PRIVATE INTERNATIONAL LAW OF CONTRACT IN ANGOLA AND MOZAMBIQUE*

1 Introduction

The Republic of Angola and the Republic of Mozambique are two of five countries on the African continent with Portuguese as an official language (the others being Cabo Verde, Guinea-Bissau and São Tomé and Príncipe). Regarding their independence from Portugal, they share a relatively similar history. In consequence of the Portuguese Carnation Revolution (Revolução dos Cravos), which was initiated 25 April 1974, Angola became independent on 11 November 1975 and Mozambique on 25 June 1975.

In order to understand the private international law of contract in force today in these two countries, it is necessary to take a look at the Portuguese law at the time before Angola and Mozambique obtained their independence. Portugal is a civil law country, having codified civil law as well as civil procedure law. The codifications extend to private international law. While the Civil Code (Código Civil) contains rules on the law applicable (some other conflict of law rules can be found in special legislation. See Pinheiro *Direito Internacional Privado – Introdução e Direito dos Conflitos – Parte Geral* 3ed (2014) 241), the Civil Procedure Code (Código de Processo Civil) regulates, *inter alia*, international jurisdiction and the recognition and enforcement of foreign judgments. The Portuguese legislator used to enact laws in mainland Portugal first and extend their applicability to the then overseas territories (o Ultramar) later. For example, the last reform of the Portuguese Civil Code, which entered into force in the mainland of Portugal 25 November 1966, was extended to Angola and Mozambique as of 1 January 1968, with minor modifications.

2 Sources of Commercial Private International Law

Having obtained their independency, Angola and Mozambique maintained the Portuguese law in force, which was valid at the respective moment of independence, as long as it did not infringe rules of the Constitution, or principles contained therein and was not altered by the national legislator afterwards (Article 239 of the Angolan Constitution and Article 305 of the Mozambican Constitution). The constitutional provisions ordering so have not been modified ever since. Therefore, the Portuguese Civil Code and the Portuguese Civil Procedure Code continue being in force in the two countries, being respectively the Angolan and Mozambican Civil Code and

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Civil Procedure Code (see Vicente *Direito Comparado Vol 1* 3ed (2014) 385). It goes without saying that later Portuguese modifications of these two Codes were not extended to Angola and Mozambique any longer. From a general point of view, an autonomous adoption of Portuguese reforms that occurred after 1975 would have been possible. But this did not occur in the field of international contract law. Therefore, the rules of Angolan and Mozambican private international law of today correspond with the Portuguese conflict rules as of 1975.

If we firstly view the Portuguese private international law, *strictu sensu*, it is noteworthy that the Civil Code contains a complete codification of private international law (Article 14–65 CC). There are, for example, rules on classification (Article 15 CC), on the *renvoi* (Article 17–19 CC), on the public *renvoi* policy exemption (Article 22 CC), and on the interpretation and determination of foreign law (Article 23 CC). Focussing on contract law, the law applicable to juridical acts (*negócios jurídicos*) – that is, acts from which contractual obligations arise – is regulated in depth (Article 35–40 CC). A section of the Code contains specific rules on the law that applies to a contractual or extracontractual obligation (Article 41–45). These rules serve for the determination of the law applicable to all contracts and include, therefore, commercial contracts.

3 The interpretation of Angolan and Mozambican law

For the interpretation of the Angolan and Mozambican rules one can refer to Portuguese judgments and doctrine. From a general point of view such references can be found in a great variety of Angolan and Mozambican judgments. For example, the Angolan Supreme Court (Rec No 02 (946/09), without date), cites Portuguese doctrine written before as well as after the Angolan independency to interpret the Angolan Civil Procedure Code. The court does not give any explanation for doing so. It seems, therefore, that the mere continuation of the usage of the former Portuguese rules is considered sufficient to refer to Portuguese sources for their interpretation. From a comparative law perspective, one may think of a "lusitanic family of laws" to describe this phenomenon (see Jayme "Betrachtungen zur Reform des portugiesischen Ehegüterrechts" in Graveson, Kreuzer, Tunc and Zweigert (eds) *Festschrift für Imre Zajtay – Mélanges en l'honneur d'Imre Zajtay* (1982) 264; Cordeiro *Tratado de Direito Civil Português II – Direito das Obrigações, Tomo I* (2009) 227*et seq*; Nordmeier *Zulässigkeit und Bindungswirkung gemeinschaftlicher Testamente im Internationalen Privatrecht* (2008) 16; and more the restrictive Vicente *O Lugar dos Sistemas Jurídicos Lusófonos entre as Famílias Jurídicas, Separata de Estudos em Homenagem ao Prof Doutor Martim de Albuquerque* (2010) 401*et seq*).

