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Indian private international law vis-à-vis party autonomy in the choice of law

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ABSTRACT
In the present era, most jurisdictions across the globe imbibe the subjective interpretation of party autonomy whereby the parties' choice of governing law in an international commercial contract is unfettered by any geographical limitations. Indian private international law conforms to this international best practice and there are sufficient judicial dicta to indicate that party autonomy extends to the choice of any law—even if it has no nexus with the transaction in question. However, the blind adoption of the traditional common law principles has led to certain ambiguities in Indian private international law, in particular concerning the limits within which this freedom must operate. Furthermore, under the current principles of Indian private international law, it is unclear whether party autonomy in the choice of law also extends to the express selection of other rules of law or non-state norms. In such circumstances, it is suggested that the Indian courts could plausibly refer to the recommendations formulated by international organisations such as the Hague Conference on Private International Law's Principles on Choice of Law in International Commercial Contracts (the Hague Principles) on these aspects for interpretational purposes if they encounter such anomalies in the future.

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1. 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. As a part of the 'choice

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[1]See Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008) 37. Also see generally PE Nygh, *Autonomy in International Contracts* (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; *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 (House of Lords (HL)).

[2]See Lawrence Collins et al (eds), *Dicey and Morris on the Conflict of Laws*, vol 2 (11th edn, Stevens & Sons 1987) 1161–96, which defines 'proper law of the contract' as the law (or laws), or rules by which, the parties intended or may have fairly be presumed to have intended in a contract to be governed, or may have fairly be presumed to have intended to submit themselves.

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of law'[3] revolution, this principle has displaced the traditional connecting factors for contracts conflicts, viz, the place of the conclusion of a contract (*lex loci contractus*)[4] and the place of performance (*lex loci solutionis*), as the governing law.[5] Although party autonomy has long been recognised as one of the most fundamental principles of private international law,[6] legal systems across the globe continue to vary in the delineation of the precise parameters within which this freedom would operate. Apropos, while the rules of private international law of some countries permit the parties to choose *any* legal system as the governing law expressly, others restrict such a choice to that which has some connection to the contractual obligation. Such variations, often referred to respectively as the subjective and objective interpretation of party autonomy in the choice of law, have been propounded by Dicey[7] and Cheshire.[8]

At present, most private international laws that stipulate the principle of party autonomy imbibe the subjective interpretation whereby the parties are free to choose any legal system to regulate disputes arising from their agreement, irrespective of whether that law has some connection with the contract or not. The purpose of this paper is, therefore, to analyse whether the principles of Indian private international law[9] similarly permit the parties to an international commercial agreement to choose any legal system to govern their agreement. It is structured as follows: section 2 provides an overview of some major jurisdictions' approach to party autonomy in the choice of law. Thereafter, given the absence of any code of private international law in India, section 3 examines the leading case-law to evaluate whether Indian courts have been receptive to the parties' choices of law

[3]See Symeon C Symeonides, *Choice of Law* (Oxford University Press 2016) 1, which defines the term 'choice of law' as 'the method or process by which one determines which state's law will govern a case that implicates the laws of more than one state or country ("multistate" case)'.

[4]But see Symeon C Symeonides, 'Choice of Law in American Courts in 2016: Thirteenth Annual Survey' (2017) 65 American Journal of Comparative Law 1, 32–33, which reports that twelve American states continue to follow the traditional approach, namely that *lex loci contractus* would be considered as the proper law of the contract. Accordingly, the principle of party autonomy has not been recognised in these states even to date.

[5]See *Chatenay v The Brazilian Submarine Telegraph Company* [1891] 1 QB 79 (England & Wales Court of Appeal (EWCA)) 82–83; *Lloyd v Guibert* (1865) LR 1 QB 115, 122; 122 ER 1134, 1146 (England & Wales High Court (EWHC), Court of King's Bench). For a detailed discussion on the applicability of the theories see JHC Morris, *The Conflict of Laws* (3rd edn, Stevens and Sons 1984) 266–67, 278. Also see Ernst Rabel, *The Conflict of Laws: A Comparative Study*, vol 2 (Callaghan & Company 1947) 357, 393, and 402–08, for other theories that were relied upon in the past to 'presume' the proper law of contract.

[6]See Russell Jay Weintraub, 'Functional Developments in Choice of Law for Contracts' (1984) 187 Recueil des Cours de l'Académie de Droit International 239, 271. Also see Symeon C Symeonides and Wendy Collins Perdue, *Conflict of Laws: American, Comparative, International* (3rd edn, West 2012) 442, and Nygh (n 1) 202–07.

[7]See Collins et al (n 2) 1039–41. See also *Lloyd v Guibert* (n 5).

[8]See GC Cheshire, *Private International Law* (6th edn, Clarendon Press 1961) 215. Also see generally, Martin Wolff, 'The Choice of Law by the Parties in International Contracts' (1937) 49 Juridical Review 110.

[9]The term 'private international law' refers to the national law that would resolve the multi-state disputes of the parties, provided they are private persons 'other than a state in the exercise of governmental authority': Symeonides, *Choice of Law* (n 3) 2.

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even when there is no connection to the transaction in question. Section 4 then provides some concluding remarks.

