ELECTRONIC CROSS-BORDER CONTRACTING, IS THAT "PROPER LAW"?

The continuous development in international communication media together with the never ending expansion of the global trade arena have impacted both positively and negatively on international contractual dispute resolution. It is common cause that once a dispute has been characterised as of a contractual nature and the *lex fori* has been established, the next step is to ascertain which law is the *lex causa* or so called "Proper Law" of the agreement.

This article is focused on the assertion of the proper law of an agreement, after it has been established that the *lex fori* is South African law, in situations where parties electronically concluded an agreement and whilst doing so omitted to exercise their autonomy to record the law which they are intent on governing the agreement, alternatively in situations where one cannot establish whether the parties contemplated and tacitly implied that a specific legal system would govern the agreement at the time when their agreement was concluded when the lex fori was already established as South African law.

In the absence of an express or tacit election of the proper law of an agreement, the correct approach to follow is to disregard the parties' intentions pertaining to such an election and take into consideration the factual nexus between the *naturalia* of the agreement and the legal systems that could potentially be applicable to the agreement.

The multilateral conflict rules (provided for by the South African International Private Law), to ascertain the proper law of an agreement entails that the *lex loci contractus* (the law of the territory in which the agreement is concluded) would primarily be assigned to govern an international agreement unless performance, characteristic to the agreement, was agreed to be effected elsewhere, in which circumstances the *lex loci solutionis* (the law of the territory in which performance in terms of the agreement would be effected) would govern the agreement.[1]

This principle was laid down in the matter of Standard Bank of South Africa Ltd v Effroiken Newman 1924 AD 171 and has ever since enjoyed authority in South African jurisdictions. Should one not be able to establish the *locus solutionis*, the *lex locus contractus* should be assigned as the proper law.

This approach might in certain circumstances be qualified even further by incorporating into it the international character of the Rome Convention on the Law Applicable to Contractual Obligations, 24 July 2008, more specifically article 4(2) thereof, which provides that where there is no choice of law autonomy exercised by the parties, the agreement is most closely connected to the habitual residence of the party which effects performance, characteristic to the specific nature of the agreement, which would in some instances where neither the *locus contractus* or *locus solutionis* can be established, assist to ascertain the proper law of an agreement.

---

[1] The territory in which a contract is concluded is known as the *locus contractus* and the territory in which performance should be effected (i.e. where delivery of goods should be made) is known as the *locus solutionis*.

It would be incorrect to accept merely from the outset that a specific territory's legal system would govern an international agreement prior to conducting a thorough investigation of how the agreement was concluded and ascertaining where and when such an agreement was concluded.

It goes without saying that such a process is dependent upon the particular communication media utilised in the conclusion of international agreements, i.e. the specific communication utilised to convey and exchange correspondence containing negotiations, offers and notices of acceptance of offers. The four main principles which should be considered whilst endeavouring to ascertain where and when an international agreement has been concluded are:

1. The Information Theory - mainly applied when agreements were concluded by means of direct communication i.e. telephonic and even video conference negotiation and conclusion of agreements. This theory entails that consensus has been reached at the time and place where one party becomes informed of another party accepting its offer.

2. The Common Law Transmission Theory - mainly applied when agreements were concluded by means of physical written letters sent by post to the addressee, hence it being commonly known in South Africa as the "Postbox rule". This theory entails that consensus has been reached at the time and place when a party transmits its acceptance of an offer to the party who made such an offer to the accepting party.

3. The Formulation Theory - exclusively applied in conjunction with the Transmission Theory and entails that consensus has been reached at the time and place when a party formulates its acceptance of an offer made to it by another party.

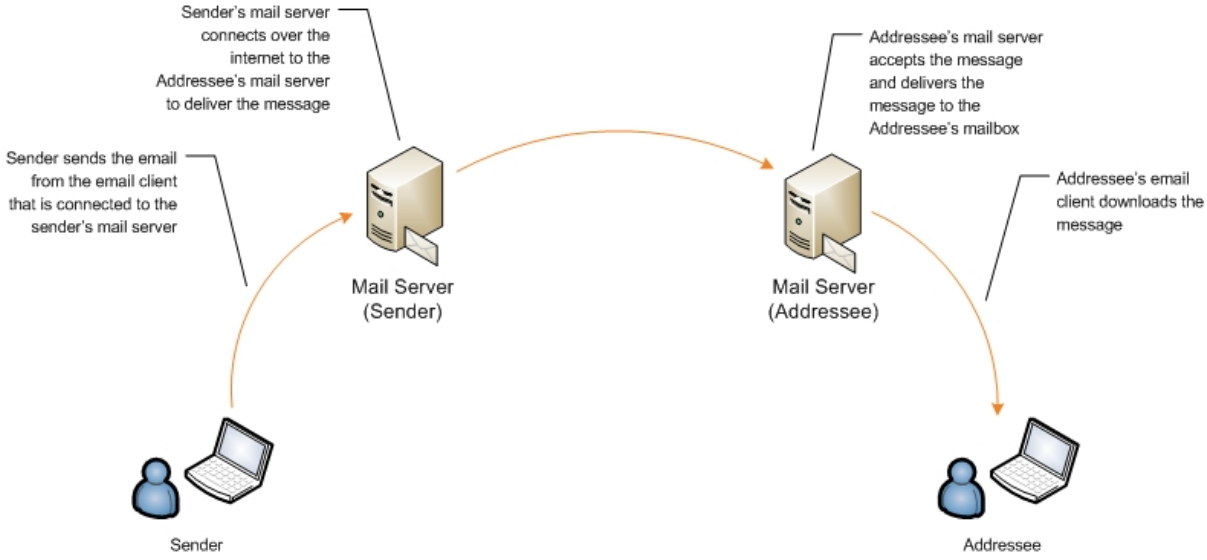
4. The *Zugangstheorie* - applied in situations of indirect communication and entails that consensus has been reached at the time and place when the addressee physically receives the message, alternatively at such time and place where the message is accessible by the addressee, in the normal scope of the day to day conduct of his business, to such an extent that the addressee is in a position to direct his / her / its actions accordingly.