Although the Civil Code provisions on the law applicable to contracts continue being in force in Portugal, the europeanisation of private international law affects the Portuguese intensely. In October 1994, Portugal adhered to the Rome Convention on the law applicable to contractual obligations of 1980. The convention was replaced by the Rome I Regulation ((EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations) that applies to

contracts concluded after 17 December 2009. According to Article 288 of the Treaty on the Functioning of the European Union, the regulation is directly applicable in all Member States and, therefore, renders inapplicable national laws. Because of its universality of application (Article 2 Rome I Regulation: "Any law specified by this Regulation shall be applied, whether or not it is the law of a Member State"), the Rome I Regulation covers cases which have exclusive contact points with Non-EU-Member States. Since the ECJ's judgment in *Owusu* (*Andrew Owusu* v *N.B. Jackson, trading as Villa Holidays Bal-Inn Villas* ECJ 1.3.2005 case C-281/02), it is common ground that the European Regulations in the area of international civil procedure law and private international law are to be applied even if the facts of the case at hand do not have any relationship with more than one Member State. From this follows that the conflict rules of the Portuguese Civil Code in the area of contract law remain in force, but do not apply as far as the scope of application of the Regulation reaches. Therefore, recent Portuguese judgments are based on the Regulation, and Portuguese doctrine focusses on the European rules. These rules differ significantly from the provisions of the Civil Code. Consequently, Angolan and Mozambican private international law can draw inspiration from the older sources only.

4 Law applicable

As already mentioned, the Angolan and the Mozambican Civil Code contain an identical set of specific rules regarding the determination of the law applicable to a contractual relationship. In this context, it is important to distinguish between the law applicable to a contractual relationship already established and the juridical acts – offer and acceptance of the offer – intended to create that relationship between the parties.

4 1 The contract concluded

The law applicable to an existing contractual relationship is determined based on the principle of party autonomy. According to Article 41(1) CC, the parties may explicitly choose the law that shall be applied to the contractual relationship established between them. An implicit choice is permitted as well. Such choice must be derived from facts that indicate the common intention of the parties to subject the contract to a specific substantive law. For example, the reference to provisions of the law of a country, the stipulation of the place of performance or a jurisdiction or arbitral agreement, conferring jurisdiction on the courts, or on an arbitrating body situated in a certain state, may serve as an indicator for an implicit choice (Machado *Direito Internacional Privado* 3ed (reprint 2009) 363). Portuguese doctrine distinguishes between an implicit and a hypothetical choice of law. The implicit choice is based on a real intention (intenção real) of the parties to apply a certain law to the contractual relationship. The hypothetical choice is one that the parties would have made if they had thought of the law applicable. Such a hypothetical choice is not permitted.

Furthermore, Article 41(2) CC limits party autonomy. Contrary to Article 3 of the Rome I Regulation, the parties do not have the freedom to choose the substantive law of any country. Instead, it is necessary that either some of

the elements of the contract that have relevance in private international law are connected with the law chosen, or the parties show a serious interest (*interesse sério*) in the application of the law they have chosen. Such element may be: the place of the conclusion or the execution of the contract; the nationality or the habitual residence of a party; the situation of the object of the contract, especially the situation of immovable property; a connection with other juridical relationships – for example, other contracts – established between the parties. Therefore, the serious interest requirement is of importance mainly, if the facts of the contract are connected to one country only. In this case the choice of law must be based on motifs worthy of judicial protection. Such a restriction is based on the fraud *a la loi* doctrine (Machado *Direito Internacional Privado* 361 refers to the realisation of the choice *bona fide*) which is known, for example, from the recent Private International Law Codification of Panama (see Article 77 Ley 7 de 8 de mayo de 2014 que adopta el Código de Derecho Internacional Privado de la República de Panamá, Gaceta Oficial Digital n. 27530 of 8.5.2014; and Samtleben *IPRax* (2015) 465 and 473).