2. Party autonomy in the choice of law in some jurisdictions: an overview

The subjective interpretation of party autonomy seems to have found favour among a large number of jurisdictions across the globe. For instance, English private international law has historically recognised the subjective interpretation of party autonomy. Although the United Kingdom is now a signatory to the Rome I Regulation (Rome I),[10] its earlier decisions on the subject have continued to influence the development of private international law in other common law jurisdictions such as India, making it relevant to discuss such decisions in some detail at this juncture. The Privy Council's decision in *Vita Food Products v Unus Shipping Company*[11] is particularly representative of the common law approach to party autonomy in the choice of law. In casu, the court per Lord Wright affirmed the parties' right to choose any law to govern their contract. Apropos, no connection would be mandated between the parties to the contract and the governing law provided that the choice was '*bona fide* and legal'.[12] Although the verdict was silent as to the circumstances which may be construed as not being '*bona fide* and legal', regard must be had to Dicey and Morris' interpretation on the subject. The authors clarify that the presiding court would usually disregard the parties' choice of an unconnected foreign law if it contravenes the mandatory rules of the legal system that was most closely connected with the contract.[13] The Court of Appeal's subsequent decision in *The Hollandia* may substantiate this explanation. Lord Denning reaffirmed the parties' freedom to choose the governing law in their contract, provided, however, that their choice did not derogate from the mandatory rules that would otherwise be applicable.[14] In casu, the parties had expressly chosen the Dutch legal system as the proper law of their contract as evidenced by a bill of

[10]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) [2008] OJL 177/6.

[11][1939] AC 277 (UK Privy Council).

[12]ibid 290. Also see generally, Lawrence Collins, 'Contractual Obligations—the EEC Preliminary Draft Convention on Private International Law' (1976) 25 International and Comparative Law Quarterly 35; Hessel E Yntema, '"Autonomy" in Choice of Law' (1952) 1 American Journal of Comparative Law 341, 345ff. But see a few earlier decisions that also permitted party autonomy in international contracts, irrespective of any connection with the transaction in question: *British South Africa Company v De Beers Consolidated Mines* [1910] 1 Ch 354 (EWHC) 381; *British Controlled Oilfields v Stagg* 127 LT 209 (EWHC); *R v International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] AC 500 (HL) 529.

[13]See Collins et al (n 2) 756.

[14][1982] 1 All ER 1076 (CA) 1080.

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lading. However, the choice operated in derogation of article III:8(b) of the Hague-Visby Rules that are applicable under the Carriage of Goods by Sea Act 1971.[15]

The Rome I Regulation equally espouses the subjective interpretation of party autonomy in the choice of law insofar as it reiterates that 'the parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.'[16] The provisions on party autonomy in Rome I are thus comparable to the position under English private international law as the former also places some restrictions on the parties' right to choose the law, viz, that it does not derogate from the mandatory provisions of the *lex fori*.[17]

In a similar vein, several other codifications of private international have dispensed with the need for any nexus between the chosen law and the contractual obligations.[18] Prominent examples include the codifications of China,[19] Hong Kong,[20] Japan,[21] Mexico,[22] South Korea,[23] Russia,[24] Switzerland,[25] Turkey[26] and Venezuela.[27]

[15]ibid. Also see generally, JHC Morris, 'The Scope of the Carriage of Goods by Sea Act 1971' (1979) 95 Law Quarterly Review 59, 66.

[16]Recital (11) Rome I. Also see art 3(1) Rome I, which espouses the parties' freedom of choice of law.

[17]ibid art 3(3), read with art 9(2) and 21. Also see Symeon C Symeonides, 'The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments' (2013) 61 American Journal of Comparative Law 873, 875, which reports that the principle of party autonomy in art 3(3) has influenced most PIL codifications around the world.

[18]But see § 187(2)(a) Restatement (Second) of Conflict of Laws 1971, which is followed by 23 American states. It prescribes the contractual obligations entered into between the parties of 23 American states and posits that the parties' right to choose the governing law would only be valid insofar as it bears a 'substantial relationship to the parties or their transaction' and has a 'reasonable basis for the parties' choice'. For a detailed understanding of choice of law principles under American private international law see generally, Symeonides, *Choice of Law* (n 3). Likewise, Nigerian private international law also places geographical restrictions on its parties' freedom to choose a law to govern their international commercial contract: *Sonnar (Nig) Ltd v Partenreedri MS Norwind* [1987] 1 All NLR 396 (Supreme Court of Nigeria) 414.

[19]art 3 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations 2010. Also see by Zhengxin Huo, 'An Imperfect Improvement: The New Conflict of Laws Act in the People's Republic of China' (2011) 60 International and Comparative Law Quarterly 1065, 1065 and 1085.

[20]See Graeme Johnston, *The Conflict of Laws in Hong Kong* (2nd edn, Sweet and Maxwell 2012) 189; Lutz-Christian Wolff, 'Hong Kong's Conflict of Contract Laws: Quo Vadis?' (2010) 6 Journal of Private International Law 465, 471–72. The private international law of Hong Kong has also (like India) developed with the aid of case law in the absence of any codification of its principles. Apropos, Hong Kong's conflict of law rules are based on the traditional common law regime as developed by case law.

