (2) Hague Principles.
[27] Commentary (n 25), Preamble para 4. See also: Khanderia (n 8), 5.
[28] Nadia de Araujo, 'Recent developments and current trends in Brazilian Private International Law concerning international contracts: Panorama of Brazilian Law', (2013), Rio de Janeiro, Brazil, 73-83.
[29] Paul Griffith Garland, *American-Brazilian Private International Law.* (1959), 51-53.
[30] art 9, Introductory Law to the Civil Code, 1942.
[31] De Araujo (n 28), 77.

obligation is to be performed in Brazil, any essential forms required by Brazilian law will be observed.

The absence of word 'In the absence of any stipulation to the contrary' from the 1942 Introductory Law has raised the debate of whether the legislator intended to forbid the parties from choosing the law applicable to their agreements? After considering several Brazilian Court decisions and writings of Brazilian scholars it can be concluded that there exist three positions on the issue, which will be explained in the subsequent paragraph.

The first position believes that such silence[32] on party autonomy is intentional and should be considered as rejection of the principle. The scholars who maintain this position argue that the current law as it stands, espouses for *lex loci celebrationis*, which as per some Brazilian academicians is mandatory and cannot be derogated from.[33] The second position stands on the footing that the principle of party autonomy has not been definitively excluded and hence can be applied indirectly.[34] Thus, as per this position parties can still make a valid choice of law, provided it is allowed under the law of the place where the contract has been concluded. The third position, which is vouched by Brazilian scholars like Valladão[35] suggest that the doctrine of party autonomy still exists, since it has not been expressively excluded. This inference, is drawn from the usage of word 'reputa-se' in Article 9 which has a connotation of a 'presumption': the presumption that this will be valid as long as the parties did not choose a legal system to rule over their contract. According to some scholars including Valladao, Article 42 of the Civil Code also adds to the inference that the doctrine is still alive since it allows the parties to designate their domicile for contractual purposes.[36] Lastly, support for this position also stems from the fact that party autonomy in Brazil is fully accepted in arbitration proceedings, pursuant to Article 2(1) of the Act.[37] Thus, scholars tend to argue that there is a clear indication that Article 9 of the Law of Introduction of 1942 is connected to the principle of party autonomy since it would be absurd to interpret the rule one way when it concerns arbitration and another way when it refers to litigation.[38]

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[32] Maria Mercedes Albornoz, 'Choice of Law in International Contracts in Latin American Legal Systems', (2010), 6 J. Priv. Int'l L. 23, 44
[33] De Araujo (n 28), 78.
[34] ibid.
[35] C.F. Forsyth, *Private International Law* (2012), 238.
[36] ibid.
[37] art 2(1) of the Arbitration Act, Law n. 9307 of 1996.
[38] Forsyth, (n 35), 239.

The inconsistency in the position vis-à-vis party autonomy in choice of law in Brazil is further aggravated by limited judicial decisions pronounced on the matter. In some cases, the Supreme Court has stated that it is 'undeniable' that Brazilian law accepts party autonomy in the field of contractual obligations.[39] Some cases have also gone a step ahead to state that Article 9 should be interpreted as subsidiary and is only applicable when there is an omission or dispute about the governing law[40]; or when the parties have not chosen any law[41]. In juxtaposition to this, some courts have put the provision aside, tending to favor the application of Brazilian law as *lex loci contractus* or as *lex executionis.*[42] Furthermore, several precedents suggest that the courts will always limit the freedom of choice in cases where the party has movable or immovable property in Brazil by applying *lex rei sitae*.[43] It can also reject choice of foreign law in order to protect public interest[44]. Thus, in light of above discussion it is difficult to ascertain widespread support for the principle or judicial trend favoring party autonomy in Brazil.