In the absence of a choice, the law of the common habitual residence of the parties (Article 42(1) CC) is applied. If the parties do not reside habitually in the same country, contracts without consideration – such as gifts – are subject to the law of the habitual residence of the donor. For all other contracts the place of their residence determines the law applicable (Article 42(2) CC). (The law does not indicate how to determine the place where the contract was concluded, see Neuhaus and Rau *Rabels Zeitschrift für ausländisches und internationales Privatrecht 32* (1968) 500 and 509). This concept differs significantly from the determination of the applicable law in the absence of a choice contained in the Rome I-Regulation. Under the Regulation, the law of the country is applied, in which the party is required to effect the characteristic performance has its habitual residence (Article 4(2) Rome I-Regulation). In addition, an escape clause and a "catch-all" clause for contracts that do not have a characteristic domicile regarding performance, exist. The place of the conclusion of the contract, which is of particular importance in Angolan and Mozambican law, plays a secondary role.

The determination of the place where the contract was concluded causes difficulties when the parties do not meet at a certain place, but communicate at a distance. Especially, the communication *via* internet or e-mail makes contracting at a distance a frequent problem. As far as we can see, neither case law on this point nor doctrine exists in Angola, Mozambique and Portugal (Machado *Direito Internacional Privado* 359 comments that the determination of the place of the conclusion can be "more difficult" for contracts concluded at a distance), which is probably due to the fact that Portugal adhered to the Rome Convention in 1994 (the comprehensive study of Pinheiro *Direito Aplicável aos contratos celebrados através da internet, in: Estudos de Direito Internacional Privado II* (2009) 11–66, does not even mention Article 42 of the Portuguese Civil code).

Some short remarks on the question of *renvoi* shall be added. Article 16–19 CC is of immense complexity (Neuhaus and Rau *Rabels Zeitschrift für ausländisches und internationales Privatrecht 32* 500 and 506; and for a

detailed study see Correia *Lições de Direito Internacional Privado I* (reprint 2007) 299–320). It is important to stress that the *renvoi* is excluded in the case of a choice of law (Article 19(2) CC). As a basic rule, Article 16 CC orders that the *renvoi* is rejected, and therefore only the substantive rules of the law designated by the conflict rules are applied. Nevertheless, exemptions from this principle exist. A *renvoi* to Angolan and Mozambican law is respected (Article 18 CC) as well as a *renvoi* to the law of a third country whose private international law accepts the *renvoi* in the case at hand (Article 17(1) CC). Finally, *renvoi* is not applied if such application would lead to the invalidity of the contract (Article 19(1) CC).

4 2 The conclusion of the contract

The rules discussed until now refer to a contractual relationship already established. Regarding juridical acts which form the relationship, special private international law rules are provided for in Article 35–40 CC.

In general, the juridical act is subject to the substantive law that governs the contract (Article 35(1) CC). Nevertheless, two aspects concerning the existence of a juridical act are governed by other laws. The first treats the relevance of a factual behaviour for the conclusion of a contract. It is the law regarding the common habitual residence of the potential parties to the contract that decides if certain behaviour – for example, bowing the head – leads to the conclusion of a contract. In case the parties do not have a common habitual residence, the place where the conduct occurs serves as, connecting factor (Article 35(2) CC). The second aspect deals with silence as acceptance of a proposal to conclude a contract or, inversely, with the necessity of explicitly rejecting an offer in order to avoid that a contractual relationship is established (Machado *Direito Internacional Privado* 352, justifies the rule by the elevated level of predictability that its application grants). Again, the law of the common habitual residence of the potential parties is applicable and, if such residence does not exist, the law of the place where the proposal had been received.