[21]art 7 of the Japanese Act on the General Rules on the Application of Laws, Act No 78 of 2006.

[22]art 7 of the Inter-American Convention of the Law Applicable to International Contracts (adopted 17 March 1994, entered into force 15 December 1996) (1994) 33 ILM 732 (Mexico City Convention).

[23]art 25 of the Conflict of Laws Act of the Republic of Korea 2001.

[24]art 1210 of the Civil Code of the Russian Federation 2006.

[25]art 15 of Switzerland's Federal Code of Private International Law 1987.

[26]art 24 of the Turkish Code on Private International Law and International Civil Procedure 2007 (Act No 5718).

[27]art 7 of the Mexico City Convention.

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The Hague Conference on Private International Law's recent Principles on Choice of Law in International Commercial Contracts (the Hague Principles),[28] which were approved on 19 March 2015,[29] similarly echo the principle of party autonomy[30] in its subjective sense via article 2(4). Although they are a non-binding set of recommendations,[31] which are intended to be used as 'soft law',[32] the Hague Principles could potentially be relevant to lawmakers, courts and arbitral tribunals[33] at the domestic level while interpreting,[34] supplementing[35] and developing[36] the rules of private international law[37] on party autonomy in the choice of law.[38] In particular, they endeavour to aid the lawmakers and judiciaries of individual countries which are not signatories to international conventions, such as Rome I, or have not codified a set of principles on the subject. The Hague Principles state that the parties may choose *any* law to govern either their entire international commercial contract or a part of it,[39] without requiring a connection with the transaction in question.[40] Moreover, the parties may also choose rules of law/non-state laws to govern their international commercial contract, provided these are 'generally accepted on an international, supranational, or regional level as a neutral and balanced set of rules' and such choice is not prohibited by the rules of the forum.[41] To this end, the Hague Principles prescribe that the only

[28] According to its art 1, the Hague Principles only apply to 'choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer or employment contracts'.

[29] For the history of the project, see Jan L Neels, 'The Nature, Objective and Purposes of the Hague Principles on Choice of Law in International Commercial Contracts' [2015] Journal of South African Law 774, 774–75; and the website of the Hague Conference on Private International Law <www.hcch.net> accessed 30 January 2018.

[30] See, para 1 of the Preamble of the Hague Principles, which limits its application to international commercial contracts. Also see art 1(2), which defines a commercial contract as international 'unless each party has its establishment in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State'.

[31] See Hague Conference on Private International Law, 'Commentary on the Hague Principles' <www.hcch.net/en/instruments/conventions/full-text/?cid=135> accessed 12 January 2017 (Commentary).

[32] Non-binding legal principles are commonly referred to as 'soft law'. Bonell defines 'soft law' as 'general instruments of normative nature with no legally binding force and which are applied only through voluntary acceptance'. See Michael Joachim Bonell, 'Soft Law and Party Autonomy: The Case of the Unidroit Principles' (2005) 51 Loyola Law Review 229. Also see Sieg Eiselen, 'Globalization and harmonization of international trade law' in Michael Faure and André van der Walt (eds) *Globalization and Private Law: The Way Forward* (Edward Elgar 2010) 97, 123–25.

[33] Commentary (n 31), Preamble, para 4.

[34] Commentary (n 31), Preamble, para 3, which defines 'interpretation' as 'the process of explaining, clarifying or construing the meaning of existing rules of private international law'.

[35] ibid. The term 'supplementation' is defined as 'the refinement of an existing rule of private international law, which does not sufficiently or appropriately provide for a particular type of situation'.

[36] ibid. The term 'development' is defined as the 'addition … of new rules, where none existed before, or effecting fundamental changes to pre-existing ones'.

[37] para 3 of the Preamble to the Hague Principles.

[38] ibid para 1.

[39] ibid art 2(1) and (2).

[40] ibid art 2(4).

[41] ibid art 3 and Commentary (n 31), art 3. Also see, Geneviève Saumier, 'The Hague Principles and the Choice of Non-State "Rules of Law" to Govern an International Commercial Contract' (2014) 40 Brooklyn Journal of International Law 1, 5ff; Symeonides, 'The Hague Principles on Choice of Law for International

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curtailment on the parties' choice of law should be when it derogates from the 'overriding mandatory provisions of the law of the forum'[42] or when the choice is manifestly incompatible with the fundamental notions of public policy (*ordre public*).[43]

3. Principles of Indian private international law on party autonomy in the choice of law

Although the Indian Contract Act 1872[44] regulates disputes on contractual obligations, its scope is limited to domestic matters.[45] Accordingly, the Act autonomously governs all contracts whose scope is purely local, and the parties' choice of law in such agreements is prohibited. For international matters, in the absence of any codification on that aspect, the Indian judiciary ordinarily relies on the traditional common law position as enunciated in *Vita Food*, which is of persuasive value. The proper law of the contract under the principles of Indian private international law is thus determined on the grounds of justice, equity and good conscience.[46]

3.1. What law may the parties to an international commercial agreement choose?

Utmost importance is given to the parties' intention while determining the law,[47] and theories such as *lex loci contractus* or *lex loci solutionis* have no relevance except when a choice cannot be ascertained at all.[48] In some earlier

Contracts' (n 17) 893ff; Ralf Michaels, 'Non-State Law in the Hague Principles on Choice of Law in International Commercial Contracts' in Kai Purnhagen and Peter Rott (eds), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Springer 2014).