Nonetheless, it is pertinent to note there have been signs of development in private international law of Brazil on party autonomy. It has recently ratified CISG, which recognizes the principle of party autonomy in international transactions. It has also participated extensively in the negotiation of the Mexico Convention on the Law Applicable to International Contracts, which took place in 1994 but has not ratified the same. Notwithstanding, such developments and sign of progression towards recognizing the principle of party autonomy, it can be stated that party autonomy will not gain full acceptance and recognition until the Law of Introduction is revised to expressively incorporate the principle of party autonomy. [45]

In light of this uncertainty the parties who still wish to choose the governing law can do so, by cautiously concluding the contract in the state of chosen law or by correspondence as stated in rule of Article 9 (paragraph 2) of the Introduction of law. Another options, is to include an arbitration clause in the contractual agreement.

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[39] *R S Components Limited v. R S do Brasil Com Imp Exp Cons Repr Ltda,* (2003), See: Albornoz, (n 32), 45.
[40] *Total Energie do Brasil, SNC et al v. Thorey Invest Negocios Ltda,* (2002). See: Albornoz, (n 32), 45.
[41] ibid.
[42] Stringer (n 6), 974-976.
[43] art 8, Introductory Law to the Civil Code, 1942
[44] De Araujo, (n 28).
[45] There have been attempts to draft a new bill but non so far have succeeded: Draft Act 4.905 of 1995, which was withdrawn after two years of deliberations with positive review at the chamber of Deputies, and Draft Act 269 of 2004, which have been filed without deliberations. See further: C.F. Forsyth, *Private International Law* (2012), 242.

SOUTH AFRICA PRIVATE INTERNATIONAL LAW: PARTY AUTONOMY IN THE CHOICE OF LAW

Private International law of South Africa is grounded on Roman Dutch law and English law. The sources or conflict rules can be found in South African constitution, legislation, English private international law (as direct sources), and international conventions and model laws.[46] Thus, there is no single codification that regulates private international law of South Africa and to this end conflict of law issues, including party autonomy have been isolated from development in Africa's civil and common law countries.

Notwithstanding, the little evidence of the development of party autonomy in South Africa the history of private international law in the field of party autonomy suggest that before colonization 'African System of law' applied *lex fori* to problems involving the foreign element.[47] The doctrine of 'proper law' on conflict of law issues came into practice only after the colonization because English common law became one of the sources of private international law in South Africa.[48] This depict that most issues in conflict of laws, including party autonomy, can be seen as a result of the dynamics of power and pragmatism, and are not inspired by any legal reasoning or theory of conflict of laws. [49]

Despite limited jurisprudence on the parties' freedom to choose the 'proper law', judicial pronouncements in 20th and 21st Century suggest that in South African private international law parties may choose the 'proper law' to govern their contract expressly, tacitly or the court may assign the governing law to the contract.

The judicial decisions suggest that subject to certain limitations, an express choice of law should be upheld[50]. In cases where the parties may not record choice of law, the Court may look into other aspects or surrounding circumstances from which their tacit choice might be inferred. While inferring tacit choice of law, the judges may consider a wide range of different

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[46] *S v. Banda* (1989): it was held that a court may take judicial notice of international conventions, including those which South Africa is not a party; S 39(1) (B) of the constitution; S 6(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983; English law (including English private international law) applied to all matters over which the Colonial Courts of admiralty previously had jurisdiction, while South African Law applied to all other admiralty matters.

[47] Richard Oppong, 'Private International Law in Africa: The Past, Present, and the Future' (2007) 55:4 Am J Comp L 677, 692.

[48] ibid.

[49] ibid.

[50] *Herbst v. Surti* (1991). See also: Forsyth, (n 35), 327.