The formal validity of a juridical act is governed, in general, either by the law applicable to the contract or – *locus regit actum* (Machado *Direito Internacional Privado* 352) – by the law of the place where the act is conducted (Article 36 CC). Therefore, if a contract is concluded at a distance, the form of the declaration of every contracting party can be subject to a different law. However, the law applicable to the contract may demand the observation of formal requirements whose infringement voids the contract and must be observed even if the contract is concluded abroad (Article 36(1) CC).

The representation by law or by authorization of the principal as well as by the organ of a company is regulated in detail (Article 37–39 CC). The corresponding rules in Portuguese private international law continue to be of practical importance (nevertheless, the rules do not seem to be of great importance in Portuguese legal practice, compare Neto *Código Civil Anotado* 18ed (2013) 40), given the fact that the question whether an agent is able to bind a principal, or an organ to bind a company in relation to a third party is, excluded from the scope of application of the Rome I-Regulation

(Article 1(2)(g) Rome I; and the inclusion of this subject was discussed, but finally rejected, see Nordmeier in Gebauer and Wiedmann *Zivilrecht unter europäischem Einfluss* 2ed (2010) Chapter 37 fn 18). In Angola and Mozambique, the company law regime governs the representation of a company (Article 38 CC), whereas the representation by individual authorization is subject to a complex conflict-of-law regime (Article 39 CC). In general, the law of the country in which the representative powers are exercised decides about presuppositions and effects of the representation (Article 39(1) CC). Exceptions exist for cases in which the agent acts in a country not indicated by the principal for the use of the representative powers (Article 39(2) CC), or in which the agent exercises these powers professionally (Article 39(3) CC). The legislator intended to balance the protection of the principal on the one hand and the transactional interests, that is, the protection of the other contracting party, on the other hand (compare Vicente "Sources and General Principles of Portuguese Private International Law: An Outline" in Vicente (ed) *Direito Internacional Privado – Ensaios Vol III* (2010) 409 and 420). The disadvantage lies in the elevated complexity of the conflict rule.

5 International Civil Procedure

The following part contains some observations on international litigation in Angola and Mozambique in the area of contract law (on these points see the country reports by Nordmeier in Geimer and Schütze (eds), *Internationaler Rechtsverkehr in Zivil- und Handelssachen* (loose-leaf compilation 2011 and 2013) Part 1006 and Part 1093).

Article 65 and article 99 of the Civil Procedure Codes – which, as the rules in the Civil Codes, are of identical content – provide for international jurisdiction (on the Portuguese reform of 2008 in this field see Nordmeier *Portugal: Änderungen im Internationalen Zuständigkeitsrecht, Praxis des Internationalen Privat- und Verfahrensrechts* (2010) 472–473). In the absence of an agreement by the parties, international jurisdiction is derived from territorial jurisdiction (Article 65(1)(a) CPC). Claims for the performance of the contract, or for damages based on non-performance can be brought before Angolan or Mozambican courts if the place of performance is situated on national territory (Article 65(1)(a) and 74(1) CPC). The domicile of the defendant constitutes international jurisdiction as well (Article 65(1)(a) and 85(1) CPC). However, according to Portuguese doctrine (Correia *Lições de Direito Internacional Privado I* 441–442), this internationally recognised rule – *actor sequitur forum rei* – does not apply if there is a special rule on territorial jurisdiction which might serve as a basis for international jurisdiction. This has been corrected in Portugal only in the 1990s, therefore with no reflection upon Angolan and Mozambican law.

As to party autonomy in international jurisdiction: Agreements that derogate the international jurisdiction of an Angolan or Mozambican court are generally prohibited (Article 99(1) CPC). But for international commercial contracts (*contratos económicos internacionais*), the parties can confer jurisdiction either on the courts of the country in which one of them is domiciled or on "international courts" (*tribunais internacionais*) (Article 99(2) CPC). Some doubt remains if international courts are arbitration tribunals

only, or if any foreign court is meant. In any case, the rule offers party autonomy at a large scale in international commercial law.