It is common knowledge that, due to territorial autonomy, every territory possesses over its own classification principles. These, if they are not identical to the aforesaid dominant principles, would at the very least incorporate a principle inherently similar to same. Some of the main considerations in adopting these principles are to regulate the passing of risk during the negotiation process which precedes the ultimate conclusion of international agreements as well as where and when such agreements have been concluded.

In the event of an international agreement being concluded by means of electronic correspondence or alternate electronic communication media, for instance Electronic Data Interchange systems, the correspondence enters the addressee's data server, where communication and information is stored and from which it can be retrieved by

the addressee. As such parties do not communicate directly with each other but via their respective electronic communication interfaces. The transmission and receipt of communication is affected on behalf of the addressee or transmitter through data servers and entails a classification of the method of conclusion of the agreement as a form of indirect communication. This in return entails that the *Zugangstheorie* would be adopted to ascertain where and when the agreement was concluded.

The application of the *Zugangstheorie* entails that when correspondence enters the addressee's data server, it is delivered to the addressee in the sense that the correspondence is thereafter accessible by the addressee regardless of where the addressee is located. Consensus would accordingly be reached where the addressee's data server is located and at the time when the correspondence was received by the server. Such classification would also be in line with South Africa's Electronic Communications and Transactions Act 25 of 2002. This process is illustrated below:



Once the location of where consensus was reached between the parties to an international agreement is established, same would indicate the *locus contractus*.

Logically one can only establish whether the *lex loci contractus* or the *lex loci solutionis* would indicate the proper law of the agreement once the *locus contractus* has been established. One will only then be in a position to ascertain whether the *locus contractus* is different from the *locus solutionis* so as to distinguish which conflict rules apply to which situations i.e. in which circumstances would the *lex loci contractus* or the *lex loci solutionis* indicate the proper law of the agreement.

There are various situations wherein the optimal application of the *Zugangsteorie* is obstructed and which provide possible defences to parties who aim to exclude the use of this procedure to establish the proper law of an international agreement. Typical examples are:

1. The recipient of a communication encounters a network or other related technological problem which prevents the recipient access to the message.

2. For instance a communication containing a notice of acceptance of an offer is submitted to an addressee by means of facsimile and the transmitting party cancels its notice of acceptance during the cooling-off period by means of electronic mail, which reaches the addressee before the initial notice of acceptance.

3. For instance when a party in South Africa places an order with XYZ Timber Manufacturers in Germany, the parties correspond by means of electronic mail and the communication is erroneously sent to “harry@timber.de” and not “barry@timber.de”, whilst both addresses exist in the relevant domain. In such an instance the communication has reached XYZ Timber and the addressee in the sense that it has been delivered to his data server but would not be accessible by the addressee in the normal scope of the day to day conduct of his business due to the fact that it was sent to the incorrect person and/or address.

4. The communication enters the addressee’s data server but it is in an electronic format which the addressee is unable to open / read and accordingly unable to take note of the content of the communication.

The burden of proof, duty to endeavour to resolve communication problems and risk however still remains with the addressee.

Due to the unchartered waters in dispute resolution of this nature there are still many situations and circumstances, whether hypothetical or not, where one would be able to question the practicality of the aforesaid principles, in which event one should apply same individually to each set of facts.

It is impossible to conduct any form of international contractual dispute resolution without at first ascertaining the proper law of an agreement as it would indicate which remedies, rights and obligations vest in the parties to such an agreement. One would expect, especially in the presence of the United Nations Convention on the International Sale of Goods, Vienna 1980 and South Africa’s still very green Consumer Protection Act 68 of 2008, that dispute resolution of this nature may still become a very complicated and cumbersome process.

When one encounters matters of this nature in practice one realises that the risk that parties take upon themselves through concluding international agreements which are not embodied in a proper written legal document that, at the very least, records the governing law and proceedings to be followed if a dispute arises in terms of the parties’ trade relationship, at least from an enforcement and dispute resolution perspective, does not constitute not proper law.

Article by:

TIAAN SMUTS AND PIETER LOURENS

Tiaan Smuts – Partner, Commercial Litigation, Adams & Adams

Pieter Lourens – Candidate Attorney, Commercial Litigation, Adams & Adams