facts to search for parties intention which includes references to Acts of parliament, usage of technical terms or concepts peculiar[51] to a particular legal system, choice of an arbitrator of a particular jurisdiction[52], *lex loci contractus* etc. The problem with respect to tacit choice of law is that even though in certain cases the courts have unlocked the parties intention and upheld choice of law, in some cases it has also ruled that parties mind never actually met. This shows that the court is not bound to decide that just because a certain *inducium* is present, *ipso jure* there has been a tacit choice of law.[53] Secondly, as much as tacit choice is enforced the courts recommend that the choice is expressed and is readily ascertainable.[54] In case, the court fails to ascertain the intention, they go ahead to assign the governing law of the contract themselves. The difficulty with assigning law is that there is no clear-cut conflict rule, which can be mechanically applied to yield a certain answer. Some of the weighing factors, which have been considered by Court while assigning the appropriate law include, 'real and closest connection', *lex loci solutionis, lex loci contractus, locus fundi*, flag of the ship, domicile of the parties, *situs* of the property etc.[55] However, there is no closed or exhaustive list of the connecting factors and the assigning of law by the court is usually peculiar to facts. Certain scholars have criticized this as corrosive of certainty.

In addition to the foregoing, the South African private international law also allows the parties to have freedom to replace all or part of the *ius dispositivum* (system's rules of contract that parties may alter) and defines the rules that they will be bound by and cannot replace.[56] Further, several judicial decisions indicate that the parties are also allowed to choose different laws to govern different sections of their contract, thereby upholding the scission principle[57]. However, this view remains deeply contested because of divergent views of the scholars on the issue.[58]

The position on party autonomy as derived from judicial pronouncements too, remain unsettled. On one hand, it has been argued that freedom of selecting the proper law of the

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[51] *Laconian Maritime Enterprises Ltd. v. Agromar Lineas Ltd.* (1986); See also: Forsyth (n 35), 328.
[52] *Tzortzis v. Monark Line A/B* (1968) 1 WLR 406.
[53] Forsyth, (n 35), 329.
[54] *Kwikspace Modular Buildings Ltd v.Sabodala Mining Co SARL and Another,* 2010 6 SA 477 SCA.
[55] Fredrick and Neels, 'The Proper Law of a Documentary Letter of Credit (Part 1)' (2003) SA Merc LJ 63. See also: *Ferraz v. D'Inhaca* 1904 TH 137; Forsyth, (n 35), 335.
[56] Forsyth, (n 35); See also: Nygh, *Autonomy in International Contracts* (1994), 12-14.
[57] *Laconian Maritime Enterprises Ltd: v. Agromar Lineas Ltd.* (1986) 3 SA 509 D 529 B- E.
[58] Van Niekerk and Schulze support the view that parties may choose several applicable laws while Fredericks and Neels suggest that there should only be one applicable law to govern the contract. See further: Van Niekerk and Schulze, *The South African Law of International Trade: Selected Topics* (2011) 61; See also: Fredrick and Neels (n 55), Forsyth (n 35), 334.

contract is even justified by the constitutional values of freedom, equality and dignity[59] and is hardly limited. On the other hand, some cases indicated that the doctrine might be subjected to nationalistic and territorial scrutiny. The doctrine is also limited by the mandatory rules serving to protect public interest and weaker parties to a contract. Lewis JA and Forsyth explains that the *ius cogens* that cannot be excluded are laws provided by statutes that will apply irrespective of whether the parties have made choice.[60] Similarly, choice of law will not be upheld when the Court feels that it is driven by fraud or is a mala fide choice designed to avoid the application of mandatory rules of an otherwise applicable law.[61] Further, in some cases the courts have completely denied the principle of party autonomy and have held that the choice of law is 'capricious and unreasonable' because it has no connection with the parties contract'. Thus, it disregarded the parties express choice of law by holding that the choice of law cannot be considered as conclusive.[62]

Hence, it is safe to conclude that African Courts are still uncertain in their acknowledgment of the principle of party autonomy in the choice of law. This is because the private international rules still remain 'underdeveloped' in various jurisdictions of South Africa. At present, there is no treaty regulating the choice of law in South Africa. Thus, the doctrine of party autonomy even though is recognized, can be disregarded on the discretion of the judge, by application of local statutes and common law doctrine (proper law), and the type of contract in issue.