In order to recognize and enforce a foreign judgment in Angola or Mozambique, special proceedings have to be observed (Article 1094–1102 CPC). A foreign judgment must meet several requirements to be recognized in Angola or Mozambique (Article 1096 CPC). Beside some internationally common conditions – authenticity of the document, finality of the judgment (*res iudicata*), no *lis pendens* in Angolan or Mozambican courts, proper summoning of the defendant, no violation of public policy – two aspects are especially noteworthy. The first demands that the judgment was issued by a court which would have had international jurisdiction if it had applied the Angolan or Mozambican rules on international jurisdiction (Article 1096(c) CPC). The second is the so-called privilege of nationality (Nordmeier in Geimer and Schütze (eds) *Internationaler Rechtsverkehr in Zivil- und Handelssachen* Part 1006 18, and Part 1093 19). If the judgment was issued against an Angolan or Mozambican citizen, it must not infringe rules of Angolan or Mozambican private law more favourable to such citizen than the ones applied by the foreign court if, according to the private international law rules, Angolan and Mozambican law were applicable (Article 1096(g) CPC). (This rule exists in Portugal as well (now Article 983 (former Article 1100) s 2 of the Portuguese Civil Procedure Code). It is considered partly unconstitutional, because the protection granted is limited to Portuguese citizens only, partly incompatible with the non-discrimination principle of EU law. See among others Jayme "Machado Villela (1871–1956) und das Internationale Privatrecht" in Basedow, Hopt and Kötz (eds) *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag* (1998) 296; Pinheiro *Direito Internacional Privado – Competência Internacional e Reconhecimento de decisões estrangeiras* 2ed (2012) 526–527; and Dias "As Sociedades no Comércio Internacional (Problemas Escolhidos de Processo Civil Europeu, Conflitos de Leis e Arbitragem Internacional)" in Miscelâneas *IDET* No 5 (2008) 60–61.) For example, if an Angolan living in his home country concludes a contract in Angola with an Italian living in Italy, and the Italian obtains a judgment against the Angolan in an Italian court, this judgment will be recognized in Angola only if it does not infringe rules of relevant Angolan private law. The substantive law applicable in this case is, according to Article 42(2)(ang) CC, the law of the country where the parties entered into the contract.

6 Arbitration

While the Portuguese Civil Procedure Code continues being in force in Angola and Mozambique, both countries have enacted laws on arbitration. The Angolan law on voluntary arbitration enforced in 2003 (Law 16/03 of 25.7.2003); the Mozambican law on arbitration, conciliation and mediation dates from 1999 (Law 11/99 of 8.7.1999). Both acts are based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, and contain rules on the arbitral agreement, the constitution of the arbitral body, its proceedings and the arbitral award (for Angolan Law see Diamvutu in Carter *The International Arbitration Rewiev* 5ed (2014) 38*et seq*). In addition,

Mozambique is a contracting state of the New York Convention in regard to the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

7 Final remarks

In conclusion, one can say that Angola and Mozambique have much in common in the area of private international law of contracts. This is due to the Portuguese heritage of the two countries. Their private international law codifications provide solid grounds for solving conflicts of laws, but they seem to need further development (from a general point of view for the Angolan Law Jorge "Perspectivas atuais do direito angolano" in Jayme andSchindler (eds) *Portugiesisch – Weltsprache des Rechts* (2004) 89 and 93). The same is true for the rules on International Civil Procedures. As Portugal takes part in the European integration process, Angolan and Mozambican laws are (on their own) when unique with new phenomena – for example, the conclusion of contracts *via* the internet. Therefore, the development of Angolan and Mozambican doctrine in the field of private international law as well as the implementation of internationally recognised model laws (eg, the Hague Principles on Choice of Law in International Commercial Contracts of 19 March 2015) is highly desirable. In addition, such development might permit the adoption if the conflict of law rules to the African commercial reality, and make them more accessible to scholars, lawyers and judges from Angola and Mozambique – as well as from Portugal, South Africa, Germany or any other country.

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