[42]art 11(1), (2) Hague Principles; Commentary (n 31), para 11; Symeonides, 'The Hague Principles on Choice of Law for International Contracts' (n 17) 883ff. Also see Nygh (n 1) 202–07; JJ Fawcett, 'Evasion of Law and Mandatory Rules in Private International Law' (1990) 49 Cambridge Law Journal 44; Adeline Chong, 'The Public Policy and Mandatory Rules of Third Countries in International Contracts' (2006) 2 Journal of Private International Law 27, for a detailed discussion on the applicability of 'overriding mandatory norms' to the principle of party autonomy (see art 9(1) of Rome I).

[43]The Hague Principles, art 11(3)–(4); Commentary (n 31), art 11; Symeonides, 'The Hague Principles on Choice of Law for International Contracts' (n 17) 883ff. Also see generally Nygh (n 1) 202–07; Chong (n 42), for a discussion on the interrelationship between public policy and mandatory norms.

[44]Act No 9 of 1872.

[45]ibid s 1.

[46]VG Ramachandran, 'Conflict of Laws as to Contracts' (1970) 12 Journal of the Indian Law Institute 269, 270.

[47]See the relevant decisions of the Supreme Court, which underscore that an international contract would be governed by the law chosen by the parties, express or implied: *Delhi Cloth and General Mills Co v Harnam Singh* AIR 1955 SC 590; *Dhanrajamal Gobindram v Shamji Kalidas and Co* AIR 1961 SC 1285; *National Thermal Power Corporation v Singer Company* [1992] 3 SCC 551. Also see KB Agrawal and Vandana Singh, *Private International Law in India* (Kluwer Law International 2010) 97; PM North, *Cheshire's Private International Law* (9th edn, Butterworths 1974) 216.

[48]*Brijraj Marwari v Anant Prasad* AIR 1942 Cal 509 (Calcutta High Court, CHC); *Indian and General Investment Trust v Sri Ramchandra Mardaraja Deo, Raja of Kalikote* AIR 1952 Cal 508 (CHC) [38]; Ramachandran (n 46) 275. Also see Agrawal and Singh (n 47) 96–97, for a discussion on the presumptions of the proper law of the contract.

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decisions, however, Indian courts remained nebulous as to whether the expressed intention would entail the choice of any law even if it bears no connection with the transaction in question. For instance, the Calcutta High Court in *Brijraj v Anant* merely mentioned that the express intention of the parties would prevail over the *lex loci solutionis*,[49] while determining the proper law of the contract.[50] In a similar vein, the Privy Council per Lord Atkin in *The State Aided Bank of Travancore Ltd v Dhrit Ram* also restricted its explanation to the fact that the contract in question would typically be governed by the parties' express choice of law, only in the absence of which their implied intention would be inferred.[51]

In due course, the Supreme Court of India provided some clarification as regards the law that the parties may choose. In particular, in *Delhi Cloth and General Mills Co Ltd v Harnam Singh*, the court was provided with an opportunity to decide, inter alia, whether Indian private international law gave the parties the freedom to choose the governing law subjectively 'by ranging all over the world and picking out whatever laws they like from any part of the globe and agreeing that those laws shall govern their contract'.[52] This dispute pertained to the recovery of balance from the plaintiff, residing in Lyallpur (Pakistan), who was purchasing cloth from the defendant in India. The proper law of the contract was that of Lyallpur, which thus bore a nexus with the transaction. However, in the alternative, the court per Bose J confirmed that 'the subjective theory may produce strangely unrealistic results'[53] because the unconnected law would be difficult to enforce if it is illegal or against public policy.[54]

The Supreme Court reinforced this opinion in *British India Steam Navigation Co Ltd v Shanmughavilas Cashew Industries*, while examining a contract evidenced by a bill of lading wherein the parties expressly chose the English legal system as the proper law.[55] In casu, KN Saikia and PB Sawant JJ upheld the parties' choice, because the appellant was a company incorporated in England,[56] and concurred with Lord Wright's observation in *Vita Food* that 'the choice must be bona fide and legal, and not against public policy'.[57] Nonetheless, the Supreme Court did not adopt the position in English law that party autonomy is not confined by geographical limits, and instead emphasised that 'it may not be permissible to choose a wholly

[49]AIR 1942 Cal 509 (CHC) [2].
[50]ibid, referring to the Privy Council decision in *Mount Albert Borough Council v Australasian Temperance and General Mutual Life Assurance Society, Ltd* [1938] AC 224.
[51]AIR 1942 PC 6 [8].
[52]AIR 1955 SC 590 [37].
[53]ibid.
[54]ibid, referring to Lord Wright's observations in *Mount Albert Borough Council* (n 50).
[55][1990] 3 SCC 481. Also see Agrawal & Singh (n 47) 93.
[56]ibid [30], referring to Collins et al (n 2) Rule 180: Sub-Rule 1, 1168–82.
[57]ibid [31], see *Vita Food* (n 11).