COMPARISON OF PRIVATE INTERNATIONAL LAW OF BRAZIL AND SOUTH AFRICA VIS-À-VIS PARTY AUTONOMY IN THE CHOICE OF LAW

A comparative analysis of private international law of Brazil and South Africa vis-à-vis party autonomy in the choice of law would indicate that contractual choice-of-law, as recognized by the international community is not fully supported by existing Brazilian and South African legislation. In both the jurisdictions, the judicial pronouncements do not reveal a strong trend

[59] *Brisley v. Drotsky* (2002) 4 SA 1 28.
[60] *Representative of Lloyds v. Classing Sailing Adventures* (2010) 5 SA 90 SCA 96. See also: Forsyth (n 35), 321.
[61] Paul Beaumont, *Private International Law*, (1990) 267.
[62] The Court relied on several Australian decisions to hold that the choice is 'capricious and unreasonable': refer: *Sonnar Nigeria Ltd. v. Partenreedri MS Nordwind,* (1987) NWLR, 520 See also: *Funduk Engineering Ltd v. Mc Arthur*, (1995) All NLR 157; *Fan Milk Ltd c. State Shipping Corporation,* (1971) 1 GLR 238. The Ghana Court rejected a choice of law and forum and stated that the English and Ghanaian law are same on the subject.

favoring party autonomy. In light of the analysis of the private international laws of Brazil and South Africa in the preceding two sections, it can be concluded that party autonomy under Brazilian is not readily acceptable and can be exercised only in an indirect manner in exceptional circumstances. On the other hand, judicial decisions in South Africa indicate that party autonomy is generally accepted with certain limitations, in cases where the parties expressly make a choice of law to govern their contract. However, this position is not conclusive owing to the fact that in certain cases the judges have curtailed the freedom of parties to choose the governing the law at their own discretion. Secondly, even in the absence of choice of law the Courts of South Africa will not go ahead with applying the South African law, they rather tend to look for a tacit choice of law or assign a proper law after considering several connecting factors to the contract. The Court in Brazil does not tend to look at other such connecting factors, and are usually inclined in applying Brazilian law if it appears that there exists a connection with the Brazilian law.

In both the jurisdictions the legislature has maintained silence on the doctrine of party autonomy in choice of law. There is not any express provision allowing the principle of party autonomy but neither is there any principle prohibiting it. The judicial decisions and scholarly work are significant but hold divergent views; thereby suggesting that the position with respect to acceptance of party autonomy in choice of law remain unsettled and divided in both Brazil and South Africa. The reluctance in enacting a legislation and general approach of restricting or prohibit party autonomy through mandatory provisions in local statutes can be attributed to the fragile economies and colonial experiences of both the countries[63]. It inclines these countries towards protecting their national interests from foreign economic exploitation. Such is also the case in Brazil, where historical and socio political context has led to the adoption of the doctrine of territorialism.[64] The 1942 Code was enacted as a response to the unprecedented afflux of migrants during Second World War. As a consequence of which, the Brazilian law changed substantially to adopt a nationalist and territorial approach to conflict of laws. [65]Thus the historical background of both the countries justifies the current judicial practice, which tends to apply *lex fori* when faced with multistate cases.

[63] Ogunranti (n 11), 116.
[64] Albornoz (n 32), 51.
[65] De Araujo (n 28), 77.

Notwithstanding the under-developed stage of the private international laws of both the jurisdictions, there have been significant developments in certain aspects of Brazilian law towards recognition of party autonomy in the choice of law. As explained above, Brazil has ratified CISG, which explicitly recognizes the principle of party autonomy. It has also come up with two bills with important and necessary reforms about private international law, which if implemented would bring significant developments on the law of party autonomy in choice of law.[66] On the other hand, there is little evidence to conclude if there have been similar developments in South African private international law. This is because; South Africa has still not ratified or signed any treaty to explicitly recognize party autonomy in the choice of law. Nor it has made any attempts to codify its rules of private international law on the issue.

RECOMMENDATIONS

The principle of party autonomy has gained prominence in the last few decades; several national systems as well as the conventions have adopted the principle.[67] Considering the significance of principle in ensuring certainty and efficiency in choice of law rules, it is recommended that the legislatures of both the countries should take a proactive approach in explicitly recognizing the principle of party autonomy in the choice of law.

In addition to the above, adopting the position of Rome I regulation while assigning the applicable law (in cases where the parties have not expressly chosen any law), can be beneficial for South Africa. The Regulation provides with eight set of crystallized rules and raises a presumption that where there is no choice of law by the parties - the contract will be presumed to be closely connected with the habitual residence of the party who is 'to effect the performance which is characteristic of the contract'.[68] This is a useful idea and has been adopted by many countries[69] since it brings predictability and uniformity as long as characteristic performer is clear. While this is a general rule, it also provides some flexibility by allowing departure from it in exceptional circumstances – in the cases where 'the contract is manifestly more closely connected with another country'.[70] Thus it can be concluded that

[66] See n 45.
[67] Dollinger, *Private International Law in Brazil*, (Kluwer Law International 2012), 123.
[68] art 4 Rome I Regulation.
[69] Forsyth, (n 35), 335.
[70] art 4(3) of Rome I Regulation.

these eight rules can specifically prove beneficial in bringing uniformity to the vexed situation on the choice of law in South Africa where the courts apply their discretion in assigning 'proper law' to the contract.

Brazil, similarly should take active steps in ratifying the Inter-American Convention on the Law Applicable to International Contracts because it does not expressly consecrate the principle of party autonomy and does not even lightly touch upon the principle of proximity. The Mexico Convention can be beneficial in this case because it embraces both subjective and objective analysis on the concept of proximity[71]. It would also help in overcoming the judicial tendency to apply Brazilian law in spite of other connecting factors. Secondly, the convention would also ensure that the freedom of party autonomy in the choice of law does not derogate from the mandatory rules or the public order of the forum.

Further, it is also suggested that both South Africa and Brazil can refer to the Hague principles, as approved on 19th march 2015. The Hague principles on the choice of law are an important non-binding instrument, which echoes the principle of party autonomy and can serve as a model for national legislators, courts and arbitral tribunals at the domestic level while interpreting, supplementing and developing the rules of private international law on party autonomy in choice of law.[72] The principle allows the parties to choose the governing law of either their entire international contract or part of it without requiring a connection with the transaction in in question.[73] Thus even though, there is not much evidence to demonstrate the effectiveness of the principles in practice both the jurisdictions can still make references to it while developing their respective international laws in the matter relating to party autonomy.[74]

FINAL REMARKS

Party autonomy has gained prominence in the last few decades; national systems as well as the conventions have adopted the principle, which helps them structure their choice of law rules. However, certain countries such as South Africa and Brazil still do not have any express provision recognizing the principle of party autonomy in choice of law. The position in both

[71] Jacob Dollinger, *Evolution of Principles for Resolving Conflicts in the Field of Contracts and Torts*, (Leiden, the Netherlands: Martinus Nijhoff 2000), 410-415.
[72] Commentary, (n 25). See also: Khanderia (n 8), 5.
[73] Art 2(4) of The Hague Principles. See also: Commentary (n 25).
[74] Khanderia (n 8), 15.

the jurisdictions on party autonomy vis-à-vis choice of law remains uncertain and divided as depicted by the judicial pronouncements and scholarly work of Brazilian and South African scholars. This paper by comparing the private international laws of both the countries on the principle of party autonomy in choice of law concludes that despite the absence of codified law on the issue; South African Courts have upheld express choice of law by the parties to govern their contract. On the other hand, under Brazilian law the principle may be applied only in an indirect manner. Further, considering the current under-developed stage of the principle of party autonomy in both the jurisdictions it is recommended that these countries ratify prominent international conventions such as Rome I Regulation or Mexico Convention, which provide for an express set of rules on the principle of party autonomy in choice of law. Another approach is to legislate a new set of rules on the issue. While doing so, both the countries can rely upon the Hague Principles which advocates a very contemporary approach on party autonomy in the choice of law.