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unconnected law which is not otherwise a proper law of contract'.[58] This position was substantiated on account of the court's 'residual power to strike down for good reasons' such clauses.[59] Cheshire's objective interpretation thus unambiguously found favour in some initial sessions of the Supreme Court.

Given the precedential value of the highest judiciary's previous decisions, various other courts were bound to limit the parties' choice to a law that has a connection to the transaction in question. Nonetheless, the Calcutta High Court per Mookerjee J in *Swedish East Asia Company Ltd v BR Herman and Mohatta (India) Pvt Ltd* instead showed a preference for Dicey's subjective interpretation. The court opined that the parties' choice of law would be upheld 'even where [it] has no real connection with the contract', provided 'the selection is bona fide and there is no objection on the ground of public policy'.[60] However, the contract at issue, which chose the Swedish legal system as the governing law, was not neutral because the appellant was a firm incorporated in Sweden and had undertaken to carry goods on behalf of a Swedish citizen to a port in Calcutta. Subsequently, the court in *Rabindra N Maitra v Life Insurance Corporation of India*,[61] while giving another obiter dictum, reneged on its previous opinion and affirmed its preference for Cheshire's objective interpretation to correspond with the Supreme Court's verdict in *British India Steam Navigation Co Ltd*. In casu, while analysing a life insurance policy containing an express choice of Pakistani law, the court per Law J reaffirmed that the parties' express choice of law would only be respected if it has a 'real or substantial connection with the contract looked upon as a whole'.[62] The court concluded that there would be no justification for a choice of an unconnected law 'unless of course, it is also the proper law according to the objective standard'.[63]

3.2. Abandonment of the restrictive approach: current developments

The Supreme Court in *National Thermal Power Corporation v Singer Company*[64] abandoned the restrictive approach, which confined the parties' choice of the governing law to a legal system that bore a connection with the contract. The verdict corresponds with the common law approach in *Vita Food*[65] and *The Hollandia*[66] which permits the choice of any law even if there is no

[58] ibid [31], see *Vita Food* (n 11).
[59] ibid [31].
[60] AIR 1962 Cal 601 [14].
[61] AIR 1964 Cal 141 (CHC) [16]–[18].
[62] ibid [24].
[63] ibid.
[64] [1992] 3 SCC 551.
[65] *Vita Food* (n 11).
[66] [1983] 1 AC 565 (HL).

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geographical nexus between the obligation and the chosen law. It heralds the current position in Indian private international law vis-à-vis party autonomy in the choice of law.[67]

The Supreme Court in casu was called upon to examine two international commercial agreements between the National Thermal Power Corporation and Singer for determining, inter alia, whether the parties had the right to choose a governing law to regulate all plausible disputes that may arise from their contractual obligations. Although the parties had chosen the Indian legal system, which had a connection with the contract as a whole, the court per Thommen and Agrawal JJ clarified that '[t]he expressed intention of the parties is generally decisive in determining the proper law of the contract'.[68] The court further elaborated that party autonomy in the choice of law under Indian private international law would also extend to the selection of different laws to govern different parts of the contract. Moreover, even though the Supreme Court had previously relied upon Upjohn J's observation in *Vita Food*[69] in the case of *British India Steam Navigation Co Ltd*, it emphasised in the present case that the *only* limitation to the parties' freedom to choose a governing law for their international commercial contract would be that the choice is not *bona fide* or is opposed to public policy.[70] The court further elucidated that:

> the concept of party autonomy in international contracts is respected by all systems of law so far as it is not incompatible with the proper law of the contract[71] or the mandatory procedural rules of the place where the arbitration is agreed to be conducted or any overriding public policy.[72]

This verdict seemingly refines the earlier interpretation in *British India Steam Navigation Co Ltd*[73] on the subject to accommodate global best practices as regards party autonomy in the choice of law—as reflected in section 2 of this article. However, the decision does not clarify what the '*bona fide*' requirement is. Even the *Vita Food* decision, which is of persuasive value in India, does not outline the instances where the parties' express choice of law may not be considered as *bona fide*. It appears that the choice of *any* law will be valid and

[67]cf Agrawal and Singh (n 47) 94.
[68][1992] 3 SCC 551 [14], referring to Collins et al (n 2), Rule 180: Sub-Rule (1), 1168–82, which defines 'the proper law of the contract'. See *British India Steam Navigation Co* (n 55) [30]–[31], which relied on the same definition in Rule 180, but delimited the parties' right to a choice of law which has a connection to the transaction in question.
[69]*British India Steam Navigation Co Ltd* (n 55) [31].
[70]*National Thermal Power Corporation* (n 68) [14], referring to the remarks of Lord Wright in *Vita Food* (n 11).
[71]The court at this juncture is referring to the manner in which the material validity of the choice of law clause may be tested. Under the principles of Indian private international law, material validity would be determined by putative proper law, that is, the law which would apply in the absence of such a choice. For a detailed discussion on the aspect, see Agrawal and Singh (n 47) 100.
[72]*National Thermal Power Corporation* (n 68) [28].
[73]*British India Steam Navigation Co Ltd* (n 55).

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thus *bona fide* if it does not bypass either the overriding mandatory provisions or the public policy of India.[74] Overriding mandatory provisions are those which cannot be derogated from and are applicable even when foreign law is meant to govern the contract.[75] In Indian private international law, a provision is considered as violating a mandatory norm if its performance is illegal and is therefore construed as being against public policy.[76] This interpretation conforms with international policy and practice in this regard. For instance, the private international laws of China,[77] the European Union (including the United Kingdom),[78] Hong Kong,[79] Japan,[80] Mexico,[81] Russia,[82] South Korea,[83] Switzerland,[84] Turkey[85] and Venezuela[86] justify the refusal of the application of the law expressly chosen by the parties if it contravenes the overriding mandatory rules or the public policy of the *lex fori*. Likewise, the Hague Principles also prescribe a similar approach.[87] The Indian courts should accordingly define what the 'bona fide' requirement is within the judgment itself.[88] This would bring about greater predictability and certainty in Indian private international law, considering the lack of clear-cut rules on the subject. Perhaps the Indian judiciary could refer to the Hague Principles and the recommendations in this regard for an interpretation on that aspect.

More recently, the Supreme Court in *Modi Entertainment Network and Another v WSG Cricket Pte Ltd*[89] explicitly clarified that Indian private international commercial law permits the choice of any legal system even when it does not have any connection with the contractual obligation in question.

[74] *National Thermal Power Corporation* (n 68) [28]. Also see Graeme Johnston, 'Conflict of Laws' in Pinho J Ribeiro et al (eds), *Chitty on Contracts—Hong Kong Specific Contracts* (2nd edn, Sweet & Maxwell 2008) 1323, which provides a similar explanation for understanding the *bona fide* requirement under Hong Kong's choice of law rules.

[75] See art 9 of Rome I, which defines overriding mandatory rules. For a detailed discussion on mandatory rules, see Nygh (n 1) 199ff.

[76] Agrawal and Singh (n 47) 101. Also see the decision of the Bombay High Court in *Taprogge Gesellschaft mBH v IAEC India Ltd* AIR 1988 Bom 157, which held that agreements in restraint of trade would be void ab initio and opposed to public policy even if the parties had chosen a foreign law to govern their international commercial contract.

[77] art 4 and 5 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations 2010.

[78] art 9 and 21 of Rome I.

[79] See Wolff (n 20) 473–74.

[80] art 11 and 12 of the Japanese Act on the General Rules on the Application of Laws, Act No 78 of 2006.

[81] art 11 and 18 of the Mexico City Convention.

[82] art 1210(5) of the Civil Code of the Russian Federation 2006.

[83] art 7 and 10 of the Conflict of Laws Act of the Republic of Korea 2001.

[84] art 17 and 18 of Switzerland's Federal Code of Private International Law 1987.

[85] arts 5 and 6 of the Turkish Code on Private International Law and International Civil Procedure 2007 (Act No 5718).

[86] arts 11 and 18 of the Mexico City Convention.

[87] art 11 Hague Principles.

[88] See Wolff (n 8) 466, who opines that the requirement of *bona fide* should not be relied upon in the absence of a precise definition unless the decision itself explains its meaning, unambiguously.

[89] [2003] 4 SCC 341.

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In casu, the respondent had granted a licence to the appellant for telecasting a tournament organised by the International Cricket Conference (ICC) in Kenya, on Indian television. Both parties expressly agreed that English law, applied by the English courts, would govern all disputes relating to the transaction. The appellant nevertheless initiated action in the Bombay High Court alleging that the continuation of the proceedings in the neutral (English) forum, according to law which has no connection with the transaction, would be oppressive and vexatious. The Bombay High Court's refusal to accept the appellant's contentions were accepted by the Supreme Court, per Syed Shah Mohammed Quadri and Arijit Pasayat JJ, on appeal.

The Supreme Court's ruling in the two aforementioned cases represents the prevailing judicial opinion by the mandate of the Constitution of India as envisaged in article 141.[90] All Indian courts are subsequently bound to enforce the subjective interpretation of party autonomy as adopted by the highest judiciary in these cases. For instance, the decisions by the High Courts of Bombay, Calcutta and Delhi, in *Rhodia Ltd v Neon Laboratories Ltd*,[91] *White Industries Australia Limited v Coal India Limited*[92] and *Swatch Limited v Priya Exhibitors Private Ltd*[93] respectively, were akin to the Supreme Court's approach in *National Thermal Power*. In all three disputes, the judges affirmed the parties' autonomy to choose any law to govern their international commercial contract. Even though the parties had opted for legal systems which were connected to the contractual obligations in each dispute,[94] the courts elucidated that the *only* limitation to this freedom was that the choice was not *bona fide* and was opposed to public policy.[95] However, the ambiguity as regards the meaning of '*bona fide* and opposed to public policy' continued because none of these decisions clarified the parameters for adjudicating these requirements. In few other instances, such as *Shree Precoated Steels Limited v Macsteel International Far East Ltd*[96] and *Max India Limited v General Binding Corporation*,[97] the Bombay and Delhi High Courts relied on the ratio in *Modi Entertainment Network* and upheld the parties' choice of governing law

[90]Constitution of India 1950, art 141, provides that '[t]he law declared by the Supreme Court shall be binding on all courts within the territory of India'.
[91]AIR 2002 Bom 502 (Bombay High Court (BHC)).
[92][2004] 2 Cal LJ 197 (CHC).
[93][2008] 101 DRJ 99 (Delhi High Court (DHC)).
[94]In *Rhodia Ltd* (n 91), the parties (two companies incorporated respectively in India and the UK) had expressed a choice in favour of English law to govern their agreement regarding the manufacture and sale of pharmaceuticals. In *White Industries Australia Limited* (n 92), the parties (an Australian and an Indian state-owned company) expressly chose the Indian legal system to govern their commercial agreement. Likewise, in *Swatch Limited* (n 93), the parties (an Indian and Swiss company) opted for Swiss law as the proper law.
[95]*Rhodia Ltd* (n 91) [10]; *White Industries Australia Limited* (n 92) [18]–[19], [40], [42] and [74]; *Swatch Limited* (n 93) [15].
[96][2008] 2 Bom CR 681 (BHC).
[97][2009] 112 DRJ 611 (DB) (DHC).

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even though it had no geographical nexus with the contractual obligation at issue.[98]

3.2.1. Ordre public and choice-of-law connotations

In *National Thermal Power*, the Supreme Court emphasised that it would refuse the application of the parties' choice if it contravenes the public policy of India. However, it did not clarify the parameters for ascertaining whether a choice of law derogates from public policy. Accordingly, the New Delhi Telecom Dispute Settlement and Appellate Tribunal (the Tribunal) verdict in *Kumarina Investment Ltd v Digital Media Convergence Ltd*[99] is pertinent insofar as it enriched the legal discourse on the subject. In the present case, an Indian company incorporated in India (the respondent) concluded a contract to permit the petitioning company, situated in Israel, to stream certain channels on its website via the internet. A dispute arose when the respondent allegedly disconnected the transmission of some channels without prior notice, causing the petitioner to initiate action before the Tribunal.

Like most of the earlier disputes that various Indian courts had decided, this case also questioned the legality of the parties' choice to be governed by a neutral legal system, namely English law. The Tribunal explicitly rejected the petitioner's contention that the choice of unconnected law was susceptible to producing 'strangely unrealistic results'.[100] Instead, it referred to the Supreme Court's dicta in *British Indian Steam Navigation* and *National Thermal Power*,[101] and, interestingly, favoured the subjective interpretation of party autonomy adopted in the latter on the reasoning that it imbibes upon the international best practices on the subject as envisaged in Rome I[102] and the English legal system.[103]

The Tribunal further reasserted that it was 'settled law in India' that courts may only disregard the parties' express choice in favour of a legal system of another country if it is against the public policy of India, or when it contravenes any provision of a Parliamentary Act.[104] Its findings are noteworthy considering that the principles stipulated in *National Thermal Power* merely underscored that such autonomy cannot be misused to infringe the 'public

[98]In *Shree Precoated Steels Limited*, two companies incorporated in India and Hong Kong respectively chose to be governed by English law, which had no connection with their transaction. In *Max India Limited*, two companies based in India and the US agreed to be bound by the legal system of Singapore.
[99][2010] TDSAT 73.
[100]ibid [37], relying on the Supreme Court's earlier verdict in *Delhi Cloth and General Mills* (n 47).
[101]ibid [30].
[102]ibid, referring to Andrea Bonomi, 'Rome I Regulation on the Law Applicable to Contractual Obligations' (2008) 10 Yearbook of Private International Law 165, 169.
[103]ibid, referring to Lawrence Collins et al (eds), *Dicey, Morris and Collins on the Conflict of Laws* (14th edn, Sweet and Maxwell 2006).
[104]ibid [11], [14], [16] and [17], referring to the Supreme Court's dicta in the *National Thermal Power Corporation* (n 64).

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policy of India', without as such providing any clarification as to its scope.[105] Accordingly, the Tribunal elucidated that the subject-matter should be viewed through the lens of the relevant provisions of the Indian Contract Act 1872, in particular sections 23, 27 and 28. Consequently, if the parties' agreement operates in restraint of trade,[106] restricts any party from enforcing its rights under the contract through the usual proceedings, or extinguishes or discharges the liability of any party,[107] an Indian court would disregard the choice of law and continue to adjudicate according to Indian law.

3.2.2. Choice of 'rules of law' as the governing law

The above discussion demonstrates that there are sufficient judicial dicta to ascertain that the existence of party autonomy in the choice of law under Indian private international commercial law extends to the choice of any law, even if that law bears no connection to the transaction. However, whether the courts would be as receptive to a choice of non-state rules, such as *lex mercatoria* or other non-binding instruments like the UNIDROIT Principles of International Commercial Contracts (UPICC),[108] in matters of litigation, remains uncertain.

To date, there has been only one case before the Delhi High Court wherein the acceptance of *lex mercatoria* was discussed, briefly and in obiter.[109] Although the court did not explicitly refute the validity of *lex mercatoria* as a choice of law, it indicated that the contract can only be governed by non-state rules when the parties have expressly stipulated the dispute should be adjudicated by fairness and equity.[110] Nonetheless, the court per Rajiv Sahai Endlaw J highlighted that *lex mercatoria* is not a popular choice given the ambiguity as to whether it is a 'separate body of international commercial law or equivalent to freedom from strict legal constraint'.[111] In this context, the present author opines that Indian private international law should restrict the express choice of *lex mercatoria* to govern an international commercial agreement due to the extreme vagueness and uncertainty as to what these rules comprise.[112]

[105]See *National Thermal Power Corporation* (n 64) [28].
[106]*Kumarina Investment Ltd* (n 99), referring to ss 23 and 27 of the Indian Contract Act 1872, and Atul M Setalvad, *Conflict of Laws* (3rd edn, Lexis Nexis 2014) 203. s 23 provides that agreements in contravention of the public policy of India are unlawful and, accordingly, s 27 states that contracts in restraint of trade are against the public policy of India. Also see *Taprogge Gesellschaft mBH* (n 77).
[107]*Kumarina Investment Ltd* (n 99), referring to s 28 of the Indian Contract Act 1872, which provides that all agreements in restraint of legal proceedings are void.
[108]UNIDROIT, 'UNIDROIT Principles of International Commercial Contracts, 2016' <www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf> accessed 12 January 2017 (UPICC).
[109]*National Highways Authority of India v Sheladia Associates, INC* [2009] 113 DRJ 835.
[110]ibid [30].
[111]ibid.
[112]Michael J Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn, Transnational Publishers 2005) 200–08.

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On the other hand, the choice of non-binding instruments such as the UPICC and its acceptance in the context of litigation remains to be seen.[113] At present, section 28 of the (Indian) Arbitration and Conciliation Act 1996 permits the parties to choose non-state norms to decide their disputes. Moreover, the arbitral tribunal is also empowered to apply such rules of law in the absence of any choice and if it considers these rules to be appropriate.[114] In a similar vein, non-state norms formulated by established international bodies which consist of a coherent set of principles should also be acceptable given their systematic and predictable nature.[115] The extension of party autonomy to the selection of rules of law such as the UPICC would operate in tandem with the acceptance of the choice of unconnected laws—the objective being similar in purpose, namely to endow parties with the freedom to opt for systems which are neutral yet coherent and reliable. Considering that Indian courts have in the past relied upon individual provisions of the UPICC to decide a dispute when their domestic contract law was silent on the aspect,[116] they should also accept the parties' choice to be governed by such non-state norms. In this context, although the extension of party autonomy to the choice of rules of law is not a prevalent international practice,[117] Indian courts could plausibly refer to the innovative approach of article 3 of the Hague Principles which advocates the acceptance of such rules of law if they are faced with a dispute in the future course of time.

4. Final remarks

Although the English legal system has moved to the more predictable and well-defined approach prescribed by the Rome I Regulation, India has continued to embrace the traditional common law principles as regards the acceptance of choice of law in an international commercial agreement. The blind

[113]The UNILEX database lists only four contractual disputes before an arbitral tribunal, in which the parties expressly chose the UPICC to govern the contract. These are: International Chamber of Commerce (ICC) Award no 11880 (2004); Tribunal of International Commercial Arbitration at the Ukrainian Chamber of Commerce and Trade, Arbitral Award (22 December 2004); Centro de Arbitraje de Mexico, Arbitral Award (30 November 2006); Permanent Court of Arbitration, Arbitral Award (2009).

[114]s 28(1)(b)(iii).

[115]Bonell (n 112) 208. Also see the Preamble of the UPICC (n 108), comment 4(b).

[116]See Delhi High Court decisions in *Sandvik Asia Pvt Ltd v Vardhman Promoters Pvt Ltd* (2007) 94 DRJ 762; *Hansalaya Properties v Dalmia Cement (Bharat) Ltd* [2008] 106 DRJ 820 (DB).

[117]See, for instance, Recital (13) Rome I read with art 1(1) Rome 1, which limits party autonomy to the choice of a State law. On the other hand, there is considerable ambiguity on whether the Mexico City Convention also limits party autonomy to the choice of national law. While Rodriguez and Albornoz opine that the Mexico City Convention only permits the parties to opt for national legal systems, Juenger adopts the view that such party autonomy includes a choice of general principles of law. See José Antonio Moreno Rodriguez and María Mercedes Albornoz, 'Reflections on the Mexico City Convention in the Context of the Preparation of the Future Hague Instrument on International Contracts' (2011) 7 Journal of Private International Law 491, 504–07 and Friedrich K Juenger, 'Contract Choice of Law in the Americas' (1997) 45 American Journal of Comparative Law 195, 204. Also see generally, Friedrich K Juenger, 'The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons' (1994) 42 American Journal of Comparative Law 381.

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adoption of the traditional common law principles has led to certain ambiguities in Indian private international law, in particular concerning the requirement of '*bona fide*'. Thus, even though Indian private international commercial law corresponds with the global best practices on the subject, it is imperative that the judiciary enumerates the instances which would not be considered as '*bona fide*' to promote predictability and certainty.

Moreover, while there are sufficient judicial dicta to indicate the extension of party autonomy to the choice of any law, there is no clarity on whether Indian courts would similarly accept the express selection of other rules of law or non-state norms. In such circumstances, the recommendation stipulated by the Hague Principles, which advocate a very contemporary approach, viz, that party autonomy should also be extended to a choice of 'non-state rules',[118] should be relied upon for interpretation and to develop the rules on party autonomy in Indian private international law.

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[118]art 3 Hague Principles.

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